Supreme Court of California
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S259522

IN THE SUPREME COURT OF CALIFORNIA

RAUL BERROTERAN II,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

FORD MOTOR COMPANY,
Real Party in Interest.

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

MOTION FOR JUDICIAL NOTICE EXHIBITS 1 – 6

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

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#34(L) 2/11/65

Third Supplement to Memorandum 65-4

This supplement considers the matters raised by the Attorney General at the last meeting and certain other matters. These were not discussed in the First Supplement because we wanted to send that to you without waiting for the remainder to be prepared.

Section 600

Assemblyman Foran has informed us that he has been receiving letters complaining about the failure to include the presumption of due care in the code and about the inclusion of the provision stating that a presumption is not evidence. He stated that he wanted a fuller explanation that he might give to persons inquiring about these matters. Accordingly, we prepared the statement attached hereto as Exhibit I.

The judges also expressed some concern about the same matters. Their concern was that the dead, incompetent, or amnesic party needs something working in his favor to compensate for the fact that he cannot contradict the evidence of his negligence. We drafted a proposed section to meet this problem directly, and it is attached hereto as Exhibit II. The judges indicated, however, that they did not wish to invite the parties to comment on the evidence; and our discussion eventually satisfied them that the Evidence Code is satisfactory in these respects.

Sections 620-624

The Attorney General objected to the omission of the conclusive presumption of malice from this portion of the code. The presumption now appears as subdivision 1 of Code of Civil Procedure Section 1962,

which provides that there is a conclusive presumption of:

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

We did not perpetuate this provision for several reasons. First, it is of little value. "This 'conclusive presumption' has little meaning, either as a rule of substantive law or as a rule of evidence, for the facts of deliberation and purpose which must be established to bring the presumption into operation are just as subjective as the presumed fact of malicious and guilty intent." People v. Gorshen, 51 Cal.2d 716, 731 (1959). Says Witkin, "Intent is proved by either direct or circumstantial evidence . . . , and the statutory presumptions of intent (C.C.P. 1962(1), 1963 (2)(3)) do not play any particularly important part in the proof." WITKIN, CALIFORNIA CRIMES § 53 (1963). Witkin notes that the conclusive presumption is sometimes cited in decisions affirming first degree murder convictions, but there is a special definition of malice in the Penal Code for purposes of the definition of murder. See PENAL CODE § 188. Moreover, there is another definition of "malice" in the Penal Code for use generally in regard to the criminal law. See PENAL CODE § 7(4). Both of these Penal Code definitions seem to cover the ground covered by Section 1962(1).

Thus, insofar as the criminal law is concerned the presumption seems to be unnecessary. Moreover, the presumption seems at best to state either a definition of malice or a truism that would exist whether or not there were such a conclusive presumption. Davis v. Hearst, 160 Cal. 143 (1911), is illustrative. There the court was concerned with the malice that gives rise to a claim for punitive damages. It was also concerned with that "malice" that some courts have said is the gist of the action

for libel. It held that malice in fact must be proved to sustain a claim for punitive damages. The "malice" sometimes referred to as the gist of the action for libel, or "malice in law," is a fiction and not "malice" at all. After developing at some length the true meaning of "malice" and pointing out the essential elements thereof, the court pointed out that the conclusive presumption recited in Section 1962(1) refers to all these elements, too. See 160 Cal. at 167-168. But the court developed its rationale of "malice" wholly without reliance on the conclusive presumption.

We concluded originally that the conclusive presumption served no useful purpose. We still believe so. We see no harm that it does, either. However, we think that clearer thinking is stimulated if meaningless formulizations are removed from the law. Strictly speaking, Section 1962(1) is a definition of "malice" and not a presumption. Thus, even if we were to perpetuate it, it would seem inappropriate in the Evidence Code. Perhaps it might be placed in the preliminary provisions of the Civil Code or in that part of the Civil Code dealing with exemplary damages.

Sections 630-667

The Attorney General objected to the failure to include in the list of presumptions those appearing in subdivisions 2 and 3 of Code of Civil Procedure Section 1963--that an unlawful act was done with an unlawful intent and that a person intends the ordinary consequence of his voluntary act.

We omitted these presumptions not only because they do no good but also because they are misleading and give rise to error. Exhibit III is an extract from the memo (64-2) that was before the Commission when they were considered. Where a specific intent is required, it is error to

instruct the jury in terms of these presumptions. Nevertheless, appellate courts rely on them repeatedly to affirm judgments in specific intent cases. There is no need to rely on them in such cases, for the only question is whether there was a permissible inference of intent for the jury to draw. But, because the appellate courts cite the presumptions as makeweights to support the jury-drawn inference, trial courts rely on these decisions to formulate instructions in specific intent cases. Justice Shinn once complained:

> We are at a loss to understand why [such an instruction] was given, or why it is given in so many cases where it can serve no purpose and tends to create confusion. [People v. Booth, 111 Cal. App.2d 106, 108 (1952).]

Moreover, on the merits of these presumptions, we believed that a person's intent is better left to inference. Circumstances vary. In some cases, an inference of intent will be strong and in others it will be weak. We thought, and still think, that the trier of fact should be permitted to decide whether or not to draw the inference. Compelling a conclusion in every case through the use of presumption seems inappropriate. It is settled that an instruction to the effect that "The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused" is a proper instruction. People v. Besold, 154 Cal. 363 (1908). This instruction performs the function of these presumptions without creating the danger of error that these presumptions create.

Section 788

The Commission directed the staff to present a memorandum discussing the various alternative solutions to the problem of impeaching a witness with evidence of a prior criminal conviction. The Commission was primarily concerned with subdivision (a), hence, subdivision (b) will not be mentioned in this memorandum.

Subdivision (a) presents two basic problems: (1) What, if any, should be the limitations on the criminal convictions that may be shown for impeachment purposes? (2) What are the conditions under which an examiner should be permitted to ask about prior convictions?

(1) Limitations on the convictions usable for impeachment.

The first problem involves several subsidiary problems. Should misdemeanors as well as felonies be permitted to be shown? Should any kind of crime be permitted to be shown, or only particular crimes?

To develop an approach to these problems, it is desirable to consider analytically what is being done when evidence of a conviction is introduced. Section 787 declares the general rule that evidence of specific acts is inadmissible to attack credibility. The apparent reason for this limitation is to preclude a trial within a trial to determine whether the alleged act occurred when the only relevance of the act is to show the witness' character for veracity. Despite the fact that a person's character is best revealed by what he has done, time just does not permit the full investigation of these collateral matters.

Where the witness' prior conduct has resulted in a criminal conviction, the considerations prompting exclusion of evidence of specific acts no longer apply. The conviction is easily provable and is good evidence that the acts for which the witness was convicted actually occurred. Thus,

it is not the fact of conviction that is itself important, it is the fact of the commission of the crime that reflects on the witness' veracity; and the conviction is merely used as evidence that the witness did in fact commit the crime. (Section 1300 is similar in that it permits certain convictions to be used as evidence that the crime was committed.)

The inquiry, then, is: what criminal acts bear sufficiently on a witness' credibility that they should be permitted to be shown? and what convictions are sufficiently reliable evidence that the crimes were in fact committed that they should be permitted to be shown?

(a) Felony or misdemeanor. Should all criminal convictions be permitted to be shown or only felonies or only crimes punishable as felonies?

Under existing law, felonies only may be shown. The argument for retaining the felony limitation is that the rule permitting impeachment by convictions is of dubious value anyway, and it should not be extended. The worst aspects of the rule have been ameliorated by the amendment of Penal Code § 17 which permits a judge, in granting probation without imposition of sentence, to designate the crime as a felony or misdemeanor.

The argument for broadening the rule to include crimes punishable as felonies is that the existing rule operates harshly and illogically. If two persons are convicted of burglary, one may be sentenced to one year in the county jail--and is unimpeachable because he is a misdemeanant. The other may get probation without any jail time, and he is impeachable because he is a felon. Yet, the character of the probationer is likely to be better than that of the prisoner--and that very fact may have caused probation to be granted.

The reasons for restricting convictions to serious crimes apply equally to crimes punishable as a felony and to felonies. One reason is to provide assurance that the crime was seriously litigated, and therefore the judgment of conviction can be relied upon from an evidentiary standpoint. A crime punishable as a felony is tried as a felony, and since the potential of a felony sentence exists, it will be as seriously contested as a trial that actually results in a felony sentence. The other reason for insisting on felony convictions is to provide assurance that the crime was serious. Minor violations of the law do not necessarily indicate a character that would be willing to risk a felony conviction by lying under oath. That a person bought a drink at the age of 20 by representing himself to be 21 does not indicate that such person might commit perjury. This consideration, however, is equally applicable to crimes punishable as a felony. At the time of commission, the actor has no way of knowing that the punishment will eventually be that for a misdemeanor. The crime is as serious as a felony in its potential result to the actor and is thus as indicative as a felony conviction would be of the actor's willingness to risk a felony conviction by testifying untruthfully.

The above argument summarizes the reasons for not extending the crimes permitted to be shown to misdemeanors generally. On the other hand, it may be argued that if the class of crimes is properly selected as bearing on credibility, it should not matter whether the particular crime was a felony or misdemeanor. The essential inquiry is the witness' propensities in regard to truthtelling, and any crime showing a disrespect for the truth reflects on the witness' truthtelling propensities.

(b) "Dishonesty or false statement." Section 788 now limits the convictions that may be shown for impeachment purposes to convictions of crimes involving "dishonesty or false statement." The Commission limited the showable crimes to those involving these essential elements at the recommendation of the State Bar Committee. The URE also requires that these elements be involved. The judges' committees approved this limitation; and, on July 1, 1964, the Alameda County District Attorney wrote to the Commission that "we feel that the proposed change in this regard is reasonably fair and logical."

The Alameda County District Attorney's letter went on to say, "There is no doubt that showing a prior conviction that has nothing to do with dishonesty, particularly where it is the same as the offense charged, has a high potential for unfair prejudice to the defendant. The proposed change [to limit impeaching crimes to those involving "dishonesty"] would put the attack on credibility precisely where it belongs, i.e., showing a history of dishonesty."

Although there is some uncertainty in this standard, nonetheless it is the correct one. For the only purpose of showing the conviction is to show the witness' propensity for departing from the truth--to show that he has been dishonest before and, hence, cannot be trusted now. Any uncertainty in the application of this standard to specific crimes will eventually be worked out in practice by the courts.

On the other hand, while the uncertainties in the standard are being worked out, some guilty defendants may be freed and many unnecessary appeals will probably be generated. Moreover, the difficulties are being created for no substantial improvement in the law. Any person who has so little

regard for the law or the rights of others that he will commit a crime serious enough to warrant a felony sentence will have no serious qualms about committing perjury--or at least in shading the facts--when it is to his interest to do so. Perjury prosecutions are rare, and perjury convictions are rarer; hence, it is reasonable to believe that a person who has been convicted of a serious crime would be willing to run the slight risk of a perjury prosecution if he had something substantial to gain thereby.

(c) "Intention to deceive or false statement." An alternative solution to the problem that was once approved by the Commission is to require that the crime involve false statement or an intention to deceive. This solution is premised on the argument that "dishonesty" is too vague, that "dishonesty" will create as many different standards as there are judges. In contrast, requiring that an element of the crime involve deception makes the rule relatively easy to apply. Moreover, this standard requires--even more than the "dishonesty" standard does--that the conviction involve the essential character trait that is sought to be proved--the witness' propensity for misstating facts.

The Commission abandoned this standard upon the argument that a large number of crimes involving deception could not be shown if it were approved. The theft family of crimes are all charged as "theft" even though some involve various sorts of deceit; and, because all forms of theft do not necessarily involve deceit, theft convictions would not be permitted to be shown. Hence, embezzlers, bunco artists, etc. would be unimpeachable, while others guilty of less serious crimes would be.

(d) "Perjury." A committee report to the Conference of State Bar Delegates urged the limitation of the crimes showable for impeachment

purposes to perjury. The majority of the committee cited a long list of alleged abuses in the use of prior convictions against criminal defendants. They cite, also, the fact that changes in the law occur, and, hence, some crimes that were felonies are now misdemeanors. Others would now be treated as juvenile offenses. The laws of various states vary in defining a felony. Persons are dissuaded from instituting civil suits in vindication of their rights because their pasts may be revealed. Prosecutors tend to try a defendant with priors for his previous crimes, going into detail as to the facts. They argue that inasmuch as the only issue is the witness' present credibility, only perjury should be permitted to be shown.

The contrary argument is that a person who will suborn perjury or bribe witnesses or jurors, falsify evidence, etc. is as likely to depart from the truth on the witness stand as someone who has committed perjury.

(e) Crimes against public justice. A minority report of the committee just referred to urged the limitation of the showable crimes to those defined in that part of the Penal Code dealing with crimes against public justice. These crimes would include perjury, subornation of perjury, offering false evidence, bribing jurors, judges, or witnesses, bribing officials, etc. The proposal is based on the thought that these crimes are so essentially like perjury, and so necessarily involve the very character traits in issue, that they should be permitted to be shown. (The minority report also recommended inclusion of crimes of the same nature as that being prosecuted in criminal trials.)

The contrary argument is, again, the character defect that would cause a person to lie under oath (or shade the facts) is also revealed by many other crimes that are not included in the crimes against public justice. A person who would risk felony conviction to defraud someone is not likely

to be seriously inhibited from committing perjury if he thinks that it is to his interest and that he can get away with it.

(f) Specific crimes. Another alternative is to specify the crimes that may be shown. The advantage of this alternative is the certainty that it creates. Precise value judgments can be made in regard to each crime as to the extent to which it bears on credibility.

The principal objection to the alternative is the volume of detail that it would add to the statute. Each crime would have to be separately considered and policy arguments would rage about each one. Moreover, some crimes defined in codes other than the Penal Code may be overlooked even though they inherently involve veracity.

In preparing this memorandum, we began to prepare a list of specific crimes, and it became apparent after filling two pages with references to specific sections that this was not a feasible venture. Overlooking some crime that should be included is too easy; the volume of crimes included is so great that all felonies might as well be included. It might be feasible, however, to combine a standard, that would include most crimes, with specific references to crimes that are not covered by the standard. For example, crimes involving false statement or an intention to deceive or defraud might be used for the general standard, and in addition the following specific crimes:

Bribery (in all forms--offering, soliciting, giving, receiving of public officials, sports events, etc.), Penal Code § 95 (corrupt influence of juror), § 115 (recording forged instruments), §§ 116-117 (altering jury lists), § 171a (smuggling narcotics, deadly weapons into reformatory), § 187 (murder), § 192(1) voluntary manslaughter, § 203 (mayhem), § 207

(kidnapping), § 211 (robbery), all crimes involving intentional infliction of personal injury, § 237 (felony false imprisonment), theft in all forms, § 459 (burglary), §§ 466-467 (possession of burglar tools or a deadly weapon with intent to use the same), §§ 518-527 (extortion), attempts or conspiracy to commit any listed crime, Health and Safety Code § 11503 (narcotics sales).

(g) Limited rule as to criminal defendant. Another alternative solution to the problem of impeachment is to limit the crimes that may be shown insofar as a criminal defendant only is concerned. The principal abuse of the present impeachment rule that is pointed out in the Committee report to the Conference of State Bar Delegates is the abusive use of convictions in criminal actions. The Commission's original recommendation on Witnesses adopted this approach. There we recommended that the defendant-witness could not be impeached with convictions unless he had placed his character in issue.

It may be argued that such a rule gives the defendant too much of an advantage and deprives the jury of information essential to weigh his testimony accurately. If it is important for the jury to hear such evidence in regard to other witnesses, it is just as important when the defendant is a witness.

The contrary argument is that the defendant's position is unique. The other witnesses are not in a position to be convicted because they are bad actors. Restricting impeachment in such a way is really not harmful to the prosecution in any fair sense, for the jury will realize that the defendant has the greatest of motives for deception in the case at hand--he does not wish to be convicted. All that such a rule would do, therefore, would be to prevent the trial of a defendant for past offenses

instead of the offense charged.

As a possible modification of this rule, perjury only, or crimes against public justice such as bribery and falsification of evidence, might be permitted to be shown. The drafting task is simple, because the language is in the Commission's published recommendation relating to witnesses.

The argument in support of this modification is that these crimes have such great relevance to the witness' capacity for truth telling that they should be permitted to be shown in all cases. The contrary argument is the same as that in opposition to any limitation so far as the defendant is concerned and, in addition, the complexity such a provision would add to trials.

(2) Conditions for asking about prior convictions

(a) The in camera hearing. Section 788 now requires that the court hold a hearing out of the presence of the jury in which he determines whether the crime sought to be shown involves the necessary elements and that either the defendant has admitted the conviction or the examiner has competent evidence of the conviction.

Existing law does not require this in camera proceeding. However, a judge will sometimes hold an in camera hearing after questions have been asked to see if they were properly asked. See, e.g., People v. Darnold, 219 Cal. App.2d 561, 582-283 (1963). The argument in favor of the pre-question hearing is that a determination of the examiner's good faith after the asking of the question is insufficient to protect the witness' rights. The judge must either instruct the jury to disregard the question and the implications arising therefrom--which may be ineffective to cure

the harm--or declare a mistrial. The judge will naturally be extremely reluctant to declare a mistrial because of the delay, inconvenience to witnesses and parties, etc. Hence, the likelihood is that he will give the somewhat ineffective instruction to the jury to disregard the examiner's question. The pre-question hearing by the judge permits the judge to determine the propriety of the question and to provide adequate protection to the witness without having to make a choice between two undesirable solutions to the problem that is created by the asking of the question.

On the other hand, the requirement of a pre-question hearing forces a hearing to be held in all cases whether needed or not. In most cases, the witness will admit the conviction, and in such cases the hearing will be superfluous. Not only will the hearing be superfluous, it will be undesirable; for it interrupts the flow of the trial, it prevents the examiner from confronting the witness with the conviction, and it prevents the examiner from conducting his cross-examination in the most effective way. The hearing of issues in secret is time consuming, and it is disturbing to the jury, who must speculate on what information is so secret that it must be kept from them. Thus, an undesirable trial procedure is proposed to remedy a problem that actually exists in very few cases.

(b) "Competent evidence" or "good faith." For many years, the California courts have held that a prosecutor must act in "good faith" if he asks a witness about prior convictions. In People v. Perez, 58 Cal.2d 229 (1962) the Supreme Court strongly intimated that good faith requires that the examiner have competent evidence of the conviction. The court said:

> "The usual manner of making proof of a prior [felony] conviction is to ask the witness who has suffered such a conviction if he

has been theretofore convicted of a felony, and if he denies that he has been so convicted, to produce a copy of the judgment of conviction." (Emphasis added.) The clear implication of the latter statement in Craig is that the questioner should be prepared to show by documentary evidence that the witness has suffered a prior conviction, in the event of a denial thereof. [Citations omitted.] . . . It has also been announced in other jurisdictions that an interrogator, in order to avoid a charge of misconduct, must be prepared to follow up with proof questions of a witness concerning prior felony convictions. [58 Cal.2d at 238-239.]

In People v. Darnold, 219 Cal. App.2d 561 (1963)(hg. den.), however, the court affirmed a determination that a prosecutor acted in good faith in asking the defendant's character witnesses about prior convictions when the prosecutor's questioning was based on information obtained from another deputy district attorney. The defendant was also a witness, and the questioning was justified in part upon that ground. The reported decision does not indicate whether the deputy who was the source of the information had personal knowledge of the conviction and could have testified thereto if required.

Section 788 now requires the examiner to have evidence of the conviction. The evidence may be an admission by the witness or competent evidence in any other form.

The requirement of Section 788 is objected to on the ground that the only requirement should be the good faith of the examiner. He may be in possession of a "rap sheet" showing a conviction or other reliable information which is not admissible evidence. It is difficult to obtain documentary evidence of convictions from other states. Hence, to refuse an examiner the right to ask about convictions when he has no competent evidence thereof will prevent him from asking such questions in many instances when there has been in fact a conviction. Moreover, the

prosecution is likely to be aware of the need for evidence of convictions only where a defendant is concerned. Other witnesses may appear without prior notice to the prosecution, and there is no time in such cases to obtain documentary evidence of a conviction.

On the other hand, nothing in Section 788 prevents an examiner from utilizing the in camera hearing to ask the witness if he has been convicted. At the last meeting of the Commission, we were told that rarely, if ever, does a witness deny a conviction if he has been in fact convicted. A defendant on trial for a more serious offense than perjury might be tempted to deny a conviction if he did not think the prosecution could immediately prove otherwise, but it seems unlikely that a witness not in custody would deny under oath a fact so easily and conclusively provable, and the possibility that a defendant would do so also seems remote. We were told at the meeting of the judges' committees that questioning in regard to prior felonies is "devastating" to a defendant. That being so, the concern should not be with whether the prosecutor is acting fairly. He is not on trial. The defendant is the one on trial, and the concern should be whether he is being unfairly prejudiced in the eyes of the jury--regardless of the prosecutor's good faith or lack thereof. Requiring the prosecutor to have evidence, either in the form of an admission or other competent evidence, of a conviction before he may ask a witness about it in front of the jury is the only way in which a fair trial can be assured.

Conclusion

We are persuaded by the comments of the Assembly committee, the representatives of the prosecuting agencies, and Mr. B. E. Witkin that the "dishonesty" standard is unworkable. It will create as many different standards as there are judges. Limiting the crimes to perjury or crimes

against public justice is too limiting, for the character traits bearing on a witness' veracity are also demonstrated by many other crimes. A person who has spent a lifetime as a "bunco" artist should be as subject to impeachment as a person who committed perjury once. When the crimes that bear on credibility are compiled, however, the list is so long that virtually all crimes might as well be included. The prosecutor's good sense will require that convictions based on negligent conduct be excluded. And, even if the prosecutor uses such a conviction, it is unlikely to have much influence with the jury insofar as the witness' credibility is concerned. Hence, we believe that any crime serious enough to result in a felony conviction should be usable for impeachment purposes.

We also believe that convictions of crimes punishable as felonies should be usable. No rational reason exists for permitting the person granted straight probation to be impeached while precluding impeachment of the person sentenced to a year in jail for such crimes as grand theft, burglary, extortion, etc.

We further recommend that the Commission restore the limitation relating to criminal defendants that was contained in the tentative recommendation relating to witnesses. All of the comments that we have received in support of restrictions on the impeachment rule have focussed on the criminal defendant. They all point to abuses of the right of impeachment through which the defendant is tried for crimes other than the one charged. Since this is the source of the complaints over the impeachment rule, the problem should be met directly by a provision dealing with that specific problem. The Code should prohibit the impeachment of a criminal defendant with evidence of prior convictions unless the defendant first introduces

evidence of his good character. We retreated from this position because of the criticisms received from the prosecuting agencies. The staff believes that the retreat was in part because we believed we might be able to meet their objections. That is now obviously impossible, since the prosecuting agencies oppose any change of any sort in the existing law and even resist codifying existing case law that is not favorable to them. Therefore, we recommend a return to the Commission's original position in this regard.

Finally, we recommend the retention of both the in camera hearing procedure and the requirement that the examiner have evidence of the prior conviction. The water is over the dam when the question is asked, whether or not the examiner was acting in good faith. As the damage cannot be effectively undone except by the extreme expedient of a mistrial, protection against the damage must be provided before the question is asked. At the in camera hearing, the examiner may ask the witness if he has sustained a conviction and may use any admission there given.

A draft to carry out the foregoing recommendations is as follows:

788. (a) Subject to subdivisions (b) and (c), evidence of a witness' conviction of a ~~felony~~ crime is admissible for the purpose of attacking his credibility if the court, in proceedings held out of the presence of the jury, finds that:

~~(1)--An essential element of the crime is dishonesty or false statement; and~~ (1) The crime is a felony or, if committed in this State, is a crime punishable as a felony; and

(2) The witness has admitted his conviction of the crime or the party attacking the credibility of the witness has produced

competent evidence of the conviction.

(b) In a criminal action, evidence of the defendant's conviction of a crime is inadmissible for the purpose of attacking his credibility as a witness unless he has first introduced evidence of his character for honesty or veracity for the purpose of supporting his credibility.

~~(b)~~ (c) Evidence of a witness' conviction of a ~~felony~~ crime is inadmissible for the purpose of attacking his credibility if:

(1) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.

(2) A certificate of rehabilitation and pardon has been granted the witness under the provisions of Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.

(3) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4 or 1203.4a.

(4) The record of conviction has been sealed under the provisions of Penal Code Section 1203.45.

~~(4)~~ (5) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in paragraph (2) ~~or~~ , (3) , or (4).

~~(5)~~ (6) A period of more than 10 years has elapsed since the date of his release from confinement, or the expiration of the period of his parole, probation, or sentence, whichever is the later date.

Section 1153

The District Attorney's Association and the Attorney General objected to the codification of the rule that a withdrawn plea of guilty is inadmissible.

Apparently, the hope is that the enactment of the Evidence Code would repeal the holding of People v. Quinn, 61 Cal.2d ___, 39 Cal. Rptr. 393 (1964). Quinn held that a withdrawn plea of guilty is inadmissible. If Section 1153 were modified to omit the reference to a withdrawn plea of guilty, it would be arguable (probably with merit) that evidence of such a withdrawn plea is admissible under the general provisions of Section 351 ("Except as otherwise provided by statute, all relevant evidence is admissible").

The argument in favor of the deletion is that a plea of guilty is made only under the most stringent conditions for assuring that the defendant really means what he says. Since that is so, there are no doubts concerning the trustworthiness of the admission such as there are concerning an offer to plead guilty. The evidence is highly reliable and is deserving of consideration on the issue of guilt.

The contrary argument is that permitting such evidence to be introduced virtually destroys the value of the right to withdraw a plea. Penal Code Section 1018 provides "On application of the defendant at any time before judgment the court may, and in the case of a defendant who appeared without counsel at the time of the plea to court must, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." Numerous cases have made it clear that the "good cause" mentioned does not include disappointment with the result of the plea. The "good cause" refers to "mistake, ignorance, or inadvertence or any other factor overreaching defendant's free and clear judgment." People v. Butler, 70 Cal. App.2d

553, 561 (1945). The defendant may not understand that he is not in fact guilty and that he has a good defense, for few laymen understand what elements are essential to a determination of guilt. If a plea of guilty has been mistakenly or ignorantly made and is for that reason permitted to be withdrawn, the defendant should be entitled to a trial unprejudiced by evidence that he pleaded guilty.

Section 1230

The District Attorney's Association also objected to the codification of the Spriggs rule, which permits a declaration against penal interest to be admitted over a hearsay objection despite the availability of the declarant. Their argument is that the rule is new and the courts should be permitted to work with it for a while, perhaps qualifying it if it proves necessary, before the rule is hardened into statutory form.

Here, of course, the court is not confined to the terms of the hearsay division . It can fashion new hearsay rules. It might consider, however, that the declaration against interest area is covered by statute and the court is precluded from holding declarations against penal interest to be admissible unless provision for admission appears in the code.

In a note appearing in 17 Stanf. L. Rev. 322, 324 (1965), it is pointed out that other states that admit declarations against penal interest impose conditions on admissibility that were not imposed by the court in Spriggs. Future cases, however, might develop similar limitations on admissibility if the courts were permitted to work with the rule for a while. For example, Maryland will exclude such a declaration if there appears to have been collusion, and the trial judge has discretion to exclude obviously spurious confessions. Virginia admits such declarations if there is anything

substantial other than the bare confession to connect the declarant with the crime. More stringent limitations appear in the decisions of other states. The note also reports that California is the first state where a court has eliminated the unavailability of the declarant condition. Therefore, argue the prosecutors, the courts should be left free to work with the rule for a while to determine whether some limitation is necessary.

The contrary argument is that a declaration against penal interest is as trustworthy as a declaration against pecuniary interest. Says Professor McCormick:

> Wigmore, however, is probably right in believing that the argument of the danger of perjury is a dubious one since the danger is one that attends all human testimony, and in concluding that "any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent." [McCORMICK, EVIDENCE § 255.]

Says Professor Wigmore:

> But, furthermore, [the exclusion of declarations against penal interest] cannot be justified on grounds of policy. The only plausible reason of policy that has ever been advanced for such a limitation is the possibility of procuring fabricated testimony to such an admission if oral. This is the ancient rusty weapon that has always been brandished to oppose any reform in the rules of Evidence, viz., the argument of danger of abuse. This would be a good argument against admitting any witnesses at all, for it is notorious that some witnesses will lie and that it difficult to avoid being deceived by their lies. . . .
>
> . . . Those who watched (in 1899) with self-righteous indignation the course of proceedings in Captain Dreyfus' trial should remember that, if that trial had occurred in our own Courts, the spectacle would have been no less shameful if we, following our own supposed precedents, had refused to admit what the French Court never for a moment hesitated to admit,-- the authenticated confession of the absconded Major Esterhazy, avowing himself the guilty author of the treason there charged, and now known beyond a doubt to have been the real traitor. [5 WIGMORE, EVIDENCE § 1477.]

It must, of course, be conceded that Wigmore assumed that unavailability was a condition for the admission of all declarations against interest, including declarations against penal interest. But, if the declarant is available, he may be called and examined concerning the declaration, and the truth or falsity of the statement thoroughly explored. The reliability of the statement is in no way improved by the declarant's unavailability. In fact, it would seem that the dangers of abuse and fabrication would be less if the declarant were available for examination concerning the matter.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

ELIMINATION OF PRESUMPTION OF DUE CARE

AS EVIDENCE UNDER THE EVIDENCE CODE

Under existing law, when a person's negligence or exercise of due care is in issue, that person's death, incompetence, or other incapacity (such as amnesia) to testify concerning the facts gives rise to a presumption that he exercised due care. The courts instruct juries that this presumption is a form of evidence that must be considered with all of the other evidence in the case. See, e.g., Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313 (1952); Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16 (1942). Under the Evidence Code, there is no presumption of due care that arises upon proof of death or incapacity, and no presumption is evidence.

To the extent that this presumption of due care affects the burden of proof in negligence cases, it is superseded by Evidence Code Section 521, which provides that a party claiming that some person did not exercise a requisite degree of care has the burden of proof on the issue. Thus, in a simple negligence case where the only issue is the defendant's negligence, the plaintiff has the burden of persuading the trier of fact by a preponderance of the evidence that the defendant was negligent. This is the plaintiff's burden in all negligence cases, not merely those cases where the defendant is dead or incapacitated from testifying concerning the accident. Providing a presumption of due care that arises from the defendant's death or incapacity would be idle, for the presumption would not add to the plaintiff's burden of proof (nor should it). The plaintiff would still be required merely to prove the defendant's negligence by a preponderance of the evidence.

Similarly, in a contributory negligence case, Section 521 requires the defendant to prove the plaintiff's contributory negligence by a preponderance of the evidence. Providing the plaintiff, in addition, with a presumption of due care that arises upon the plaintiff's death or incapacity would not add to the defendant's burden of proof (nor should it). The defendant would still be required to prove the plaintiff's contributory negligence by a preponderance of the evidence.

Thus, adding to the Evidence Code a presumption of due care that arises upon proof of a person's death or incapacity to testify would be idle, for such a presumption would merely duplicate in a narrow area the provisions of Section 521. Moreover, the presumption would create the undesirable implication that a party claiming negligence does not have the burden of proof on the issue in those cases where the person claimed to be negligent is not dead or incapacitated.

The doctrine that a presumption is evidence is omitted from the Evidence Code because there is no way in which the jury can be informed under that doctrine precisely how the presumption affects the fact-finding process. Hence, it introduces into the fact-finding process an element of irrationality and chance that has no proper place in the serious conduct of a lawsuit.

Illustrative of the problems created by the doctrine that a presumption is evidence is the case of Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313 (1952). That was a simple negligence case arising out of a one-car accident: the only issue was whether the defendant driver was negligent. The defendant was held to be entitled to an instruction on the presumption of due care because of the fact that he claimed to have amnesia. The plaintiffs were held to be entitled to an instruction on res ipsa loquitur and on the presumption of negligence that arises when a person violates the rules of the

road. After instructing the jury on res ipsa loquitur, the court instructed:

> These instructions direct your attention to two conflicting rebuttable presumptions relating to the conduct of the defendant (one) that he exercised due care at the time of the accident which presumption arises in the event that you find that as a result thereof he is unable to remember the facts pertaining to the same, and (two) that he was negligent if you find that he was driving on the wrong side of the road, or that he permitted the automobile to leave the road in question entirely, or that he fell asleep at the wheel. If you find the facts to exist which give rise to these presumptions, then these conflicting presumptions constitute evidence, the effect of which is to be determined by you, not by the court; they are to be weighed and considered by you in the light of and in connection with all of the other evidence, and you are to give to them, and each of them, such weight as you deem proper.

As pointed out in Justice Traynor's dissenting opinion, this instruction gives the jury no clue as to how it should resolve the factual issues from the evidence presented. Under the Evidence Code, the case would be submitted to the jury in the manner suggested by Justice Traynor:

> The facts and issues in these cases are simple and could easily have been presented to the jury in an intelligible manner. . . .
>
> [T]he jury should have been instructed to find defendant liable if it concluded that he had the ability to explain the accident and failed to do so. It should also have been instructed that if it found that defendant had no memory of the accident because of amnesia, it should base its verdict solely on the evidence presented and find defendant liable only if it concluded that the accident was more probably than not the result of negligence on his part. Under such instructions the mental processes involved in reaching a verdict would not have been difficult. If the jury disbelieved defendant's evidence that he was suffering from amnesia, his liability would be established. If it believed that evidence, it would then have to decide only whether or not to draw the inference from the occurrence of the accident and the surrounding circumstances that defendant was negligent. If it could not decide whether or not to draw that inference it would find for the defendant because of plaintiffs' failure to discharge their burden of proof.

The instructions suggested by Justice Traynor inform the jury precisely the findings they should make on the basis of their beliefs concerning

plaintiffs' evidence and defendant's evidence. The instructions given, however, virtually require the jury to determine the verdict by chance; for no hint is given as to how the facts should be determined from the evidence. The Evidence Code provisions on presumptions have been drafted with the objective of eliminating incomprehensible instructions, such as that given in Scott v. Burke, from California practice.

If it seems necessary in a particular case to call to the jury's attention that a person's death, incompetency, or other disability has prevented him from contradicting or explaining the evidence of his negligence, that fact may be readily called to the jury's attention in argument. The existence of such a disability, however, is no justification for perpetuating the practice of giving instructions that cannot be intelligently applied by the laymen who sit on juries.

§ 414. Incapacity of person to deny or explain evidence of misconduct

414. If evidence is received that a person was negligent or guilty of crime or other wrongdoing, the fact that such person is dead, incompetent, or otherwise incapable of giving testimony to explain or deny the evidence against him may be commented upon by the court and by counsel and may be considered by the court or jury.

Comment. Under existing law, when a person's negligence or exercise of due care is in issue, the court instructs the jury such person's death, incompetence, or other incapacity to testify concerning the facts gives rise to a presumption that he excercised due care. The court also instructs that this presumption is a form of evidence that must be considered with all of the other evidence in the case. See, e.g., Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313 (1952); Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16 (1942).

The doctrine that a presumption is evidence is not contained in the Evidence Code for the reasons discussed in the Comment to Section 600. Nonetheless, the instructions given in the cases where the presumption of due care has been applied are helpful to the extent that they impress upon the jury that the person charged with negligence cannot contradict the evidence against him or otherwise impress the jury with his innocence, and that this incapacity may be properly considered in evaluating the evidence of negligence.

Section 414 accomplishes directly what the instructions on the presumption of due care accomplished indirectly. Under Section 414, the jury may be informed directly that the fact that the person charged with misconduct is incapable of testifying to contradict or explain the

evidence against him may be considered in evaluating that evidence.

Section 414 applies only when the person charged with misconduct is physically incapable of testifying concerning the events in question. He may be dead or incompetent, or he may be suffering from amnesia. Cf. Scott v. Burke, 39 Cal.2d 388, 247, P.2d 313 (1952). Unavailability of the person because of privilege would not warrant application of Section 414. Compare EVIDENCE CODE § 240 and the Comment thereto.

C.C.P. § 1963

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

Class: This so-called presumption should be repealed.

This statutory rebuttable presumption is virtually indistinguishable from the conclusive presumption stated in C.C.P. § 1962 of "a malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another". But, "This 'conclusive presumption' has little meaning, either as a rule of substantive law or as a rule of evidence, for the facts of deliberation and purpose which must be established to bring the presumption into operation are just as subjective as the presumed fact of malicious and guilty intent." People v. Gorshen, 51 Cal.2d 716, 731, 336 P.2d 492 (1959). We do not propose to alter the conclusive presumption, however.

The rebuttable presumption expressed in § 1963(2), when correctly construed, means no more than that a person is presumed to have intended what he in fact did. (Cf. C.C.P. § 1963(3), "That a person intends the ordinary consequences of his voluntary act ".) Hence, if some specific intent, other than that inherent in the voluntary doing of the act involved, is a necessary element of a crime, the presumption is inapplicable and it is error to instruct upon it. People v. Snyder, 15 Cal.2d 706, 104 P.2d 639 (1940); People v. Maciel, 71 Cal. App. 213, 234 Pac. 877 (1925); cf., People v. Neal, 40 Cal. App.2d 115, 104 P.2d 555 (1940). The Maciel case stated the rule to be that ". . . whenever a specific intent is an essential ingredient of the offense no presumption of law can arise as to the existence of such intent, for it is a fact to be proved like any other fact in the case." 71 Cal. App. at 217. Holding that an instruction based on § 1963(2) was prejudicially erroneous in a prosecution for assault with intent to kill. the

court said:

> If the court had charged the jury that when the act committed by an accused is unlawful the law raises a disputable presumption that the act was intended, and that the person doing it, if he did it voluntarily, also intended the ordinary consequences of his act, the instruction would have stated a rule of evidence substantially as declared in subdivisions 2 and 3 of section 1963 of the Code of Civil Procedure. . . . Had the court worded its instruction so as to state the law substantially as it is declared in these code provisions, it would have been properly applicable to the lesser offense of an assault with a deadly weapon; and in that event, appellant, if he had desired to limit the instruction to a declaration that it did not apply to the greater offense of an assault with intent to commit murder, would have been obliged to request the court so to declare.
>
> . . . Instead, [the court] gave an instruction the vice of which lies in the fact that it goes beyond the rule that an accused who has done an unlawful act is presumed to have intended to do that act, and broadly asserts that when the act committed by an accused is unlawful the law presumes 'the criminal intent,' without telling the jury what is the criminal intent which the law presumes in such cases. . . .
>
> . . . It is only when the intent is not made an affirmative element of the crime that the law presumes that the act, if knowingly done, was done with a criminal intent. (16 C.J., p. 81) When a specific intent is an element of the offense it presents a question of fact which must be proved like any other fact in the case. It is none the less a question of fact though it cannot be proved by direct and positive evidence. All the circumstances surrounding the act furnish the evidence from which the presence or absence of the specific intent may be inferred by the jury; and no presumption of law can ever arise that will decide it. [71 Cal. App. at 217-18.]

Thus, the presumption is at best but a reiteration of the presumption in § 1963(3) that a person intends to do what he voluntarily does. At worst, it is nonsense. It forces one to assume a preliminary fact (that an unlawful act was done) that one cannot determine without relying on the presumed fact (that there was an unlawful intent). If the intent was not unlawful, there was no unlawful act.

Therefore, the staff recommends the repeal of this presumption.

3. That a person intends the ordinary consequence of his voluntary act.

Class: Repeal.

Says Witkin, "This [presumption] appears to be a simple truism, which accords with logic and human experience . . . ." Witkin, California Crimes 58. But it is settled that it is error in a criminal case to instruct in the language of this presumption when specific intent is a necessary element of the crime. People v. Snyder, 15 Cal.2d 706, 104 P.2d 639 (1940); People v. Brown, 27 Cal. App.2d 612, 81 P.2d 463 (1938). The rule is stated in People v. Mize, 80 Cal. 41, 44-45, 22 Pac. 80 (1889) (quoted in both Snyder and Brown, supra) as follows:

> It is doubtless true that, as a general rule, a man is presumed to have intended that which he has done, or that which is the immediate and natural consequence of his act, but where an act becomes criminal only when it has been performed with a particular intent, that intent must be alleged and proved. It is for the jury, under all the circumstances of the case, to say whether the intent required by the statute to constitute the offense existed in the mind of the defendant. . . . In homicide cases, where the killing is proved, it rests on the defendant to show justification, excuse, or circumstances of mitigation, subject to the qualification that the benefit of the doubt is to be given to the prisoner; but this is because the statute expressly shifts the burden of proving circumstances of mitigation upon the defendant in homicide cases. The rule is confined to murder trials. (Pen. Code, sec. 1105; People v. Cheong Foon Ark, 61 Cal. 527.)

The cited cases also make clear, however, that the requisite intent may be inferred from the commission of the act and the surrounding circumstances. The strength of the inference--whether in a civil case it should be permissive or mandatory--would seem to depend on the nature of the circumstances. Hence, it seems improper to give the conclusive effect of a presumption to the evidence. The matter should be left to inference. And, because circumstances may vary, we do not believe that a statutory inference should be enacted permitting the inference to be drawn in every case. Whether the inference is permissible should be left to the ordinary rules governing circumstantial evidence.

It is settled that it is proper to instruct the jury that an inference of intent may properly be drawn from proof of the voluntary doing of an act. "The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused." Instruction approved in People v. Besold, 154 Cal. 363, 97 Pac. 871 (1908).

Repeal of the presumption may possibly forestall instructions to the jury based on the presumption and resulting reversals. Justice Shinn once commented on an instruction based on this presumption as follows:

> We are at a loss to understand why it was given, or why it is given in so many cases where it can serve no purpose and tends to create confusion. To be sure it states the law as declared in the Penal Code, but that is no reason for giving an instruction which expounds legal principles that are wholly irrelevant to the issues. In every case involving specific intent an instruction on specific intent is sufficient for all purposes. It embraces all the elements of general intent. When instructions are given on both general and specific intent a third instruction is necessary which states that the instruction on general intent does not relate to crimes which require proof of specific intent. The instruction on general intent should not be given at all in a prosecution for violation of section 288. In fact it is only in rare cases that it will serve any purpose. Occasionally the question will arise as an issue for the jury whether the act charged was committed knowingly and voluntarily. But unless the evidence presents that question the rule on general intent is irrelevant and redundant. [People v. Booth, 111 Cal. App.2d 106, 108-09, 243 P.2d 872 (1952).]

Justice Shinn's failure to understand why the instruction is so frequently given in specific intent cases may be because he is unaware that the appellate courts still erroneously rely on the presumption in specific intent cases in affirming convictions. See, e.g., People v. Hulings, 211 Cal. App.2d 218, 27 Cal. Rptr. 446 (1962); People v. Williams, 186 Cal. App.2d 420, 8 Cal. Rptr. 871 (1960); People v. Chapman, 156 Cal. App.2d 151, 319 P.2d 8 (1957). In each of these cases, it was unnecessary to mention the presumption because the inference of the defendant's intent arising from his acts was fully sufficient to support the conviction.

#34 2/12/65

Second Supplement to Memorandum 65-4

Subject: Study No. 34(L) - New Evidence Code

Attached is a portion of a preliminary draft of the report of the State Bar Committee on Evidence to the Board of Governors on the proposed Evidence Code. We had hoped to be able to send you the entire report in time for the February meeting. However, we have not yet (on February 12) received the remainder of the report.

You will find that the report contains an excellent summary of the proposed Evidence Code. I suggested to Mr. Westbrook that he might consider having the report published in the State Bar Journal.

Respectfully submitted,

John H. DeMoully
Executive Secretary

2d Supp Memo 65-4 EXHIBIT I

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January
28th
1965

OUR FILE NUMBER

921,499-30

TO: STATE BAR COMMITTEE ON EVIDENCE

Gentlemen:

Enclosed please find pages 1-35 of the proposed report to the Board of Governors on the proposed Evidence Code. This portion embraces discussion of historical background, of the Uniform Rules, of the need for an evidence code and of Divisions 1-7, inclusive, of the proposed code. The remainder of the report, relating to the last four divisions of the proposed code and the conclusion, will be transmitted to you early next week.

Please give your immediate attention to the enclosure with a view to giving me any comments or criticisms as early next week as possible. I hope to have the entire report approved by the committee by the end of next week, so that it may be distributed to the Board of Governors well in advance of their February meeting.

It occurs to me that the matters so far covered in the proposed report most likely to occasion comment are those relating to the elimination of the second crack doctrine with respect to confessions and with respect to dying declarations and spontaneous statements and the elimination of presumptions as evidence. I apologize for the time pressures on this but assure you that they have been occasioned by professional and personal pressure beyond my control.

Sincerely yours,

Philip F. Westbrook, Jr.

PFW:vhr
enclosure
ccs: Messrs. Barnes, Welch,
Hayes, Mathews and
✓De Moully

To: Board of Governors, State Bar of California

From: Committee on Evidence, State Bar of California

Date: _____, 1965

Subject: Proposed California Evidence Code

Among the major proposals before the 1965 Session of the California Legislature is a new Evidence Code, contained in Senate Bill No. 110 and Assembly Bill No. 333 and based upon a Recommendation of the California Law Revision Commission published in its final form under date of January, 1965. If adopted, the Evidence Code will replace the existing provisions of the Code of Civil Procedure insofar as they relate to the law of evidence and codify decisional law on the subject not presently reflected in any statutory provision. In addition, the proposed Evidence Code would clarify existing law and, in a relatively few, but nevertheless important instances, change existing law. It is the purpose of this report to present to the Board the views of the State Bar Committee with respect to this proposal and to recommend the position which the State Bar Committee believes the Board should adopt.

A. HISTORICAL BACKGROUND

Existing statutory provisions relating to the law of evidence are contained primarily in Part IV of the Code of Civil Procedure. These provisions are in essentially

the same form as when that code was adopted in 1872. A revision of Part IV was enacted in 1901 but was declared unconstitutional because the legislation embraced more than one subject and because of deficiencies in the title of the legislation. About 1932, the California Code Commission undertook a thoroughgoing revision of the law of evidence. This work continued until 1939 when the project was abandoned because the American Law Institute undertook the drafting of the Model Code of Evidence and the Commission thought it undesirable to duplicate the Institute's effort.

The American Law Institute effort was responsive to widespread feeling that the law of evidence in most states required revision as well as clarification. Hence, rather than attempting a Restatement of the law of evidence, the American Law Institute departed from its usual practice to prepare the Model Code of Evidence which was promulgated in 1942. The Model Code would have effected rather drastic changes in the law of evidence and the reaction to it was generally adverse. In California, the Model Code was referred to the Committee on the Administration of Justice which recommended that the State Bar oppose its adoption. By 1949, the adoption of the Model Code was a dead issue in California and elsewhere.

Nevertheless, continued need for revision of the law of evidence prompted the National Conference of

Commissioners on Uniform State Laws to undertake the drafting of Uniform Rules of Evidence, which were approved by the Commissioners and the American Bar Association in 1953. The Uniform Rules are simpler than the Model Code and, in addition, eliminate proposals contained in the Model Code which were objectionable. The Uniform Rules have been adopted by statute in Kansas and the Virgin Islands. In New Jersey, a revised form of the privileges article has been adopted by statute and the remainder of the Uniform Rules has been adopted in substantially revised form by court rule.

In 1956, the California Legislature directed the Law Revision Commission to make a study to determine whether the law of evidence in California should be revised to conform to the Uniform Rules. The State Bar Committee to Consider the Uniform Rules of Evidence (now the State Bar Committee on Evidence) was created in October 1957 to work with the Law Revision Commission to the end that any proposed legislation would be the product of thorough study and consideration by representatives of the State Bar as well as the Law Revision Commission. The following organizations (through committees or representatives) have also participated in study, comment and criticism of the Commission's work:

Senate Fact Finding Committee on Judiciary

Assembly Interim Committee on Judiciary-Civil

Assembly Interim Committee on Criminal Procedure
Judicial Council
Conference of California Judges
Municipal Court Judges Association of
Los Angeles County
California Commission on Uniform State Laws
Office of the Attorney General
State Department of Public Works
State Office of Administrative Procedure
District Attorney's Association of California
League of California Cities

The San Francisco Bar Association and other local bar associations have also participated.

As the end result of this effort, the Law Revision Commission has drafted the Evidence Code which is under consideration by the 1965 Session of the California Legislature.

B. THE UNIFORM RULES OF EVIDENCE

The Commission has recommended against adoption of the Uniform Rules of Evidence for the following reasons:

1. The need for uniformity in the law of evidence is not as great as in the case of laws which have substantive rather than procedural significance.

2. Many existing statutory provisions have served well and should be continued. While adjustment of the Uniform Rules would permit such continuance, the effort would be self-defeating because the objective of a clear, logically organized and complete statement of the law of evidence could not be achieved in this manner.

3. The draftsmanship of the Uniform Rules departs substantially from the standards of legislative draftsmanship in California. Some of the rules are cumbersome in organization and structure and frequently different language is used to express the same idea. If adopted by court rule with resulting ease of amendment, these problems might not be acute, but legislative enactment requires greater accuracy and precision.

4. The Uniform Rules would change existing California law in important respects which are considered undesirable. Hence, uniformity could not be achieved in any event.

The State Bar Committee concurs in this recommendation for the reasons stated by the Commission.

Nevertheless, it should be noted that the Uniform Rules have performed a most important and useful function. They have provided a framework for a comprehensive and

critical evaluation of the law of evidence not only as it exists in California but as the proponents of the Uniform Rules believe it should be.

C. NEED FOR AN EVIDENCE CODE

1. Arguments for an Evidence Code

The arguments for an evidence code may be related to three principal concepts: (1) The desirability of codifying existing law, (2) the desirability of clarifying existing laws, and (3) the desirability of revising existing law.

The argument for codification of existing law proceeds upon the unquestioned premise that the existing statutory provisions relating to the law of evidence are fragmentary and sometimes inaccurate. The bulk of the law of evidence has found expression only in court decisions. Despite the existence of commendable treatises on the California law of evidence, there is no single authoritative source to which the bench and bar can turn. An evidence code, together with the Law Revision Commission's comment thereon (which will be published as an integral part of the annotated code), would provide an official handbook of the law of evidence. Such a handbook would be of practical value in an area of the law where the speedy and accurate determination of points at issue can play a significant role in the efficient administration of justice.

Perhaps even more important than the desirability of simple codification of existing law is the desirability of clarifying existing law. In the development of the law of evidence, court decisions leave substantial gaps, obscurities, and even inconsistencies. Necessarily, case law in this field depends upon sporadic presentation of particular questions as they arise. The process of clarification is retarded by the fact that many evidentiary questions are subordinate to questions of substantive law in a particular case and by the desirable and necessary concept that evidentiary rulings are not ground for reversal unless clearly erroneous. An evidence code provides the opportunity to fill in gaps and eliminates inconsistencies without violence to the basic concepts involved.

Revision of anachronistic rules of evidence can be an important objective of an evidence code. It should be emphasized that the proposed code is largely a restatement and clarification of existing law. However, it does embody important changes in the law of evidence. Such changes are difficult of accomplishment on a fragmentary basis as shown by the continuing but ineffectual concern of the State Bar with the repeal or modification of the Dead Man Statute. The changes in the law of evidence which are embodied in the proposed Evidence Code will be evaluated herein on a point by point basis. However, it

should be noted that the desirability of and need for an evidence code does not depend upon the desirability of particular changes in the law of evidence which can be added to or deleted from the proposed code with relative ease.

2. Arguments Against An Evidence Code

The arguments against an evidence code are more diffuse but are nevertheless worthy of serious consideration. They may also be related to three principal concepts: (1) concern that a code will proliferate evidence problems in the courts, (2) concern that a code will create an undesirable rigidity in the law of evidence, and (3) concern that a code will introduce impractical and academic concepts into the law of evidence.

Concern with the proliferation of evidence problems in the courts proceeds on the premise that, on the whole, the California law of evidence has worked effectively. The thought is expressed that such procedural reforms as the Federal Rules of Civil Procedure and the California Discovery Act have consumed an inordinate amount of time and attention in the trial and appellate courts and that it has taken years to produce any substantial degree of certainty as to their construction and application. An evidence code may result in similar

intensification of controversy and uncertainty over a period of time.

Rigidity in the law of evidence is certainly undesirable. Except in those areas where the law of evidence is based primarily on considerations of public policy which are best left to the legislature (e.g., assignment of burden of proof, exceptions to the hearsay rule and creation of privileges), the proposed code reserves to the courts room for the further development and clarification of the law of evidence. Nevertheless, the possibility exists that trial courts in particular will be reluctant to develop new areas if the law of evidence is reduced to comprehensive codified form.

Perhaps no area of the law is more concerned with consideration of practicality than the law of evidence. However desirable innovation in this area of the law may be, it should first be tested against the experience and judgment of trial lawyers and judges. Theoretical concepts such as were expressed in the Model Code of Evidence and some writings on the law of evidence may actually produce injustice.

3. Recommendation

On balance, a substantial majority of the Committee favors the enactment of an evidence code. The

codification and clarification of existing law will do much to reduce uncertainty in the law of evidence. Any resulting problems of construction and application will be relatively temporary and will themselves accelerate the development and clarification of the law. The possible reluctance of trial courts to depart from the safe guidelines of a code can be no more frustrating to the ends of justice than the fragmentary development of the law heretofore existing. Finally, such innovations and changes as are included in the proposed Evidence Code can and should be tested on their own merits and can be accepted or rejected independently of the code as a whole.

A subsidiary question exists as to the desirability of a separate evidence code as distinguished from revision of Part IV of the Code of Civil Procedure which now deals with the law of evidence. Three considerations dictate an affirmative answer to this question. First, Part IV of the Code of Civil Procedure contains provisions which do not deal with the law of evidence. While these provisions may require revision, they are beyond the scope of the Law Revision Commission's present study and present authority. Second, the law of evidence is concerned equally with criminal and civil proceedings. Third, the objective of a concise and reasonably comprehensive evidence handbook can best be accomplished through a separate code.

D. THE PROPOSED EVIDENCE CODE

The proposed Evidence Code is divided into eleven divisions which will be discussed seriatim. In each instance, the general format and content of the division and its subdivisions will be presented. Significant clarifications of or changes in existing law will be specifically discussed.

1. Preliminary Provisions (Division 1)

Division 1 contains certain provisions which are usually found at the beginning of modern California codes. They would work no change in the existing law of evidence. The most significant provision specifies a delayed effective date of January 1, 1967, which serves two functions. First, it would permit ample familiarization of the bench and bar with the Code before it becomes effective. Second, it would permit legislative correction of any defects which may be disclosed by further study and comment before the Code becomes effective.

2. Words and Phrases Defined (Division 2)

Division 2 contains definitions which, generally speaking, are used throughout the Code. Definitions which have application only to specific subject matters are contained for the most part in the particular portion of the Code to which they relate. Except in one particular, the

definitions contained in Division 2 would not work any significant change in the existing law except as applied to particular subject matters hereinafter discussed.

The one change of general application contained in Division 2 relates to the definition of "evidence." As presently defined in C.C.P. Section 1823, "judicial evidence" is restricted to that "sanctioned by law." However, it is well established that even otherwise inadmissible "evidence" may be considered in support of a judgment if received without objection. The Code would make it clear that evidence consists of "testimony, writings, material objects, or other things that are offered to prove the existence or nonexistence of a fact." Hence, the definition includes anything offered in evidence whether or not admissible and whether or not received. The Committee concurs in this change.

3. General Provisions (Division 3)

a. Applicability of Code (Chapter 1)

With certain exceptions contained in particular parts of the Code (e.g. Division 8. Privileges), the Code would be applicable only to all proceedings conducted by California courts. Subject to such exceptions, it would not affect administrative or legislative proceedings, unless some other statute so provides (e.g. Government

Code Section 11513 as to hearsay evidence in proceedings under the Administrative Procedure Act) or the agency concerned chooses to apply the provisions of the code. Conversely, it would not affect other statutory provisions relaxing rules of evidence for specified purposes (e.g. C.C.P. Section 117g as to small claims court, C.C.P. Section 1768 as to conciliation proceedings, C.C.P. Section 2016(b) as to discovery proceedings, Pen. C. Section 1203 as to probation reports in criminal proceedings, and Welf. & Inst. C. Section 706 as to probation reports in juvenile court proceedings).

b. Province of Court and Jury (Chapter 2)

Existing law with respect to the province of the court and jury are restated in the Code without significant change. Briefly summarized, all questions of law and all issues of fact preliminary to the admission of evidence would be decided by the court and all other questions of fact would be decided by the jury. Questions of foreign law are specifically declared to be questions of law for determination by the court with provision for the application of the law of California or other appropriate action if the court is unable to determine foreign law.

c. Order of Proof (Chapter 3)

As under existing law, the court's discretion to regulate the order of proof is recognized.

d. Admitting and Excluding Evidence (Chapter 4)

(1) General Provisions (Article 1)

This article restates the familiar rule that only relevant evidence is admissible and the implicit premise of existing law that all relevant evidence is admissible except as otherwise provided by law. It also expresses in much more succinct and cogent form the existing concept that the court has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. Finally the article restates existing law relating to reversible error in the admission or exclusion of evidence, the requirement that the judge instruct the jury as to limitation of evidence to particular parties or purposes, and the admissibility of the whole subject matter when an adverse party introduces evidence of part of an act, declaration, conversation or writing.

(2) Preliminary Determinations on Admissibility of Evidence (Article 2)

For the most part, this article conforms to existing law relating to the determination of preliminary facts upon which the admissibility of evidence depends. With one exception, as hereinafter noted, it recognizes the existing discretion of the court to hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury.

In conformance with existing law, the code distinguishes between (a) those situations in which the court must be persuaded of the existence of the preliminary fact and the court's determination as to the preliminary fact is final, and (b) those situations in which only prima facie proof of the preliminary fact is necessary to admit the proffered evidence and the court's determination as to the preliminary fact is not final. Under the code, the second or non-final category would include only the following situations: (1) relevance depends upon existence of the preliminary fact (e.g., agency or conspiracy), (2) the preliminary fact is personal knowledge of the witness, (3) the preliminary fact is the authenticity of a writing and (4) the preliminary fact is whether a statement or conduct was by a particular person. In all of the non-final situations except the second, the code would permit

the court (as now) to admit the proffered evidence conditionally subject to evidence of the preliminary fact being supplied later in the course of the trial. In all of the non-final situations, the code would provide (as under existing law) that the court may, and on request shall, instruct the jury to disregard the proffered evidence unless the jury finds that the preliminary fact exists.

This article would work significant change in the law with respect to confessions and admissions of criminal defendants, spontaneous statements and dying declarations as follows:

1. Under existing law, the court has discretion to hear and determine the admissibility of a confession or admission of a criminal defendant in the presence and hearing of the jury. The code would require such hearing to be held out of the presence and hearing of the jury in order to avoid the possibility of the jury hearing otherwise inadmissible evidence of a prejudicial character. However, the defendant may still attack the credibility of the confession or admission before the jury, utilizing some of the matters presented to the court on the hearing as to admissibility.

2. Under existing law, the court has discretion to submit the question of the admissibility

of a confession or admission of a criminal defendant to the jury. The code would require the court to withhold the confession or admission from the jury unless the court is persuaded that it is admissible. The Commission reasons that this will avoid "passing the buck" to the jury in difficult cases and will afford a greater degree of protection to the criminal defendant than under existing law.

3. Under existing law, the court may pass to the jury the final determination as to the admissibility of dying declarations and spontaneous statements. The code would require final determination of this question by the court.

After considerable difference of opinion in previous discussions, the Committee accepts by a substantial majority the views of the Commission as to the first two of the foregoing changes. A majority of the Committee also concurs with the Commission as to the third of these changes but a substantial minority of the Committee believes that the jury should have a "second crack" at the admissibility of spontaneous statements and dying declarations.

e. Weight of Evidence Generally (Chapter 5)

This chapter restates the substance of certain existing statutory provisions as to the weight of evidence.

4. Judicial Notice (Division 4)

In conformance with existing law, the code provides that judicial notice may not be taken of any matter unless authorized or required by statutory law. Matters subject to judicial notice are classified by the code into (1) those as to which judicial notice is mandatory whether or not requested by a party, and (2) those as to which judicial notice is discretionary unless requested by a party.

For the most part the recognition and classification by the code of matters subject to judicial notice is a restatement of existing law but some clarification and changes are included in the code as follows:

(a) Matters subject to judicial notice under existing law but newly or clearly placed in the category as to which judicial notice is mandatory include the law of sister states, documents published in the Federal Register, the true signification of English words and phrases and legal expressions, and facts and propositions of generalized knowledge so universally known that they cannot reasonably be the subject of dispute. The decisional law of intermediate courts in other states, which is not clearly subject to judicial notice under existing law, is also placed in the mandatory category.

(b) The non-mandatory category of matters subject to judicial notice under the code includes the following which may or may not be subject to judicial notice under existing law: resolutions and private acts of Congress and other states; ordinances of municipalities in this state, other states and territories and possessions of the United States; regulations of other states and territories and possessions of the United States; and rules of any court of record of the United States or of any state and any territory or possession of the United States.

The Committee concurs in these clarifications and changes.

The principal changes in the existing law as to judicial notice provided by the code are procedural. Judicial notice of matters in the non-mandatory category is required to be taken if a party requests it, giving notice to each adverse party and furnishing the court with sufficient information as a basis for the request. As to all matters in the non-mandatory category and as to "universally known" facts and propositions, the court is required to give each party reasonable opportunity to present information relevant to the propriety of taking judicial notice and to the tenor of the matter to be noticed. Denial of a request for judicial notice is required to be

noted on the record at the earliest practicable time. The Committee believes that these procedural provisions represent desirable additions to the law of evidence by eliminating surprise and affording reasonable opportunity to be heard.

5. Burden Of Proof, Burden Of Producing Evidence and Presumptions (Division 5)

In general, Division 5 restates existing law dealing with the burden of proof and burden of producing evidence.

a. Burden Of Proof (Chapter 1)

Except as otherwise provided by law, a party is stated to have the burden of proof as to each fact, the existence or nonexistence of which is essential to his case. This would eliminate the inaccurate, anachronistic and confusing statutory provision that the burden of proof is upon the party having the "affirmative of the issue," a change with which the Committee concurs.

b. Burden of Producing Evidence (Chapter 2)

The burden of producing evidence on a particular fact is stated to be initially upon the party with the burden of proof and, thereafter, on the party who would suffer a finding against him in the absence of further evidence.

c. Presumptions and Inferences (Chapter 3)

(1) General (Article 1)

In this article, a presumption is defined as an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. Presumptions are classified as conclusive or rebuttable and rebuttable presumptions are further classified as those affecting the burden of proof (those which implement public policy) and those affecting the burden of producing evidence (those which merely facilitate determination of the action). Except as to criminal cases in which a special rule is provided, presumptions affecting the burden of proof are stated to place that burden on the party against whom they are invoked.

This article works a change in existing law by expressly providing (as is implicit in the code's definition of evidence) that a presumption is not evidence. However, the article expressly recognizes inferences as deductions of fact that may logically and reasonably be drawn from another fact or group of facts. Thus, even though presumptions themselves are not evidence under the code, inferences are permissible in most situations where presumptions presently apply. A substantial minority of the Committee opposes this change in existing law, believing that treating presumptions as evidence avoids injustice

in some cases. However, the majority of the Committee concurs in the proposed change, subscribing to the Commission's view that treating presumptions as evidence is illogical and that sufficient protection is afforded to litigants by the rules pertaining to the burden of proof and burden of producing evidence.

(2) Conclusive Presumptions (Article 2)

Conclusive presumptions are more rules of substantive law than evidentiary rules. Hence the code sets forth, without substantive change, the conclusive presumptions presently contained in the Code of Civil Procedure and also recognizes the existence of other conclusive presumptions in decisional and statutory law.

(3) Presumptions Affecting the Burden of Producing Evidence (Article 3)

This article lists a number of existing rebuttable presumptions as being presumptions affecting the burden of producing evidence, not all of which have been clearly classified under existing law. It also recognizes the existence of other such presumptions, some of which will require classification by the courts in accordance with the criteria set out in Article 1. A slight change in existing law is made by restating the recently eroded requirement that the presumed genuiness of ancient

documents depends, in part, upon their being acted upon as genuine and limiting the ancient documents rule to dispositive instruments. The Committee concurs in the clarification of and minor changes in existing law proposed by this article.

(4) Presumptions Affecting Burden Of Proof (Article 4)

This article lists several existing rebuttable presumptions as being presumptions affecting the burden of proof and recognizes the existence of other statutory and common law presumptions which must await classification by the courts. In this category, it is proposed to extend the presumption of lawful exercise of jurisdiction to any court of this state or the United States (as distinguished from courts of general jurisdiction). The restriction to courts of general jurisdiction would still obtain so far as courts of other states are concerned. Again, the Committee concurs in the minor change in existing law proposed by this article.

6. Witnesses (Division 6)

While the bulk of this division is a recodification of existing law, it would work several significant changes in California law on the subject.

a. Competency (Chapter 1)

In conformance with existing law, the code declares that every person is qualified to be a witness and no person is disqualified to testify to any matter except as otherwise provided by statute. The code states a general rule of disqualification as a witness if a person is incapable of expressing himself understandably either directly or through an interpreter or incapable of understanding his duty to tell the truth. Personal knowledge is also stated to be a prerequisite to testimony concerning a particular matter (except in the case of expert witnesses). Specific rules are provided as to judges and jurors as witnesses.

This chapter would produce the following changes or clarifications of existing law.

(1) Existing law requires a prior determination by the court, not only of capacity to communicate and to understand the duty to tell the truth, but also of capacity to perceive and to recollect. While the capacity to perceive and recollect are embraced within the requirement of personal knowledge, the

court may exclude testimony as to a particular matter for lack of personal knowledge only if no jury could reasonably find such knowledge. Hence, the code would relax the requisite findings as to capacity to perceive and to recollect and leave to the trier of the fact the question whether the witness in fact perceived and does recollect.

(2) Existing law declares that children under ten years of age who appear incapable of receiving just impressions of the facts or of relating them truly and persons of unsound mind are disqualified as witnesses. These special provisions do not appear in the code but the omission is not likely to have much practical significance in view of the fact that the existing special provisions have been equated to the general requirements for qualification of witnesses.

(3) Existing law may permit testimony to be admitted conditionally upon showing personal knowledge later. The code would require a prima facie showing of personal knowledge to be made upon objection of a party before the testimony may be admitted.

(4) Under existing law, a judge or juror may be called as a witness in a trial pending before them even over the objection of a party but the judge has

discretion to order the trial to be postponed or suspended or to take place before another judge or jury. The code would require prior disclosure of the information the judge or juror has and would permit testimony by the judge or juror in the absence of objection. However, upon the objection of a party, the court would be required to declare a mistrial and order the action to be assigned for trial before another judge or jury.

(5) Under existing law, parties, assignors of parties, and real parties in interest are disqualified from testifying in an action upon a claim or demand against a decedent's estate as to any matter or fact occurring before the decedent's death. This California version of the "dead man statute" would be omitted from the code but a new, limited hearsay exception would be introduced to aid the decedent's personal representative in defending against the claim or demand. The existing "dead man statute" is shot through with exceptions and restrictions. It is believed that the solution advanced by the Commission is sound and in the interests of justice.

The Committee concurs in all of the foregoing changes and clarifications.

b. Oath and Confrontation (Chapter 2)

This chapter continues existing law requiring testimony to be on oath or affirmation and in the presence of and subject to the examination of all parties to the action.

c. Expert Witnesses (Chapter 3)

The code spells out familiar rules as to expert witnesses in such manner as to clarify and organize the existing law. Experts may be qualified by reason of special knowledge, skill, experience, training or education which, against the objection of a party, must be shown to the satisfaction of the court before a witness may testify as an expert. Cross-examination of experts would be extended (as now) to a much broader basis than ordinary witnesses and includes qualifications, the subject matter of the expert testimony, the matter upon which the expert's opinion is based and the reasons therefore, and publications referred to, considered, relied upon or admitted in evidence. Credibility would be tested by examination into employment (including court appointment) and compensation and expenses. The court (as now) could limit the number of expert witnesses.

Two significant clarifications in existing law would result from the foregoing provisions:

(1) The California law is confused with respect to the extent of cross-examination on

publications in the field of expertise. Some cases suggest a broad range of inquiry into this subject matter but the trend of recent decisions seems to restrict such examination to publications relied upon by the expert. The code would permit cross-examination to any publication referred to, considered or relied upon, thus broadening the scope of cross-examination within reasonable limits. Cross-examination to other publications would be limited to those admitted in evidence.

(2) Under existing law, some doubt exists whether an expert can be asked the amount of his compensation except in condemnation. Such inquiry would be permitted under the code.

The Committee concurs with both clarifications.

This chapter also contains a restatement of existing provisions relating to the appointment of expert witnesses (other than blood test experts) by the court.

d. Interpreters and Translators (Chapter 4)

This chapter codifies and restates existing law with respect to interpreters and translators, clarifying the law only to the extent of recognizing their appointment and compensation as experts.

e. Method and Scope of Examination (Chapter 5)

(1) Definitions (Article 1)

This article carries forward existing definitions of "direct examination," "cross-examination" and "leading question" without substantive change. It adds definitions of "redirect examination" and "recross-examination" which are recognized in existing practice.

(2) Examination of Witnesses (Article 2)

Under this article, the existing power of the court to control the interrogation of a witness so as to make it as rapid, as distinct, and as effective for ascertainment of the truth as possible would be continued. So too would be the power of the court to protect a witness from undue harassment or embarrassment. Existing rules relating to nonresponsive answers and leading questions are also restated in the code as are familiar principles relating to the order and scope of the examination, the calling of witnesses by the court, the examination of adverse parties and their representatives, the exclusion of witnesses and the recalling of witnesses once excused.

This article would make a number of changes in and clarifications of existing law, as follows:

1. Under existing law, prior inconsistent statements of a witness which were written or have

been reduced to writing must be shown to a witness before he is interrogated with respect to them. This requirement, based upon an English common law rule abandoned in England for 100 years, would be eliminated and such statements would be placed on the same footing as oral statements not reduced to writing. The thought underlying the change is that the existing rule limits the effectiveness of cross-examination in this important area.

ii. Under existing law, extrinsic evidence of a witness' inconsistent statement can be introduced only if the witness were given an opportunity to explain or deny it while testifying. Under the code, such evidence could be introduced if the witness were still subject to recall in the action and even this requirement could be waived if the interests of justice require it. This change is based on the premise that, while permitting explanation or denial is desirable, there is no compelling reason to do so before the inconsistent statement is introduced in evidence.

iii. Under existing law (at least in civil cases), a writing used by the witness to refresh his memory need be made available to the adverse party only if so used by testifying. The code adopts the salutary approach of requiring such writing to

be made available if used by the witness prior to testifying.

iv. Existing law may restrict the use of writings to refresh recollection to those prepared by the witness or under his direction when the facts were fresh in his memory; the existing statutory provisions being the same as for the use of a writing as past recollection recorded. Other writings may indeed refresh a witness' memory and the code eliminates any such restriction.

v. In restating the existing statutory provisions relating to the calling and examination of an adverse party or a witness identified with an adverse party, the code clarifies problems relating to cross-examination of such witnesses in multi-party litigation by restricting cross-examination by parties whose interest is not adverse to the party with whom the witness is identified. In addition, the code clearly includes persons whose knowledge was obtained when they were identified with a party as well as those so identified at the time of trial or at the time the cause of action arose.

The Committee concurs with these changes and clarifications.

f. Credibility of Witnesses (Chapter 6)

The code catalogues recognized considerations going to the credibility and restates a number of existing restrictions and limitations on evidence going to credibility. However, it would work the following significant changes in existing law.

(1) Under existing law, impeaching evidence on collateral matters is required to be excluded. Under the code, there would be no inflexible rule of exclusion but the use of such impeaching evidence would be left within the court's discretion.

(2) Under existing law, the only evidence admissible to prove the character of a witness for honesty and veracity or the lack thereof is evidence of reputation. The code would permit opinion on these traits by persons familiar with the witness on the theory that such evidence is likely to be of more probative value than that of reputation.

(3) Under existing law, the party calling a witness is precluded from attacking his credibility unless surprised and damaged by his testimony. In recognition of the need sometimes to call hostile witnesses and in keeping with the

modern interest in full and free disclosure, the code would permit any party to attack the credibility of any witness.

(4) Any felony conviction may be used to attack credibility under existing law. The code would confine such attacks to felony convictions where an essential element of the crime was dishonesty or false statement. Moreover, contrary to existing law, the code would preclude use of such felony convictions when there is formal evidence of pardon or rehabilitation or where more than ten years has expired since release from confinement or expiration of parole, probation or sentence. It may be noted that these changes are consistent with a committee report approved at the 1964 Conference of State Bar Delegates.

(5) Older California cases restrict evidence of prior consistent statements to support the credibility of a witness to those instances where there is a change of bias, interest, recent fabrication or other improper motive. Consistently with more recent decisions tending

to treat evidence of prior inconsistent statements as impliedly charging recent fabrication, the code would permit evidence of a prior inconsistent statement to be met with evidence of a consistent statement made before the alleged inconsistent statement.

The Committee concurs with these changes.

7. Opinion Testimony and Scientific Evidence (Division 7)

As noted, the subject of expert witnesses is dealt with in the preceding division so far as special rules as to the qualification cross-examination and credibility of expert witnesses is concerned. This division deals with opinion testimony whether by lay witnesses or expert witnesses.

a. Expert and Other Opinion Testimony (Chapter 1)

Under the code, as under existing law, opinion testimony by lay witnesses would be confined (1) to certain well-recognized categories (such as an owner's opinion of the value of his property or an intimate acquaintance's opinion of sanity) and (2) to such opinions

as are rationally based on the perception of the witness and helpful to a clear understanding of his testimony. The code provisions as to expert opinion are also declarative of existing law with only one procedural innovation. Where an expert bases his opinion in whole or in part on the opinion or statement of another person (as sometimes is permissible), the code provides that such other person may be called and examined by any adverse party as if under cross-examination. This change minimizes any unfairness which may result from permitting expert opinion to be based upon the opinion of or statement of others.

b. Blood Tests to Determine Paternity

(Chapter 2)

This chapter carries forward the Uniform Act on Blood Tests to Determine Paternity without significant change.

#34(L) 2/12/65

Fourth Supplement to Memorandum 65-4

Subject: Study No. 34(L) - The New Evidence Code

Attached is a report we prepared for the Assembly Judiciary Committee. If Assembly Bill No. 333 is reported out on February 15, we expect that the attached report will be adopted by the Committee. (It is likely that additional comments will be needed to reflect actions taken by the Committee before the bill is reported out.)

Respectfully submitted,

John H. DeMoully
Executive Secretary

REQUEST FOR UNANIMOUS CONSENT TO PRINT IN JOURNAL

Willson

Mr. [redacted] was granted unanimous consent that the following letter of transmittal and Report Relative to [redacted] be ordered printed in the Journal:

Assembly Bill No. 333

LETTER OF TRANSMITTAL

CALIFORNIA LEGISLATURE
ASSEMBLY COMMITTEE ON [redacted] Judiciary--Civil
[redacted] 1965

Hon. Jesse M. Unruh, Speaker

DEAR MR. SPEAKER: The Assembly Committee on [redacted] Judiciary--Civil, having considered [redacted] and having reported it "do pass as amended" on [redacted] herewith submits this report concerning [redacted] Assembly Bill No. 333.

Assembly Bill No. 333

1965,

The report contains comments to reflect the actions taken on this bill by the Committee on [redacted] These comments should prove helpful in determining legislative intent. Judiciary--Civil.

I respectfully request that this report be printed in the Assembly Journal and that [redacted] additional copies of the Journal be printed to satisfy requests. 500

Respectfully submitted, GEORGE A. WILLSON,
[redacted] Chairman

REPORT OF ASSEMBLY COMMITTEE ON [redacted] JUDICIARY--CIVIL ON [redacted] ASSEMBLY BILL NO. 333

In order to indicate more fully its intent with respect to [redacted], the Assembly Committee on [redacted] makes the following report: Judiciary--Civil

Assembly Bill No. 333,

Except for the new or revised comments set out below, the comments contained under the various sections of [redacted] as set out in the *Recommendation of the California Law Revision Commission* [redacted] reflect the intent of the Assembly Committee on [redacted] in approving the various provisions of [redacted] Assembly Bill No. 333.

Proposing an Evidence Code (January 1965),

Assembly Bill No. 333

Judiciary--Civil

Assembly Bill No. 333

The following new and revised comments to various sections of [redacted] also reflect the intent of the Assembly Committee on [redacted] in approving [redacted] Assembly Bill No. 333.

Judiciary--Civil

Section 12.

Comment. The delayed operative date provides time for California judges and attorneys to become familiar with the code before it goes into effect.

Subdivision (a) makes it clear that the Evidence Code governs all trials commenced after December 31, 1966.

Under subdivision (b), a trial that has actually commenced prior to the operative date of the code will continue to be governed by the rules of evidence (except privileges) applicable at the commencement of the trial. Thus, if the trial court makes a ruling on the admission of evidence in a trial commenced prior to January 1, 1967, such ruling is not affected by the enactment of the Evidence Code; if an appeal is taken from the ruling, Section 12 requires the appellate court to apply the law applicable at the commencement of the trial. On the other hand, any ruling made by the trial court on the admission of evidence in a trial commenced after December 31, 1966, is governed by the Evidence Code, even if a previous trial of the same action was commenced prior to that date.

Under subdivision (c) all claims of privilege made after December 31, 1966, are governed by the Evidence Code in order that there might be no delay in providing protection to the important relationships and interests that are protected by the privileges division.

Section 311.

Comment. Insofar as it relates to the law of foreign nations, Section 311 restates the substance of and supersedes the last paragraph of Section 1875 of the Code of Civil Procedure. The provisions of Section 311 relating to the law of sister states reflect existing, but uncodified, California law. See, e.g., Gagnon Co. v. Nevada Desert Inn, 45 Cal.2d 448, 454, 289 P.2d 466, 471 (1955).

The court may be unable to determine the applicable foreign or sister state law because the parties have not provided the court with sufficient information to make such determination. If it appears that the parties may be able to obtain such information, the court may, of course, grant the parties additional time within which to obtain such information and make it available to the court. But when all sources of information as to the applicable foreign or sister state law are exhausted and the court is unable to determine it, Section 311 provides the rule that governs the disposition of the case.

Section 353

Comment. Subdivision (a) of Section 353 codifies the well-settled California rule that a failure to make a timely objection to, or motion to exclude or to strike, inadmissible evidence waives the right to complain of the erroneous admission of evidence. See WITKIN, CALIFORNIA EVIDENCE §§ 700-702 (1958). Subdivision (a) also codifies the related rule that the objection or motion must specify the ground for objection, a general objection being insufficient. WITKIN, CALIFORNIA EVIDENCE §§ 703-709 (1958).

Section 353 does not specify the form in which an objection must be made; hence, the use of a continuing objection to a line of questioning would be proper under Section 353 just as it is under existing law. See WITKIN, CALIFORNIA EVIDENCE § 708 (1958).

Subdivision (b) reiterates the requirement of Section 4½ of Article VI of the California Constitution that a judgment may not be reversed, nor may a new trial be granted, because of an error unless the error is prejudicial.

Section 353 is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law. *People v. Matteson*, 61 Cal.2d ___, 39 Cal. Rptr. 1, 393 P.2d 161 (1964).

Section 451

Comment. Judicial notice of the matters specified in Section 451 is *mandatory*, whether or not the court is requested to notice them. Although the court errs if it fails to take judicial notice of the matters specified in this section, such error is not necessarily reversible error. Depending upon the circumstances, the appellate court may hold that the error was "invited" (and, hence, is not reversible error) or that points not urged in the trial court may not be advanced on appeal. These and similar principles of appellate practice are not abrogated by this section.

Section 451 includes matters both of law and of fact. The matters specified in subdivisions (a), (b), (c), and (d) are all matters that, broadly speaking, can be considered as a part of the "law" applicable to the particular case. The court can reasonably be expected to discover and apply this law even if the parties fail to provide the court with references to the pertinent cases, statutes, regulations, and rules. Other matters that also might properly be considered as a part of the law applicable to the case (such as the law of foreign nations and certain regulations and ordinances) are included under Section 452, rather than under Section 451, primarily because of the difficulty of ascertaining such matters. Subdivision (e) of Section 451 requires the court to judicially notice "the true signification of all English words and phrases and of all legal expressions." These are facts that must be judicially noticed in order to conduct meaningful proceedings. Similarly, subdivision (f) of Section 451 covers "universally known" facts.

Listed below are the matters that must be judicially noticed under Section 451.

California and federal law. The decisional, constitutional, and public statutory law of California and of the United States must be judicially noticed under subdivision (a). This requirement states existing law as found in subdivision 3 of Code of Civil Procedure Section 1875 (superseded by the Evidence Code).

~~*Law of sister states.* The decisional, constitutional, and public statutory law in force in sister states must be judicially noticed under subdivision (a). California courts now take judicial notice of the law of sister states under subdivision 3 of Section 1875 of the Code of Civil Procedure. However, Section 1875 seems to preclude notice of sister-state law as interpreted by the intermediate-appellate courts of sister states, whereas Section 451 requires notice of relevant decisions of *all* sister-state courts. If this be an extension of existing law, it is a desirable one, for the intermediate-appellate courts of sister states are as responsive to the need for properly determining the law as are equivalent courts in California. The existing law also is not clear as to whether a request for judicial notice of sister-state law is required and whether judicial notice is mandatory. On the necessity for a request for judicial notice, see Comment, 24 CAL. L. REV. 311, 316 (1936). On~~

whether judicial notice is mandatory, see *In re Bartges*, 44 Cal.2d 241, 282 P.2d 47 (1955), and the opinion of the Supreme Court in denying a hearing in *Estate of Moore*, 7 Cal. App.2d 722, 730, 48 P.2d 28, 29 (1935). Section 451 requires such notice to be taken without a request being made.

Law of territories and possessions of the United States. The decisional, constitutional, and public statutory law in force in the territories and possessions of the United States must be judicially noticed under subdivision (a). See the broad definition of "state" in EVIDENCE CODE § 220. It is not clear under existing California law whether this law is treated as sister-state law or foreign law. See WITKIN, CALIFORNIA EVIDENCE § 45 (1958).

Charter provisions of California cities and counties. Judicial notice must be taken under subdivision (a) of the provisions of charters adopted pursuant to Section 7½ or 8 of Article XI of the California Constitution. Notice of these provisions is mandatory under the State Constitution. CAL. CONST., Art. XI, § 7½ (county charter), § 8 (charter of city or city and county).

Regulations of California and federal agencies. Judicial notice must be taken under subdivision (b) of the rules, regulations, orders, and standards of general application adopted by California state agencies and filed with the Secretary of State or printed in the California Administrative Code or the California Administrative Register. This is existing law as found in Government Code Sections 11383 and 11384. Under subdivision (b), judicial notice must also be taken of the rules of the State Personnel Board. This, too, is existing law under Government Code Section 18576.

Subdivision (b) also requires California courts to judicially notice documents published in the Federal Register (such as (1) presidential proclamations and executive orders having general applicability and legal effect and (2) orders, regulations, rules, certificates, codes of fair competition, licenses, notices, and similar instruments, having general applicability and legal effect, that are issued, prescribed, or promulgated by federal agencies). There is no clear holding that this is existing California law. Although Section 307 of Title 44 of the United States Code provides that the "contents of the Federal Register shall be judicially noticed," it is not clear that this *requires* notice by state courts. See *Broadway Fed. etc. Loan Ass'n v. Howard*, 133 Cal. App.2d 382, 386 note 4, 285 P.2d 61, 64 note 4 (1955) (referring to 44 U.S.C.A. §§ 301-314). *Compare* Note, 59 HARV. L. REV. 1137, 1141 (1946) (doubt expressed that notice is required), *with* Knowlton, *Judicial Notice*, 10 RUTGERS L. REV. 501, 504 (1956) ("it would seem that this provision is binding upon the state courts"). *Livermore v. Real*, 18 Cal. App.2d 535, 542-543, 64 P.2d 987, 992 (1937), suggests that California courts are required to judicially notice pertinent federal official action, and California courts have judicially noticed the contents of various proclamations, orders, and regulations of federal agencies. *E.g., Pacific Solvents Co. v. Superior Court*, 88 Cal. App.2d 953, 955, 199 P.2d 740, 741 (1948) (orders and regulations); *People v. Mason*, 72 Cal. App.2d 699, 706-707, 165 P.2d 481, 485 (1946) (presidential and executive proclamations) (disapproved on other grounds in *People v. Friend*, 50

Cal.2d 570, 578, 327 P.2d 97, 102 (1958)); *Downer v. Grizzly Livestock & Land Co.*, 6 Cal. App.2d 39, 42, 43 P.2d 843, 845 (1935) (rules and regulations). Section 451 makes the California law clear.

Rules of court. Judicial notice of the California Rules of Court is required under subdivision (e). These rules, adopted by the Judicial Council, are as binding on the parties as procedural statutes. *Cantillon v. Superior Court*, 150 Cal. App.2d 184, 309 P.2d 890 (1957). See *Albermont Petroleum, Ltd. v. Cunningham*, 186 Cal. App.2d 84, 9 Cal. Rptr. 405 (1960). Likewise, the rules of pleading, practice, and procedure promulgated by the United States Supreme Court are required to be judicially noticed under subdivision (d).

The rules of the California and federal courts which are required to be judicially noticed under subdivisions (e) and (d) are, or should be, familiar to the court or easily discoverable from materials readily available to the court. However, this may not be true of the court rules of sister states or other jurisdictions nor, for example, of the rules of the various United States Courts of Appeals or local rules of a particular superior court. See *Albermont Petroleum, Ltd. v. Cunningham*, 186 Cal. App.2d 84, 9 Cal. Rptr. 405 (1960). Judicial notice of these rules is permitted under subdivision (e) of Section 452 but is not required unless there is compliance with the provisions of Section 453.

Words, phrases, and legal expressions. Subdivision (e) requires the court to take judicial notice of "the true signification of all English words and phrases and of all legal expressions." This restates the same matter covered in subdivision 1 of Code of Civil Procedure Section 1875. Under existing law, however, it is not clear that judicial notice of these matters is mandatory.

"Universally known" facts. Subdivision (f) requires the court to take judicial notice of indisputable facts and propositions universally known. "Universally known" does not mean that every man on the street has knowledge of such facts. A fact known among persons of reasonable and average intelligence and knowledge will satisfy the "universally known" requirement. *Cf. People v. Tessetti*, 107 Cal. App. 7, 12, 289 Pac. 881, 883 (1930).

Subdivision (f) should be contrasted with subdivisions (g) and (h) of Section 452, which provide for judicial notice of indisputable facts and propositions that are matters of common knowledge or are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Subdivisions (g) and (h) permit notice of facts and propositions that are indisputable but are not "universally" known.

Judicial notice does not apply to facts merely because they are known to the judge to be indisputable. The facts must fulfill the requirements of subdivision (f) of Section 451 or subdivision (g) or (h) of Section 452. If a judge happens to know a fact that is not widely enough known to be subject to judicial notice under this division, he may not "notice" it.

It is clear under existing law that the court may judicially notice the matters specified in subdivision (f); it is doubtful, however, that the court *must* notice them. See *Varcoe v. Lee*, 180 Cal. 338, 347, 181 Pac. 223, 227 (1919) (dictum). Since subdivision (f) covers universally known facts, the parties ordinarily will expect the court to take judicial notice of them; the court should not be permitted to ignore such facts merely because the parties fail to make a formal request for judicial notice.

Comment. Section 452 includes matters both of law and of fact. The court *may* take judicial notice of these matters, even when not requested to do so; it is *required* to notice them if a party requests it and satisfies the requirements of Section 453.

The matters of law included under Section 452 may be neither known to the court nor easily discoverable by it because the sources of information are not readily available. However, if a party requests it and furnishes the court with "sufficient information" for it to take judicial notice, the court must do so if proper notice has been given to each adverse party. See EVIDENCE CODE § 453. Thus, judicial notice of these matters of law is mandatory only if counsel adequately discharges his responsibility for informing the court as to the law applicable to the case. The simplified process of judicial notice can then be applied to all of the law applicable to the case, including such law as ordinances and the law of foreign nations.

Although Section 452 extends the process of judicial notice to some matters of law which the courts do not judicially notice under existing law, the wider scope of such notice is balanced by the assurance that the matter need not be judicially noticed unless adequate information to support its truth is furnished to the court. Under Section 453, this burden falls upon the party requesting that judicial notice be taken. In addition, the parties are entitled under Section 455 to a reasonable opportunity to present information to the court as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed.

Listed below are the matters that may be judicially noticed under Section 452 (and must be noticed if the conditions specified in Section 453 are met).

Law of sister states. Subdivision (a) provides for judicial notice of the decisional, constitutional, and statutory law in force in sister states. California courts now take judicial notice of the law of sister states under subdivision 3 of Section 1875 of the Code of Civil Procedure. However, Section 1875 seems to preclude notice of sister-state law as interpreted by the intermediate-appellate courts of sister states, whereas Section 452 permits notice of relevant decisions of all sister-state courts. If this be an extension of existing law, it is a desirable one, for the intermediate-appellate courts of sister states are as responsive to the need for properly determining the law as are equivalent courts in California. The existing law also is not clear as to whether a request for judicial notice of sister-state law is required and whether judicial notice is mandatory. On the necessity for a request for judicial notice, see Comment, 24 CAL. L. REV. 311, 316 (1936). On whether judicial notice is mandatory, see In re Bartges, 44 Cal.2d 241, 282 P.2d 47 (1955), and the opinion of the Supreme Court in denying a hearing in Estate of Moore, 7 Cal. App.2d 722, 726, 48 P.2d 28, 29 (1935).

Law of territories and possessions of the United States. Subdivision (a) also provides for judicial notice of the decisional, constitutional, and statutory law in force in the territories and possessions of the United States. See the broad definition of "state" in EVIDENCE CODE § 220. It is not clear under existing California law whether this law is treated as sister-state law or foreign law. See WITKIN, CALIFORNIA EVIDENCE § 45 (1958).

Resolutions and private acts. Subdivision (a) provides for judicial notice of resolutions and private acts of the Congress of the United States and of the legislature of any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220.

The California law on this matter is not clear. Our courts are authorized by subdivision 3 of Code of Civil Procedure Section 1875 to take judicial notice of private statutes of this State and the United States, and they probably would take judicial notice of resolutions of this State and the United States under the same subdivision. It is not clear whether such notice is compulsory. It may be that judicial notice of a private act pleaded in a criminal action pursuant to Penal Code Section 963 is mandatory, whereas judicial notice of the same private act may be discretionary when pleaded in a civil action pursuant to Section 459 of the Code of Civil Procedure.

Although no case in point has been found, California courts probably would not take judicial notice of a resolution or private act of a sister state or territory or possession of the United States. Although Section 1875 is not the exclusive list of the matters that will be judicially noticed, the courts did not take judicial notice of a private statute prior to the enactment of Section 1875. *Ellis v. Eastman*, 32 Cal. 447 (1867).

Regulations, ordinances, and similar legislative enactments. Subdivision (b) provides for judicial notice of regulations and legislative enactments adopted by or under the authority of the United States or of any state, territory, or possession of the United States, including public entities therein. See the broad definition of "public entity" in EVIDENCE CODE § 200. The words "regulations and legislative enactments" include such matters as "ordinances" and other similar legislative enactments. Not all public entities legislate by ordinance.

This subdivision changes existing law. Under existing law, municipal courts take judicial notice of ordinances in force within their jurisdiction. *People v. Cowles*, 142 Cal. App.2d Supp. 865, 867, 298 P.2d 732, 733-734 (1956); *People v. Crittenden*, 93 Cal. App.2d Supp. 871, 877, 209 P.2d 161, 165 (1949). In addition, an ordinance pleaded in a criminal action pursuant to Penal Code Section 963 must be judicially noticed. On the other hand, neither the superior court nor a district court of appeal will take judicial notice in a civil action of municipal or county ordinances. *Thompson v. Guyer-Hays*, 207 Cal. App.2d 366, 24 Cal. Rptr. 461 (1962); *County of Los Angeles v. Bartlett*, 203 Cal. App.2d 523, 21 Cal. Rptr. 776 (1962); *Becerra v. Hochberg*, 193 Cal.

App.2d 431, 14 Cal. Rptr. 101 (1961). It seems safe to assume that ordinances of sister states and of territories and possessions of the United States would not be judicially noticed under existing law.

Judicial notice of certain regulations of California and federal agencies is mandatory under subdivision (b) of Section 451. Subdivision (b) of Section 452 provides for judicial notice of California and federal regulations that are not included under subdivision (b) of Section 451 and, also, for judicial notice of regulations of other states and territories and possessions of the United States.

Both California and federal regulations have been judicially noticed under subdivision 3 of Code of Civil Procedure Section 1875. 18 CAL. JUR.2d *Evidence* § 24. Although no case in point has been found, it is unlikely that regulations of other states or of territories or possessions of the United States would be judicially noticed under existing law.

Official acts of the legislative, executive, and judicial departments. Subdivision (c) provides for judicial notice of the official acts of the legislative, executive, and judicial departments of the United States and any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220. Subdivision (c) states existing law as found in subdivision 3 of Code of Civil Procedure Section 1875. Under this provision, the California courts have taken judicial notice of a wide variety of administrative and executive acts, such as proceedings and reports of the House Committee on Un-American Activities, records of the State Board of Education, and records of a county planning commission. See WITKIN, CALIFORNIA EVIDENCE § 49 (1958), and 1963 Supplement thereto.

Court records and rules of court. Subdivisions (d) and (e) provide for judicial notice of the court records and rules of court of (1) any court of this State or (2) any court of record of the United States or of any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220. So far as court records are concerned, subdivision (d) states existing law. *Flores v. Arroyo*, 56 Cal.2d 492, 15 Cal. Rptr. 87, 364 P.2d 263 (1961). While the provisions of subdivision (c) of Section 452 are broad enough to include court records, specific mention of these records in subdivision (d) is desirable in order to eliminate any uncertainty in the law on this point. See the *Flores* case, *supra*.

Subdivision (e) may change existing law so far as judicial notice of rules of court is concerned, but the provision is consistent with the modern philosophy of judicial notice as indicated by the holding in *Flores v. Arroyo, supra*. To the extent that subdivision (e) overlaps with subdivisions (c) and (d) of Section 451, notice is, of course, mandatory under Section 451.

Law of foreign nations. Subdivision (f) provides for judicial notice of the law of foreign nations and public entities in foreign nations. See the broad definition of "public entity" in EVIDENCE CODE § 200. Subdivision (f) should be read in connection with Sections 311, 453, and 454. These provisions retain the substance of the existing law which was enacted in 1957 upon recommendation of the California

Law Revision Commission. CODE CIV. PROC. § 1875. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Judicial Notice of the Law of Foreign Countries* at I-1 (1957).

Subdivision (f) refers to "the law" of foreign nations and public entities in foreign nations. This makes all law, in whatever form, subject to judicial notice.

Matters of "common knowledge" and verifiable facts. Subdivision (g) provides for judicial notice of matters of common knowledge within the court's jurisdiction that are not subject to dispute. This subdivision states existing case law. *Varcoe v. Lee*, 180 Cal. 338, 181 Pac. 223 (1919); 18 CAL. JUR.2d *Evidence* § 19 at 439-440. The California courts have taken judicial notice of a wide variety of matters of common knowledge. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958).

Subdivision (h) provides for judicial notice of indisputable facts immediately ascertainable by reference to sources of reasonably indisputable accuracy. In other words, the facts need not be actually known if they are readily ascertainable and indisputable. Sources of "reasonably indisputable accuracy" include not only treatises, encyclopedias, almanacs, and the like, but also persons learned in the subject matter. This would not mean that reference works would be received in evidence or sent to the jury room. Their use would be limited to consultation by the judge and the parties for the purposes of determining whether or not to take judicial notice and determining the tenor of the matter to be noticed.

Subdivisions (g) and (h) include, for example, facts which are accepted as established by experts and specialists in the natural, physical, and social sciences, if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings. These subdivisions include such matters listed in Code of Civil Procedure Section 1875 as the "geographical divisions and political history of the world." To the extent that subdivisions (g) and (h) overlap subdivision (f) of Section 451, notice is, of course, mandatory under Section 451.

The matters covered by subdivisions (g) and (h) are included in Section 452, rather than Section 451, because it seems reasonable to put the burden on the parties to bring adequate information before the court if judicial notice of these matters is to be mandatory. See EVIDENCE CODE § 453 and the *Comment* thereto.

Under existing law, courts take judicial notice of the matters that are included under subdivisions (g) and (h), either pursuant to Section 1875 of the Code of Civil Procedure or because such matters are matters of common knowledge which are certain and indisputable. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958). Notice of these matters probably is not compulsory under existing law.

Section 703

Comment. Under existing law, a judge may be called as a witness even if a party objects, but the judge in his discretion may order the trial to be postponed or suspended and to take place before another judge. CODE CIV. PROC. § 1883 (superseded by EVIDENCE CODE §§ 702 and 704). *But see People v. Connors*, 77 Cal. App. 438, 450-457, 246 Pac. 1072, 1076-1079 (1926) (dictum) (abuse of discretion for the presiding judge to testify to important and necessary facts).

Section 703, however, precludes the judge from testifying if a party objects. Before the judge may be called to testify in a civil or criminal action, he must disclose to the parties out of the presence and hearing of the jury the information he has concerning the case. After such disclosure, if no party objects, the judge is permitted—but not required—to testify.

Section 703 is based on the fact that examination and cross-examination of a judge-witness may be embarrassing and prejudicial to a party. By testifying as a witness for one party, a judge appears in a partisan attitude before the jury. Objections to questions and to his testimony must be ruled on by the witness himself. The extent of cross-examination and the introduction of impeaching and rebuttal evidence may be limited by the fear of appearing to attack the judge personally. For these and other reasons, Section 703 is preferable to Code of Civil Procedure Section 1883.

Subdivision (c) is designed to prevent a plea of double jeopardy if either party to a criminal action calls or objects to the calling of the judge to testify. Under subdivision (c), both parties will have, in effect, consented to the mistrial and thus waived any objection to a retrial. See WITKIN, CALIFORNIA CRIMES § 193 (1963).

Section 704

Comment. Under existing law, a juror may be called as a witness even if a party objects, but the judge in his discretion may order the trial to be postponed or suspended and to take place before another jury. CODE CIV. PROC. § 1883 (superseded by EVIDENCE CODE §§ 703 and 704). Section 704, on the other hand, prevents a juror from testifying before the jury if any party objects.

A juror-witness is in an anomalous position. He manifestly cannot weigh his own testimony impartially. A party affected adversely by the juror's testimony is placed in an embarrassing position. He cannot freely cross-examine or impeach the juror for fear of antagonizing the juror—and perhaps his fellow jurors as well. And, if he does not attack the juror's testimony, the other jurors may give his testimony undue weight. For these and other reasons, Section 704 forbids jurors to testify over the objection of any party.

Before a juror may be called to testify before the jury in a civil or criminal action, he is required to disclose to the parties out of the presence and hearing of the remaining jurors the information he has concerning the case. After such disclosure, if no party objects, the juror is required to testify. If a party objects, the objection is deemed a motion for mistrial and the judge is required to declare a mistrial and order the action assigned for trial before another jury.

Section 704 is concerned only with the problem of a juror who is called to testify before the jury. Section 704 does not deal with *voir dire* examinations of jurors, with testimony of jurors in post-verdict proceedings (such as on motions for new trial), or with the testimony of jurors on any other matter that is to be decided by the court. *Cf.* EVIDENCE CODE § 1150 and the *Comment* thereto.

Subdivision (c) is designed to prevent a plea of double jeopardy if either party to a criminal action calls or objects to the calling of the juror to testify. Under subdivision (c), both parties will have, in effect, consented to the mistrial and thus waived any objection to a retrial. See WITKIN, CALIFORNIA CRIMES § 193 (1963).

Section 768

Comment. Section 768 deals with a subject now covered in Sections 2052 and 2054 of the Code of Civil Procedure. Under the existing law, a party need not disclose to a witness any information concerning a prior inconsistent *oral* statement of the witness before asking him questions about the statement. *People v. Kidd*, 56 Cal.2d 759, 765, 16 Cal. Rptr. 793, 796-797, 366 P.2d 49, 52-53 (1961); *People v. Campos*, 10 Cal. App.2d 310, 317, 52 P.2d 251, 254 (1935). However, if a witness' prior inconsistent statements are in *writing* or, as in the case of former oral testimony, have been reduced to writing, "they must be shown to the witness before any question is put to him concerning them." Code Civ. Proc. § 2052 (superseded by Evidence Code § 768); *Umemoto v. McDonald*, 6 Cal.2d 587, 592, 58 P.2d 1274, 1276 (1936).

Section 768 eliminates the distinction made in existing law between oral and written statements and permits a witness to be asked questions concerning a prior inconsistent statement, whether written or oral, even though no disclosure is made to him concerning the prior statement. (Whether a foundational showing is required before other evidence of the prior statement may be admitted is not covered in Section 768; the prerequisites for the admission of such evidence are set forth in Section 770.) The disclosure of inconsistent written statements that is required under existing law limits the effectiveness of cross-examination by removing the element of surprise. The forewarning gives the dishonest witness the opportunity to reshape his testimony in conformity with the prior statement. The existing rule is based on an English common law rule that has been abandoned in England for 100 years. See McCormick, Evidence § 28 at 58 (1954).

Existing law apparently does not require that a writing (other than one containing prior inconsistent statements used for impeachment purposes) be shown to a witness before he can be examined concerning it. Section 2054 of the Code of Civil Procedure, which seems to so require, actually

[redacted] requires only that the adverse party be given an opportunity to inspect any writing that is *actually shown* to a witness before the witness can be examined concerning the writing. See *People v. Briggs*, 58 Cal.2d 385, 413, 24 Cal. Rptr. 417, 435, 374 P.2d 257, 275 (1962); *People v. Keyes*, 103 Cal. App. 624, 284 Pac. 1096 (1930) (hearing denied); *People v. De Angelli*, 34 Cal. App. 716, 168 Pac. 699 (1917). Section 768 clarifies whatever doubt may exist in this regard by declaring that such a writing need not be shown to the witness before he can be examined concerning it. Of course, the best evidence rule may in some cases preclude eliciting testimony concerning the content of a writing. See Evidence Code § 1500 and the *Comment* thereto.

Subdivision (b) of Section 768 preserves the right of the adverse party to inspect a writing that is *actually shown* to a witness before the witness can be examined concerning it. As indicated above, this preserves the existing requirement declared in Code of Civil Procedure Section 2054. However, the right of inspection has been extended to all parties to the action.

Insofar as Section 768 relates to prior inconsistent statements that are in writing, see the Comment to Section 769.

Section 769

Comment. Section 769 is consistent with the existing California law regarding the examination of a witness concerning prior inconsistent *oral* statements. *People v. Kidd*, 56 Cal.2d 759, 765, 16 Cal. Rptr. 793, 796-797, 366 P.2d 49, 52-53 (1961). In addition to this section, see Section 770 relating to inconsistent statements of a witness that are in writing (see the definitions of "statement" and "writing" in Evidence Code §§ 225 and 135, respectively); see the Comment to Section 768.

Section 771

Comment. Section 771 grants to an adverse party the right to inspect any writing used to refresh a witness' recollection, whether the writing is used by the witness while testifying or prior thereto. The right of inspection granted by Section 771 may be broader than the similar right of inspection granted by Section 2047 of the Code of Civil Procedure, for Section 2047 has been interpreted by the courts to grant a right of inspection of only those writings used by the witness while he is testifying. *People v. Gallardo*, 41 Cal.2d 57, 257 P.2d 29 (1953); *People v. Grayson*, 172 Cal. App.2d 372, 341 P.2d 820 (1959); *Smith v. Smith*, 135 Cal. App.2d 100, 286 P.2d 1009 (1955). In a criminal case, however, the defendant can compel the prosecution to produce any written statement of a prosecution witness relating to matters covered in the witness' testimony. *People v. Estrada*, 54 Cal.2d 713, 7 Cal. Rptr. 897, 355 P.2d 641 (1960). The extent to which the public policy reflected in criminal discovery practice overrides the restrictive interpretation of Code of Civil Procedure Section 2047 is not clear. See WITKIN, CALIFORNIA EVIDENCE § 602 (Supp. 1963). In any event, Section 771 follows the lead of the criminal cases, such as *People v. Silberstein*, 159 Cal. App.2d Supp. 848, 323 P.2d 591 (1958) (defendant entitled to inspect police report used by police officer to refresh his recollection *before* testifying), and grants a right of inspection without regard to when the writing is used to refresh recollection. If a witness' testimony depends upon the use of a writing to refresh his recollection, the adverse party's right to inspect the writing should not be made to depend upon the happenstance of when the writing is used.

Subdivision (c) excuses the nonproduction of the memory-refreshing writing where the writing cannot be produced through no fault of the witness or the party eliciting his testimony concerning the matter. The rule is analogous to the rule announced in People v. Parham, 60 Cal.2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963), which affirmed an order denying defendant's motion to strike certain witnesses' testimony where the witnesses' prior statements were withheld by the Federal Bureau of Investigation.

It should be noted that there is no restriction in the Evidence Code on the means that may be used to refresh recollection. Thus, the limitations on the types of writings that may be used as recorded memory under Section 1237 do not limit the types of writings that may be used to refresh recollection under Section 771.

Section 772

Comment. Subdivision (a) codifies existing but nonstatutory California law. See WITKIN, CALIFORNIA EVIDENCE § 576 at 631 (1958).

Subdivision (b) is based on and supersedes the second sentence of Section 2045 of the Code of Civil Procedure. The language of the existing section has been expanded, however, to require completion of each phase of examination of the witness, not merely the direct examination.

Under subdivision (c), as under existing law, a party examining a witness under cross-examination, redirect examination, or recross-examination may go beyond the scope of the initial direct examination if the court permits. See CODE CIV. PROC. §§ 2048 (last clause), 2050; WITKIN, CALIFORNIA EVIDENCE §§ 627, 697 (1958). Under the definition in Section 760, such an extended examination is direct examination. *Cf.* CODE CIV. PROC. § 2048 ("such examination is to be subject to the same rules as a direct examination").

Such direct examination may, however, be subject to the rules applicable to a cross-examination by virtue of the provisions of Section 776, 804, or 1203.

Subdivision (d) states an exception for the defendant-witness in a criminal action that reflects existing law. See WITKIN, CALIFORNIA EVIDENCE § 629 at 676 (1958).

Section 914

Comment. Subdivision (a) makes the general provisions concerning preliminary determinations on admissibility of evidence (Sections 400-406) applicable when a presiding officer who is not a judge is called upon to determine whether or not a privilege exists. Subdivision (a) is necessary because Sections 400-406, by their terms, apply only to determinations by a court.

Subdivision (b) is needed to protect persons claiming privileges in nonjudicial proceedings. Because such proceedings are often conducted by persons untrained in law, it is desirable to have a judicial determination of whether a person is required to disclose information claimed to be privileged before he can be held in contempt for failing to disclose such information. What is contemplated is that, if a claim of privilege is made in a nonjudicial proceeding and is overruled, application must be made to a court for an order compelling the witness to answer. Only if such order is made and is disobeyed may a witness be held in contempt. That the determination of privilege in a judicial proceeding is a question for the judge is well-established California law. See, *e.g.*, *Holm v. Superior Court*, 42 Cal.2d 500, 507, 267 P.2d 1025, 1029 (1954).

Subdivision (b), of course, does not apply to any body—such as the Public Utilities Commission—that has constitutional power to impose punishment for contempt. See, *e.g.*, CAL. CONST., Art. XII, § 22. Nor does this subdivision apply to witnesses before the State Legislature or its committees. See GOVT. CODE §§ 9400-9414.

Likewise, subdivision (b) does not apply to hearings and investigations of the State Industrial Accident Commission. See Labor Code Section 5708.

Section 1042

Comment. Section 1042 provides special rules regarding the consequences of invocation of the privileges provided in this article by the prosecution in a criminal proceeding or a disciplinary proceeding.

Subdivision (a). This subdivision recognizes the existing California rule in a criminal case. As was stated by the United States Supreme Court in *United States v. Reynolds*, 345 U.S. 1, 12 (1953), "since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." This policy applies if either the official information privilege (Section 1040) or the informer privilege (Section 1041) is exercised in a criminal proceeding or a disciplinary proceeding.

In some cases, the privileged information will be material to the issue of the defendant's guilt or innocence; in such cases, the law requires that the court dismiss the case if the public entity does not reveal the information. *People v. McShann*, 50 Cal.2d 802, 330 P.2d 33 (1958). In other cases, the privileged information will relate to narrower issues, such as the legality of a search without a warrant; in those cases, the law requires that the court strike the testimony of a particular witness or make some other order appropriate under the circumstances if the public entity insists upon its privilege. *Priestly v. Superior Court*, 50 Cal.2d 812, 330 P.2d 39 (1958).

In cases where the legality of an arrest is in issue, however, Section 1042 would not require disclosure of the privileged information if there was reasonable cause for the arrest aside from the privileged information. Cf. People v. Hunt, 216 Cal. App.2d 753, 756-757, 31 Cal. Rptr. 221, 223 (1963)("The rule requiring disclosure of an informer's identity has no application in situations where reasonable cause for arrest and search exists aside from the informer's communication.").

Subdivision (a) applies only if the privilege is asserted by the State of California or a public entity in the State of California. Subdivision (a) does not require the imposition of its sanction if the privilege is invoked in an action prosecuted by the State and the information is withheld by the federal government or another state. Nor may the sanction be imposed where disclosure is forbidden by federal statute. In these respects, subdivision (a) states existing California law. *People v. Parham*, 60 Cal.2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963) (prior statements of prosecution witnesses withheld by the Federal Bureau of Investigation; denial of motion to strike witnesses' testimony affirmed).

Subdivision (b). This subdivision codifies the rule declared in *People v. Keener*, 55 Cal.2d 714, 723, 12 Cal. Rptr. 859, 864, 361 P.2d 587, 592 (1961), in which the court held that "where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it." Subdivision (b), however, applies to all official information, not merely to the identity of an informer.

Section 1156.

Comment. Section 1156 supersedes Code of Civil Procedure Section 1936.1 (added by Cal. Stats. 1963, Ch. 1558, § 1, p. 3142). Except as noted below, Section 1156 restates the substance of the superseded section.

The phrase "Sections 2016 to 2036, inclusive," has been inserted in Section 1156 in place of the phrase "Sections 2016 and 2036," which appears in Section 1936.1, to correct an apparent inadvertence. This substitution permits use of all kinds of discovery procedures, instead of depositions only, to discover material of the type described in Section 1156. E.g., CODE CIV. PROC. §§ 2030 (written interrogatories); 2031 (motion for order for production of documents).

Section 1156 also makes it clear that the names of patients may not be disclosed without the consent of the patient. This limitation is necessary to preserve the physician-patient and psychotherapist-patient privileges.

Section 1203

Comment. Hearsay evidence is generally excluded because the declarant was not in court and not subject to cross-examination before the trier of fact when he made the statement. *People v. Bob*, 29 Cal.2d 321, 325, 175 P.2d 12, 15 (1946).

In some situations, hearsay evidence is admitted because there is either some exceptional need for the evidence or some circumstantial probability of its trustworthiness, or both. *People v. Brust*, 47 Cal.2d 776, 785, 306 P.2d 480, 484 (1957); *Turney v. Sousa*, 146 Cal. App.2d 787, 791, 304 P.2d 1025, 1027-1028 (1956). Even though it may be necessary or desirable to permit certain hearsay evidence to be admitted despite the fact that the adverse party had no opportunity to cross-examine the declarant when the hearsay statement was made, there seems to be no reason to prohibit the adverse party from cross-examining the declarant concerning the statement. The policy in favor of cross-examination that underlies the hearsay rule, therefore, indicates that the adverse party should be accorded the right to call the declarant of a statement received in evidence and to cross-examine him concerning his statement.

Section 1203, therefore, reverses (insofar as a hearsay declarant is concerned) the traditional rule that a witness called by a party is a witness for that party and may not be cross-examined by him. Because a hearsay declarant is in practical effect a witness against the party against whom his hearsay statement is admitted, Section 1203 gives that party the right to call and cross-examine the hearsay declarant concerning the subject matter of the hearsay statement just as he has the right to cross-examine the witnesses who appear personally and testify against him at the trial.

Subdivisions (b) and (c) make Section 1203 inapplicable in certain situations where it would be inappropriate to permit a party to examine a hearsay declarant as if under cross-examination. Thus, for example, subdivision (b) does not permit counsel for a party to examine his own client as if under cross-examination merely because a hearsay statement of his client has been admitted; and, because a party should not have the right to cross-examine his own witness merely because the adverse party has introduced a hearsay statement of the witness, witnesses who have testified in the action concerning the statement are not subject to examination under Section 1203.

subject matter of the

Subdivision (d) makes it clear that the unavailability of a hearsay declarant for examination under Section 1203 has no effect on the admissibility of his hearsay statements. The subdivision forestalls any argument that availability of the declarant for examination under Section 1203 is an additional condition of admissibility for hearsay evidence.

Section 1237

Comment. Section 1237 provides a hearsay exception for what is usually referred to as "past recollection recorded." Although the provisions of Section 1237 are taken largely from the provisions of Section 2047 of the Code of Civil Procedure, there are some substantive differences between Section 1237 and existing law.

The existing 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 the time when the fact recorded in the writing actually occurred or at another time when the fact was fresh in the witness' memory, and (3) that the witness "knew that the same was correctly stated in the writing." Under Section 1237, however, 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' statement at the time it was made. In addition, Section 1237 permits testimony of the person who recorded the statement to be used to establish that the writing is a correct record of the statement. Sufficient assurance of the trustworthiness of the statement is provided if the declarant is available to testify that he made a true statement and if the person who recorded the statement is available to testify that he accurately recorded the statement.

~~Second, under Section 1237 the writing embodying the statement~~ is itself admissible in evidence. Under present law, the declarant reads the writing on the witness stand; the writing is not otherwise made a part of the record unless it is offered in evidence by the adverse party.

Under subdivision (b), as under existing law, the statement must be read into evidence. See Anderson v. Souza, 38 Cal.2d 825, 243 P.2d 497 (1952). The adverse party, however, may introduce the writing as evidence. Cf. Horowitz v. Fitch, 216 Cal. App.2d 303, 30 Cal. Rptr. 882 (1963)(dictum).

Section 1241.

Comment. Under existing law, where a person's conduct or act is relevant but is equivocal or ambiguous, the statements accompanying it may be admitted to explain and make the act or conduct understandable. CODE CIV. PROC. § 1850 (superseded by EVIDENCE CODE § 1241); WITKIN, CALIFORNIA EVIDENCE § 216 (1958). Some writers do not regard evidence of this sort as hearsay evidence, although the definition in Section 1200 seems applicable to many of the statements received under this exception. Cf. 6 WIGMORE, EVIDENCE §§ 1772 et seq. Section 1241 removes any doubt that might otherwise exist concerning the admissibility of such evidence under the hearsay rule.

Section 1250

Comment. Section 1250 provides an exception to the hearsay rule for statements of the declarant's *then* existing mental or physical state. Under Section 1250, as under existing law, a statement of the declarant's state of mind at the time of the statement is admissible when the then existing state of mind is itself an issue in the case. *Adkins v. Brett*, 184 Cal. 252, 193 Pac. 251 (1920). A statement of the declarant's then existing state of mind is also admissible when relevant to show the declarant's state of mind at a time prior or subsequent to the statement. *Watenpaugh v. State Teachers' Retirement System*, 51 Cal.2d 675, 336 P.2d 165 (1959); *Whitlow v. Durst*, 20 Cal.2d 523, 127 P.2d 530 (1942); *Estate of Anderson*, 185 Cal. 700, 198 Pac. 407 (1921); *Williams v. Kidd*, 170 Cal. 631, 151 Pac. 1 (1915). Section 1250 also makes a statement of then existing state of mind admissible to "prove or explain acts or conduct of the declarant." Thus, a statement of the declarant's intent to do certain acts is admissible to prove that he did those acts. *People v. Alcalde*, 24 Cal.2d 177, 148 P.2d 627 (1944); *Benjamin v. District Grand Lodge No. 4*, 171 Cal. 260, 152 Pac. 731 (1915). Statements of then existing pain or other bodily condition also are admissible to prove the existence of such condition. *Bloomberg v. Laventhal*, 179 Cal. 616, 178 Pac. 496 (1919); *People v. Wright*, 167 Cal. 1, 138 Pac. 349 (1914).

A statement is not admissible under Section 1250 if the statement was made under circumstances indicating that the statement is not trustworthy. See EVIDENCE CODE § 1252 and the *Comment* thereto.

In light of the definition of "hearsay evidence" in Section 1200, a distinction should be noted between the use of a declarant's statements of his then existing mental state to prove such mental state and the use of a declarant's statements of other facts as circumstantial evidence of his mental state. Under the Evidence Code, no hearsay problem is involved if the declarant's statements are not being used to prove the truth of their contents but are being used as circumstantial evidence of the declarant's mental state. See the *Comment* to Section 1200.

Section 1250(b) does not permit a statement of memory or belief to be used to prove the fact remembered or believed. This limitation is necessary to preserve the hearsay rule. Any statement of a past event is, of course, a statement of the declarant's then existing state of mind —his memory or belief—concerning the past event. If the evidence of that state of mind—the statement of memory—were admissible to show that the fact remembered or believed actually occurred, any statement narrating a past event would be, by a process of circuitous reasoning, admissible to prove that the event occurred.

> The limitation in Section 1250(b) is generally in accord with the law developed in the California cases. Thus, in *Estate of Anderson*, 185 Cal. 700, 198 Pac. 407 (1921), a testatrix, after the execution of a will, declared, in effect, that the will had been made at an aunt's request; this statement was held to be inadmissible hearsay "because it was merely a declaration as to a past event and was not indicative of the condition of mind of the testatrix at the time she made it." 185 Cal. at 720, 198 Pac. at 415 (1921).

A major exception to the principle expressed in Section 1250(b) was created in *People v. Merkouris*, 52 Cal.2d 672, 344 P.2d 1 (1959). That case held that certain murder victims' statements relating threats by the defendant were admissible to show the victims' mental state—their fear of the defendant. Their fear was not itself an issue in the case, but the court held that the fear was relevant to show that the defendant had engaged in conduct engendering the fear, *i.e.*, that the defendant had in fact threatened them. That the defendant had threatened them was, of course, relevant to show that the threats were carried out in the homicide. Thus, in effect, the court permitted the statements to be used to prove the truth of the matters stated in them. In *People v. Purvis*, 56 Cal.2d 93, 13 Cal. Rptr. 801, 362 P.2d 713 (1961), the doctrine of the *Merkouris* case was limited to cases where identity is an issue; however, at least one subsequent decision has applied the doctrine where identity was not in issue. See People v. Cooley, 211 Cal. App.2d 173, 27 Cal. Rptr. 543 (1962).

The doctrine of the *Merkouris* case is repudiated in Section 1250(b) because that doctrine undermines the hearsay rule itself. Other exceptions to the hearsay rule are based on some indicia of reliability peculiar to the evidence involved. *People v. Brust*, 47 Cal.2d 776, 785, 306 P.2d 480, 484 (1957). The exception created by *Merkouris* is not based on any probability of reliability; it is based on a rationale that destroys the very foundation of the hearsay rule.

To be distinguished from the Merkouris decision, however, are certain other cases in which the statements of a murder victim have been used to prove or explain subsequent acts of the decedent, and are not used as a basis for inferring that the defendant did the acts charged in the statements. See, e.g., People v. Atchley, 53 Cal.2d 160, 172, 346 P.2d 764, 770 (1959); People v. Finch, 213 Cal. App.2d 752, 765, 29 Cal. Rptr. 420, 427 (1963). Statements of a decedent's then state of mind--i.e., his fear--may be offered under Section 1250, as under existing law, either to prove that fear when it is itself in issue or to prove or explain the decedent's subsequent conduct. Statements of a decedent narrating threats or brutal conduct by some other person may also be used as circumstantial evidence of the decedent's state of mind--his fear--when that fear is itself in issue or when it is relevant to prove or explain

the decedent's subsequent conduct; and for that purpose, the evidence is not subject to a hearsay objection for it is not offered to prove the truth of the matters stated. See the Comment to Section 1200. See also the Comment to Section 1252. But when such evidence is used as a basis for inferring that the alleged threatener must have made threats, the evidence falls within the language of Section 1250(b) and is inadmissible hearsay evidence.

Section 1291

Comment. Section 1291 provides a hearsay exception for former testimony offered against a person who was a party to the proceeding in which the former testimony was given. For example, if a series of cases arises involving several plaintiffs and but one defendant, Section 1291 permits testimony given in the first trial to be used against the defendant in a later trial if the conditions of admissibility stated in the section are met.

Former testimony is admissible under Section 1291 only if the declarant is unavailable as a witness.

Paragraph (1) of subdivision (a) of Section 1291 provides for the admission of former testimony if it is offered against the party who offered it in the previous proceeding. Since the witness is no longer available to testify, the party's previous direct and redirect examination should be considered an adequate substitute for his present right to cross-examine the declarant.

Paragraph (2) of subdivision (a) of Section 1291 provides for the admissibility of former testimony where the party against whom it is now offered had the right and opportunity in the former proceeding to cross-examine the declarant with an interest and motive similar to that which he now has. Since the party has had his opportunity to cross-examine, the primary objection to hearsay evidence—lack of opportunity to cross-examine the declarant—is not applicable. On the other hand, paragraph (2) does not make the former testimony admissible where the party against whom it is offered did not have a similar interest and motive to cross-examine the declarant. The determination of similarity of interest and motive in cross-examination should be based on practical considerations and not merely on the similarity of the

party's position in the two cases. For example, testimony contained in a deposition that was taken, but not offered in evidence at the trial, in a different action should be excluded if the judge determines that the deposition was taken for discovery purposes and that the party did not subject the witness to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case. In such a situation, the party's interest and motive for cross-examination on the previous occasion would have been substantially different from his present interest and motive.

Under paragraph (2), testimony in a deposition taken in another action and testimony given in a preliminary examination in another criminal action is not admissible against the defendant in a criminal action unless it was received in evidence at the trial of such other action. This limitation insures that the person accused of crime will have an adequate opportunity to cross-examine the witnesses against him.

Section 1291 supersedes Code of Civil Procedure Section 1870(8) which permits former testimony to be admitted in a civil case only if the former proceeding was an action between the same parties or their predecessors in interest, relating to the same matter, or was a former trial of the action in which the testimony is offered. Section 1291 will also permit a broader range of hearsay to be introduced against the defendant in a criminal action than has been permitted under Penal Code Section 686. Under that section, former testimony has been admissible against the defendant in a criminal action only if the former testimony was given in the same action—at the preliminary examination, in a deposition, or in a prior trial of the action.

Subdivision (b) of Section 1291 makes it clear that objections based on the competence of the declarant or on privilege are to be determined by reference to the time the former testimony was given. Existing California law is not clear on this point; 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 these matters are to be determined as of the time the former testimony is offered in evidence. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES *Appendix* at 581-585 (1964).

Subdivision (b) also provides that objections to the form of the question may not be used to exclude the former testimony. Where the former testimony is offered under paragraph (1) of subdivision (a), the party against whom the former testimony is now offered phrased the question himself; and where the former testimony is admitted under paragraph (2) of subdivision (a), the party against whom the testimony is now offered had the opportunity to object to the form of the question when it was asked on the former occasion. Hence, the party is not permitted to raise this technical objection when the former testimony is offered against him.

Section 1562.

Comment. Section 1562 supersedes the provisions of Code of Civil Procedure Section 1998.2. Under Section 1998.2, the presumption provided in this section could be overcome only by a preponderance of the evidence. Section 1562, however, classifies the presumption as affecting the burden of producing evidence only. See EVIDENCE CODE §§ 603 and 604 and the Comments thereto. Section 1562 makes it clear, too, that the presumption relates only to the truthfulness of the matters required to be stated in the affidavit by Section 1561. Other matters that may be stated in the affidavit derive no presumption of truthfulness from the fact that they have been included in it.

Section 137.5 (Labor Code Section 5708)

Comment. Except for rules relating to privileges, the Evidence Code does not apply to hearings and investigations of the State Industrial Accident Commission. Subdivision (b) of Section 914, which restricts the contempt power of nonjudicial agencies, is made not applicable to the Industrial Accident Commission. Thus, the broad contempt power of the Industrial Accident Commission under Labor Code Section 132 is applicable in cases where a privilege is claimed.

#34(L) 2/12/65

Fifth Supplement to Memorandum 65-4

Subject: Study No. 34(L) - The New Evidence Code

Attached is an analysis of Section 788 prepared for use in our presentation to the Assembly Judiciary Committee in the hearing to be held on February 15.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Section 788 - Impeachment of a Witness With Evidence of a Conviction

The Law Revision Commission has made several efforts to develop a workable impeachment rule that would correct the anomalies and deficiencies in the existing California law. Each time a solution has been proposed by the Commission, objections have been made to the proposal and the Commission has attempted to meet the objections by modifying its position. Each attempt to meet the objections, however, has proved unsuccessful. The Commission is between the prosecuting agencies who will accept no change in existing law and others, such as a Committee of the Conference of State Bar Delegates, who would permit only perjury convictions to be used for impeachment. In view of the objections that have been made to Section 788 as it appears in the bill, the Commission has decided to reconsider the matter at its meeting on February 18-20, 1965. The matters contained in subdivision (b), however, are not being reconsidered. The Commission is satisfied that subdivision (b) is sound. The following alternative solutions to the problem presented by subdivision (a) might be considered:

1. Permit impeachment with evidence of conviction of any crime involving as an essential element dishonesty or false statement; but prohibit the impeachment of a criminal defendant with evidence of prior convictions unless he introduces evidence of his good character.

This was the original recommendation of the Commission. It was based on the Uniform Rules of Evidence. All crimes, felonies and misdemeanors, are included because the crimes must involve the essential character traits that are in issue on a question of credibility. It eliminates the anomalous existing rule that a conviction resulting in a sentence to one year in jail cannot be used for impeachment (because it is not a felony) while a conviction

resulting in straight probation can be (because it is a felony in the absence of a misdemeanor sentence).

2. Permit impeachment with any crime involving as an essential element either false statement or the intention to deceive or defraud.

This was the position taken by the Commission at the time the Evidence Code was preprinted. The standard for the crimes permitted to be shown was narrowed because of the elimination of the prohibition against impeaching the criminal defendant until he placed his character in issue. The standard was also believed to be more precise and easy to apply. Any crime, felony or misdemeanor, may be used under this standard because the crime must involve the essential qualities relevant to a determination of veracity. The Commission abandoned this position because many crimes involving these essential elements could not be used for impeachment purposes because the record of conviction would not indicate whether they were involved in the particular case. For example, many thefts involve fraud or deceit, but the record of conviction shows merely a theft conviction.

3. Permit impeachment with evidence of conviction of any felony involving as an essential element dishonesty or false statement. This is the position reflected in the present version of the Evidence Code. The "dishonesty or false statement" standard was restored to the section at the recommendation of the State Bar Committee on Evidence; and this version of the section has been approved by that committee and the evidence committees of the Judicial Council and Conference of California Judges. In this version of Section 788, the showable crimes were limited to felonies because of the broadening of the class of crimes permitted to be shown. The "dishonesty" standard has been criticized as too vague. Nevertheless, the standard has been approved by the committees mentioned, by the Commission,

and by the Alameda County District Attorney. The Commission realized that there would be some uncertainty in peripheral areas, but believed that most crimes would be readily subject to classification while the few problem areas would eventually be made certain by the courts. The Commission decided to reconsider the matter, however, in the light of the objections to the vagueness of this standard.

4. Permit impeachment with evidence of conviction of any crime involving false statement or an intention to deceive or defraud and, in addition, certain other specified crimes, including bribery, theft, murder, voluntary manslaughter, arson, kidnapping, extortion, narcotics selling, burglary, assault with a deadly weapon, etc.

This standard would have the virtue of precision. But there is the possibility that some crime that should be included might be omitted. Moreover, the list of crimes that should be included soon begins to look like all of the serious crimes that might be committed; hence, a general reference to all serious crimes (all felonies or all crimes punishable as felonies) would serve as well.

5. Permit impeachment with evidence of conviction of any felony.

This is existing law. The rule has been the subject of substantial criticism and dissatisfaction for several years. The complaint has been that some prosecutors try the defendant for the previous crimes. Representatives of the Commission met with committees of the Judicial Council and Conference of Judges at which the judges indicated that evidence of this sort is "devastating" to a defendant and highly prejudicial. Nevertheless, the standard has virtue from the fact that it is a simple one to apply. Despite its simplicity, however, it is subject to abuse. And even if the abuses could be corrected, there are certain anomalies and absurdities

necessarily contained in it. For example, if two persons were convicted of grand theft and one was sentenced to a year in jail and the other granted straight probation, this standard would permit the person granted probation to be impeached with the prior conviction but would forbid the impeachment of the person who was jailed. Yet, it seems likely that the person jailed was the more serious offender or had the more serious prior record, and by reason thereof received the jail sentence instead of probation.

6. Permit impeachment with evidence of conviction of any crime punishable as a felony; but prohibit the impeachment of a criminal defendant with evidence of prior convictions unless he introduces evidence of his good character.

This standard, too, has the virtue of simplicity; and it eliminates the incongruity of existing law whereby the serious offender may not be impeached while the probationer may be. Moreover, prohibiting the impeachment of the criminal defendant until he makes an issue of his character strikes directly at the abuses to which the present law is subject. As the criminal defendant cannot be tried for being a past offender, it seems likely that the convictions that will actually be used for impeachment purposes will be those that are actually relevant to the issue of credibility; for no advantage is derived from trying witnesses for their past crimes. This standard, however, is subject to criticism in that it permits crimes that do not reflect on credibility to be used. And, too, it can be argued that a defendant who chooses to testify should be in no better position than any other witness. But this position reflects the Commission's original view that the criminal defendant may justifiably be treated differently from other witnesses because he is, in fact, in a different position--he is subject to conviction and they are not.

#34 2/18/65

Memorandum 65-9

Subject: Study No. 34(L) - New Evidence Code

The following matters were identified at the legislative hearings as matters of controversy in the new Evidence Code:

1. Application of the Code to Criminal Actions

The office of the Attorney General suggested that the Code be made not applicable to criminal actions and that the existing law continue to be applicable to criminal actions. The only possible way we see to accomplish this objective would be to defer the operative date of the new code as applied to criminal actions. The following amendment of Section 12 of the bill would accomplish this objective:

> 12. (a) Except as provided in subdivision (d), this code shall become operative on January 1, 1967, and shall govern proceedings in actions brought on or after that date and, except as provided in subdivision (b), further proceedings in actions pending on that date.
>
> (b) Subject to subdivision (c) a trial commenced before January 1, 1967, shall not be governed by this code. For the purposes of this subdivision:
>
> (1) A trial is commenced when the first witness is sworn or the first exhibit is admitted into evidence and is terminated when the issue upon which such evidence is received is submitted to the trier of fact. A new trial, or a separate trial of a different issue, commenced on or after January 1, 1967, shall be governed by this code.
>
> (2) If an appeal is taken from a ruling made at a trial commenced before January 1, 1967, the appellate court shall apply the law applicable at the time of the commencement of the trial.
>
> (c) Subject to subdivision (d), the provisions of Division 8 (commencing with Section 900) relating to privileges shall govern any claim of privilege made after December 31, 1966.
>
> (d) With respect to criminal actions, this code shall become operative to criminal actions brought on or after December 31, 1970.

Section 788

The staff would, if possible, like to eliminate disagreement with the law enforcement representatives. Accordingly, the staff requests Commission approval (subject to approval of the legislative member) to make the

following amendment of Section 788 of the proposed Evidence Code if an agreement can be reached with law enforcement representatives. At the same time, the staff suggests that the Commission also consider what amendment to Section 788 should be made in the event that such agreement with law enforcement officers can not be reached. Various other memoranda prepared for the meeting discuss this problem.

> 788. (a) Subject to subdivision (b), evidence of a witness' conviction of a felony is admissible for the purpose of attacking his credibility. ~~if the court, in proceedings held out of the presence of the jury, finds that:~~
>
> ~~(1) An essential element of the crime is dishonesty or false statement; and~~
>
> ~~(2) The witness has admitted his conviction of the crime or the party attacking the credibility of the witness has produced competent evidence of the conviction.~~
>
> [No change in remainder of section.]

In connection with the revision of Section 788 set out above, it should be noted that Mr. Westbrook stated (off the record) that he feared that he would be instructed by the Board of Governors to oppose the revision set out above. He believed that the sentiment of the board is such that Section 788 as drafted is as far as the board will go in allowing evidence of prior convictions for impeachment. If the revision is made, we hope to persuade the representative of the bar to remain silent and we hope that the Assembly committee can be persuaded to accept the revision.

Section 1230

The representatives of law enforcement object to Section 1230, insofar as it codifies the rule of People v. Spriggs, 60 Cal.2d 868, allowing declarations against penal interest to be received in evidence.

Section 1153

The representatives of law enforcement object to Section 1153, insofar as it codifies the rule of People v. Quinn, 61 A.C. 808, holding that a withdrawn plea of guilty may not be received in evidence.

Section 1017

The representatives of law enforcement object to Section 1017, insofar as it clothes with a privilege statements of an accused to a psychiatrist appointed by the court to advise him how to plead. Also, we fear that the representative of the American Civil Liberties Union will urge that this section does not adequately protect the criminal defendant, in that it provides a narrower privilege for the indigent criminal defendant than is provided for the criminal defendant who consults a private psychiatrist. You will recall that Professor Van Alstyne strongly objected to the section on this ground at the last meeting.

Presumptions

The representatives of law enforcement urge that the conclusive presumption of malice contained in C.C.P. Section 1962(1), and the presumptions of intent contained in C.C.P. Section 1963(2), (3), and "other existing presumptions" be included in the Evidence Code. The text of these provisions is set out in our pamphlet (see amendments and repeals).

Section 665

The representatives of law enforcement object to Section 665 insofar as it lists as a presumption affecting the burden of proof, the presumption of the invalidity of a warrantless arrest.

Section 1042

The representatives of law enforcement are concerned about the comment to this section.

Sections 1250(b) and 1252

The representatives of law enforcement are concerned about the comments to these sections.

Section 120

In order to meet an objection of the Department of Administrative Procedure, we suggest that this section be revised to read:

> 120. "Civil action" includes ~~all actions and proceedings other than a criminal action~~ civil proceedings .

This amendment is consistent with Section 130 and was also suggested by the Committee of the Judicial Council.

Section 405

Mr. Powers indicated concern about using "preliminary fact determinations" instead of "foundational showing" in this section. We would be reluctant to have the legislative committees go into this section because we fear that they will not accept the rule abolishing the second crack doctrine on confessions. Nevertheless, we do not see how we can accept this proposed change. The preliminary fact determinations involved in determining whether to allow or disallow a claim of privilege can hardly be called foundational showings. Moreover, the courts have used the same language we propose in various decisions. See, for example, People v. Graziadio, 231 A.C.A. 581, 588 (1964), where the court said:

> . . . It was proper for the trial judge, outside the presence of the jury, to determine the preliminary questions of fact upon which the admissibility of the evidence depended. [Citations omitted.]
> Consequently, the question comes to us, not as a question

> of law, but one of fact, that is, whether the statement of value was just that, an independent statement, or, indeed, a compromise not predicated upon or confined to the market value of the property taken. Since the trial court is no less the arbiter of the credibility of witnesses in a preliminary determination of whether proffered evidence is admissible, than in any other instance of fact determination within its jurisdiction, we are bound by the finding of the trial court.

See also People v. Glen Arms Estate, Inc., 41 Cal. Rptr. 303, 316 (1964):

> . . . the trial court in the instant case, upon defendant's offer to introduce the evidence and plaintiff's objection, heard testimony outside the presence of the jury before ruling on the matter. This was the proper procedure since it was for the trial judge to determine the question of the admissibility of the evidence and any preliminary questions of fact upon which the admissibility of the evidence depended. [Citations omitted.] The determination of any such preliminary questions of fact on conflicting evidence is, like the trial court's determination of any other factual issue, conclusive on appeal.

Accordingly, we urge that no change be made in Section 405. We believe that the risk that the legislative committees will not accept the elimination of the second-crack doctrine on confessions is worth running in order to resist any change in our definitional phrases in Section 405.

Sections 904, 915, 1042, Government Code Section 11513

The Office of Administrative Procedure is concerned about the application of these sections. See Exhibit I (attached).

In light of the objections concerning these sections by the Office of Administrative Procedure, the staff suggests that the following provision be added at the end of subdivision (b) of Section 915:

> For the purposes of this subdivision, a hearing officer of the Division of Administrative Procedure holding a hearing governed by Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code shall be deemed to be a "court" and a "judge."

The reasons that cause us to recommend this change are set out in Exhibit I.

Presumptions

The Office of Administrative Procedure is concerned with the repeal of the rule that a presumption is evidence. See Exhibit I.

The Office of Administrative Procedure suggests that the presumption of identity of person from identity of name be codified in the Evidence Code. See Exhibit I.

We believe that both of these suggestions should be disapproved. They are based on an erroneous analysis of the proposed code.

Sections 1070-1073

The best we can achieve on these sections is to retain them with the deletion of the words "or the disclosure of the source is required in the public interest or otherwise required to prevent injustice". Senator Cobey has suggested that I attempt to persuade the representative of the newsmen to accept this amendment rather than substituting the existing code provision.

Section 1011

There will be a representative of California's certified psychologists present at the meeting to suggest that the definition of "patient" be revised to include someone interviewed for purposes of scientific research. Under existing law, psychologists engaged in research on mental and emotional problems may solicit interviews and obtain information because they can assure the persons interviewed of the confidentiality of the information received. The definition of "patient" would remove this protection. They desire to have the protection restored. The representative will raise some other matters, too, but the above mentioned matter they believe is extremely important.

Section 451

Mr. Elmore of the State Bar suggests the following revision of Section 451, subdivision (c):

> (c) Rules of professional conduct for all members of the bar in this State adopted pursuant to Section 6076 of the Business and Professions Code and rules of practice and procedure for the courts of this State adopted by the Judicial Council.

The reason for this amendment is stated in Exhibit II attached.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

STATE OF CALIFORNIA
EDMUND G. BROWN, Governor
DEPARTMENT OF GENERAL SERVICES
OFFICE OF ADMINISTRATIVE PROCEDURE
EIGHTH STREET
SACRAMENTO 95814
455 GOLDEN GATE AVENUE
SAN FRANCISCO 94102
314 WEST FIRST STREET
LOS ANGELES 90012

Sacramento, California
February 16, 1965

To

Re: Proposed Evidence Code
S.B. 110 and A.B. 333

Dear Sir:

This bill purports to revise, consolidate and codify the statutory and case evidence law into a California Evidence Code. It is the product of several years of study by California Law Revision Commission and interested legal minds and organizations. It is appropriate that it is oriented by judicial considerations. However, the proposed Code is expressly made applicable in certain areas to administrative hearings, including license hearings under the Administrative Procedure Act.

Those provisions of this bill which affect and apply to administrative hearings under the Administrative Procedure Act give us considerable concern. The critical analysis of this bill is based upon anticipated difficulty in administration of its provisions, and is not directed toward the advisability of the policy that it reflects.

The following provisions of the bill cause concern:

1. Division 8, Privileges, sections 900 through 1073

2. Section 135 of the bill (Amendment to Government Code section 11513), p. 90

3. Division 5, Chapter 3, Presumptions and Inferences, sections 600 through 667

4. Division 2, Section 120

Comments as to Paragraph 1, Privileges:

Division 8 of the bill codifies, and apparently clarifies through reflection of some case law, the law of privileges. It prescribes in addition to the particular privileges, the procedures to be followed in determining the existence and assertability of claims of privilege.

Existing law prescribes that privileges pertaining in civil actions shall apply in license hearings under the Administrative Procedure Act (Government Code section 11513). This bill proposes a major change in the law. It treats license suspension and revocation proceedings under the Administrative Procedure Act as if they were criminal proceedings, contrary to the repeated holdings of our appellate courts that such proceedings are not criminal in nature. The bill does this by defining "disciplinary proceedings" in section 904 as a suspension or revocation proceeding. The term "disciplinary" in and of itself connotes punishment, and is not appropriate as descriptive of a proceeding designed to determine entitlement or qualification to exercise a license privilege. The bill next, in section 1042, provides that if a claim of "official information" of "identity of informer" privilege is asserted, "by the state or a public entity in this state /and/ is sustained in a criminal proceeding or in a disciplinary proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material." (Underlining for emphasis.) The bill does not distinguish between the licensing agency itself asserting the privilege and a local agency, not within the control of the state licensing agency, asserting the privilege, or as to the results which must follow therefrom. The inclusion of licensing hearings within the rule of the criminal law is a major change in existing law. There are more than 50 licensing agencies administering that number of vocations, professions, and businesses in the State of California. The cases indicate that the State controls these various vocational and professional activities because it is necessary for the protection and welfare of the public. Whatever the reason for applying the criminal rule in administrative adjudication, it might be well to ask if that rule should apply to all licensing proceedings.

If the bill is adopted in its present form, any state agency or governmental entity in the State would continue to have available to it the existing privilege of non-disclosure of information which would be against the public interest to disclose (C.C.P. 1881(5)). In proceedings under the Administrative Procedure Act, presided over by a Hearing Officer having the same qualifications as a Superior Court judge, the claim of privilege of official information (against public interest to disclose) would be disposed of by the Hearing Officer under current law, and he would have the power to require disclosure of information which is necessary to a proper determination of whether or not the privilege exists. Under the bill as proposed, the Hearing Officer is prohibited from requiring disclosure of the information claimed to be privileged, though disclosure is necessary for a proper determination of the existence of the privilege. (See section 915). Under sections 914, 915 of the bill, if a claim of official information privilege is asserted in administrative proceedings, and it is necessary that the information claimed to be privileged be disclosed in order for the proper determination of existence of privilege to be made, the administrative proceedings must cease. Only a Judge of the Superior Court can determine the existence of the privilege in this situation.

The administrative proceedings cease, and through some unprescribed procedure, resort must be had to the court to determine the existence of the privilege. Should the privilege be found to exist, then section 1042 of the bill requires the Hearing Officer to find against the licensing agency "upon any issue in the proceeding to which the privileged information is material". This is an impossibility. The bill prohibits the Hearing Officer from learning the content of the information claimed to be privileged, and yet it requires him to hold against the agency upon any issue to which that privileged information is material.

The relation of section 1042 to "disciplinary proceedings" should be eliminated from the bill. The problems created by the general, over-all, application of forfeiture provisions to all administrative licensing adjudication would not satisfy any demonstrated need. If particular agencies would benefit by such forfeiture provisions, that might best be accomplished by amendment of the particular licensing act or acts. Secondly, existing authority should be continued in the Hearing Officer on the staff of the Office of Administrative Procedure permitting him to require disclosure of information claimed to be privileged where it is necessary to rule on the existence of the privilege. Certainly he is qualified to do so.

Comments as to Paragraph 2, Section 135 of the bill:

Commenting on the amendment to section 11513 of the Government Code, section 135 of the bill, the proposed amendment to section 11513 contained in the bill correlates to sections 904 and 1042 of the bill in applying the criminal rules to administrative proceedings.

Comments as to Paragraph 3, Presumptions and Inferences:

Chapter 3 of Division 5, "Presumptions and Inferences", proposes a major change in existing law. Under existing California law, presumptions are evidence. Section 600 of the bill expressly provides: "A presumption is not evidence." (Underlining for emphasis.)

Section 1963 of the California Code of Civil Procedure contains a list of some 39 rebuttable presumptions that have been for some years treated as evidence in the State of California. The proposed bill recodifies many of the section 1963 presumptions, but does not contain, among others, subsection 1 ("that a person is innocent of crime or wrong") or subsection 25 ("identity of person from identity of name") thereof.

It would appear that the drafters of the proposed Code of Evidence have reason for eliminating the treating of presumptions as evidence. Whatever may be the benefits to be attained by such a change in courts of law, the results of the change will be detrimental in proceedings under the Administrative Procedure Act. The two presumptions mentioned above have been relied upon as evidence in a great number of license hearings. Failure to retain the "identity of name means identity of person" presumption would require proof of identity through involved evidence (e.g., fingerprints, expert testimony, etc.) when a conviction is material. Ordinarily the record of conviction and the presumption suffice to support a finding that the licensee (of same name) was convicted. It would not under this bill even though not denied.

In many Alcoholic Beverage Control Department cases, the question of whether an alcoholic beverage was sold or furnished, in response to an order being placed for an alcoholic beverage, arises. It is a crime to serve a non-alcoholic beverage when an alcoholic beverage is ordered and paid for. The presumption that a person is innocent of crime has been used in administrative proceedings as evidence that the licensee furnished an alcoholic beverage in response to an order therefor. Elimination of this presumption as evidence will create considerable problem in the area of proof of the furnishing of an alcoholic beverage. Unnecessary consumption of time is the vice predicted.

Comments as to Paragraph 4:

Section 120 of the bill defines "civil action" as including "all actions and proceedings other than a criminal action." In view of section 901 of the bill, which defines "proceeding" as including administrative proceedings, there is a possibility that administrative proceedings would be defined as a result of this bill as "civil actions."

We would recommend the amendment of section 120 to add the word "court" as an adjective to "all actions and proceedings."

For the foregoing reasons, we believe that appropriate changes should be made in the Proposed Evidence Code.

Respectfully submitted,

George R. Coan

GEORGE R. COAN
Presiding Officer

GRC:CHB:bh

Exhibit II

Mr. Mack
Rules of professional conduct for
all members of the bar in the
State

THE STATE BAR OF CALIFORNIA

San Francisco

INTER-OFFICE COMMUNICATION

TO: Mr. Barnes, Chairman, Committee Disciplinary Procedures, and Mr. Hayes

Date: January 22, 1965

FROM: Mr. Elmore

SUBJECT: Evidence Code -Judicial Notice - Status of State Bar Rules of Procedure and Rules of Professional Conduct

3 + P 1/6076

Gentlemen:

The Evidence Code sections on Judicial Notice (S.B. 110, p. 6, Sec. 450-459) raise a question whether Rules of Procedure of the State Bar may be judicially noticed, without request in each instance. See Sec. 452 (b) (c) and Sec. 453.

On the other hand, no request is needed for judicial notice of state agency regulations published in the Cal. Adm. Code or of state civil service regulations. This results from reference to Gov't. C. 11383, 11384 and 18576, in Sec. 451 of the proposed code.

It would appear the same question exists as to Rules of Professional Conduct of the State Bar.

These matters are sui generis and seemingly have not been specifically considered.

It is suggested this subject be promptly explored with a view to offering amendments before the Evidence Code is too far along.

Yours very truly,

Garrett H. Elmore
Special Counsel

GHE:ew
cc: Messrs. Mack, Matthews, Forahee

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

The Uniform Rules of Evidence

Article VIII. Hearsay Evidence

August 1962

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California

MJN 2036

LETTER OF TRANSMITTAL

To His Excellency Edmund G. Brown
Governor of California
and to the Legislature of California

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

The Commission herewith submits a preliminary report containing its tentative recommendation concerning Article VIII (Hearsay Evidence) of the Uniform Rules of Evidence and the research study relating thereto prepared by its research consultant, Professor James H. Chadbourn of the School of Law, University of California at Los Angeles. Only the tentative recommendation (as distinguished from the research study) is expressive of Commission intent.

This report covers the portion of the Uniform Rules upon which preliminary work has been completed by the Commission. In preparing this report the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence. Other portions of the Uniform Rules will be covered in subsequent reports.

This preliminary report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

Herman F. Selvin, *Chairman*
John R. McDonough, Jr., *Vice Chairman*
James A. Cobey, *Member of the Senate*
Clark L. Bradley, *Member of the Assembly*
Joseph A. Ball
James R. Edwards
Richard H. Keatinge
Sho Sato
Thomas E. Stanton, Jr.
A. C. Morrison, *Legislative Counsel, ex officio*

John H. DeMoully
Executive Secretary

August 1962

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TENTATIVE RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to

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 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.

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 extra-judicial statement which is offered to prove the truth of the matter stated. . . . The policy of the rule is to make all hearsay, even though relevant, inadmissible except to the extent that hearsay statements are admissible by the exceptions under this rule. In no instance is an exception based solely upon the idea of necessity arising from the fact of the unavailability of the declarant as a witness. . . . The traditional policy is adhered to, namely that the

[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 30 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

[2] See Comment of Commission to URE Rule 63 (opening paragraph), page 311.

> probative value of hearsay is not a mere matter of weight for the trier of fact but that its having any value at all depends primarily upon the circumstances under which the statement was made. The element of unavailability of the declarant or the fact that the statement is the best evidence available is a factor in a very limited number of situations, but for the most part is a relatively minor factor or no factor at all. Most of the following exceptions are the expressions of common law exceptions to the hearsay rule. Where there is lack of uniformity among the states with respect to a particular exception a serious effort has been made to state the rule which seems most sensible or which reflects the weight of authority. . . . The exceptions reflect some broadening of scope as will be noted in the comments under the particular sections. These changes not only have the support of experience in long usage in some areas but have the support of the best legal talent in the field of evidence. Yet they are conservative changes and represent a rational middle ground between the extremes of thought and should be acceptable in any fact-finding tribunal, whether jury, judge or administrative body.

It should be noted that the exceptions to the hearsay rule that are set forth in the subdivisions to URE 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 relevance or privilege—which makes the evidence inadmissible, the court is not authorized to admit the evidence merely because it falls within an exception to the hearsay rule.

REVISION OF URE RULES 62-66

The 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 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 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 Commission are shown in strikeout type and italics. Each provision is followed by a comment which sets forth some of the major considerations that influenced the recommendation of the Commission and explains those revisions that are not purely formal or otherwise self-explanatory.

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

For a detailed analysis of the various rules and the California law relating to hearsay, see the research study beginning on page 401. This study was prepared by the Commission's research consultant, Professor James H. Chadbourn of the School of Law, University of California at Los Angeles.

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~~ *attend or* to testify at the hearing because of ~~death or then existing physical or mental illness.,~~ ~~or~~ *age, sickness, infirmity or imprisonment.*

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

(e) Absent from the ~~place of~~ hearing ~~because~~ *and* the proponent of his statement ~~does not know and with diligence has been been unable~~

~~to ascertain his whereabouts.~~ *has exercised reasonable diligence but has been unable to procure his attendance by subpoena.*

(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:

(a) Testimony given under oath or affirmation as a witness in a former hearing or trial of the same action or proceeding;

(b) 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; and

(c) Testimony in a deposition taken in compliance with law in another action or proceeding.

COMMENT

This rule defines terms used in Rules 62-66. It has been considerably revised in form in the interest of clarity of statement.

The significance of the definition of "statement" contained in URE Rule 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 "unable to attend or testify because of age, sickness, infirmity or imprisonment," which has been substituted for somewhat similar language in the URE standard of unavailability, is taken from Code of Civil Procedure Section 2016(d)(3)(iii)—the 1957 discovery statute.

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 is 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. As has been pointed out above, 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 makes the evidence inadmissible, the court is not authorized to admit the evidence merely because it falls within an exception to the hearsay rule. Rules 62-66, 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 subdivision (7) has been deleted because it adds nothing to the preceding language.

Subdivision (8) has been added to permit convenient use of the defined term—"former testimony"—in the former testimony exceptions, Rule 63(3) and (3.1).

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 provision prior to the word "except," states the hearsay rule in its classical form, with one qualification: because the word "statement" 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

[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 entitled to claim it for him, in order to be operative. Hence, under Rule 62, it will be necessary for the privilege to be claimed before the court may find the declarant unavailable on that ground.

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 conduct, being nonassertive, does not involve the veracity of the declarant; hence, one of the principal reasons for the hearsay rule—to exclude declarations where the veracity of the declarant cannot be tested by cross-examination—does not apply. 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 statement at the time it was made, (iii) is offered after the

[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 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."

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.

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. The prohibition against leading questions on direct examination would be avoided and much of the protection against perjury provided by the requirement that in most instances testimony be given under oath in court would be lost. 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. 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) makes admissible what is usually referred to as "past recollection recorded." This paragraph makes no radical departure from existing law, for its provisions are taken largely from the provisions of Section 2047 of the Code of Civil Procedure. 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 the witness's memory and (3) that the witness "knew that the same was correctly stated in the writing." Under paragraph (c), however, 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, paragraph (c) permits testimony of the person who recorded the statement to be used to establish that the writing is a correct record of the statement. The Commission believes that sufficient assurance of the trustworthiness of the statement is provided 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 itself admissible in evidence whereas under the present law the declarant reads the writing on the witness stand and the writing is not otherwise made a part of the record unless it is offered in evidence 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 66.1 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;~~ *Except as otherwise provided in this subdivision, former testimony if the judge finds that the declarant is unavailable as a witness and that:*

(a) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; 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 testimony in a deposition taken in another action or proceeding and testimony given in a preliminary examination in another criminal action or proceeding is not admissible under this paragraph against the defendant in a criminal action or proceeding unless it was received in evidence at the trial of such other action or proceeding.

Except for objections to the form of the question which were not made at the time the former testimony was given and objections based on competency or privilege which did not exist at that time, the admissibility of former testimony under this subdivision is subject to the same limitations and objections as though the declarant were testifying in person.

COMMENT

See Comment under Rule 63(3.1).

Subdivision (3.1): Former Testimony Offered Against a Person Not a Party to the Former Action or Proceeding

(3.1) Except as otherwise provided in this subdivision, former testimony if the judge finds that:

(a) The declarant is unavailable as a witness;

(b) The former testimony is offered in a civil action or proceeding or against the people in a criminal action or proceeding; and

(c) 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.

Except for objections based on competency or privilege which did not exist at the time the former testimony was given, the admissibility of former testimony under this subdivision is subject to the same limitations and objections as though the declarant were testifying in person.

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 (Code Civ. Proc. §§ 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 of the statute 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 sub-

stantial experience has been had thereunder. Rule 63(32) and Rule 66.1 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 (3.1) of Rule 63.

The Commission recommends a modification of URE 63(3)(b). URE 63(3)(b) 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 Commission recommends that the first qualification be retained but that the second be modified in two respects: (1) to provide that in most cases where former testimony is offered against a party who was also a party to the former action any objection to the form of a question that was not made at the time the former testimony was given is waived; and (2) to make clear that the validity of objections based on competency or privilege is to be determined by reference to the time the former testimony was given. Existing California law is not clear on this latter point; 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 accommodate this revision, the Commission has proposed two subdivisions dealing with former testimony: subdivision (3) which covers former testimony offered against a person who was a party to the proceeding in which the former testimony was given and subdivision (3.1) which covers former testimony offered against a person who was not a party to such proceeding but 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 proposed by the Commissioners on Uniform State Laws. Nevertheless, 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, under the provisions recommended by the Commission 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, testimony contained in a deposition that was taken, but not offered in evidence

at the trial, in a different action would be excluded if the judge determined 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 would have been substantially different from the interest and motive of the party against whom such evidence is being offered at the trial of another action.

In these subdivisions, there are two limitations on the extent to which former testimony may be used in a criminal case:

(1) Under subdivision (3)(b) former testimony that was given at a preliminary hearing of a criminal action other than the action in which it is offered and former testimony in a deposition taken in another action or proceeding are inadmissible against the defendant in a criminal case unless such former testimony was also introduced at the trial of the other action. This exception to the general rule stated in subdivision (3)(b) insures that the person accused of crime will have an adequate opportunity to cross-examine the witnesses against him.

(2) Former testimony is admissible under subdivision (3.1) only against the prosecution in criminal cases. This limitation has been made to preserve the right of a person accused of crime to confront and cross-examine the witnesses against him. When a person's life or liberty is at stake—as it is in a criminal trial—the Commission does not believe that the accused should be compelled to rely on the fact that another person has had an opportunity to cross-examine the witness.

Even with these limitations, these subdivisions will permit a broader range of hearsay to be introduced against the defendant in a criminal action than is permitted under existing California law. Under the existing law as contained in Penal Code Section 686, former testimony is admissible against the defendant in a criminal action only if the former testimony was given in the same action—at the preliminary hearing, in a deposition or in a prior trial of the action.

Subdivision (4): Contemporaneous and Spontaneous Statements

(4) A statement *:*

(a) Which the judge finds was made while the declarant was perceiving the *act, condition or* 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 act, condition or event 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. There is an adequate guarantee of the trustworthiness of such statements in the contemporaneousness of the declarant's perception of the act, condition or 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), as revised, 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.

Paragraph (c) has been deleted. 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 recommends such rejection, however, for the reason that the paragraph 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 paragraph (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—Code of Civil Procedure Section 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 rationale of the 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, there is no rational basis for differentiating, for the purpose of the admissibility of dying declara-

tions, between civil and criminal actions or among various types of criminal actions.

The term "since deceased" has been substituted 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) as revised.) If a dying declaration would tend to exonerate the proponent of the evidence, the declaration should not 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 Code of Civil Procedure Section 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, since in the absence of this requirement the declarant's conjecture as to the matter in question might be held to be 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;~~ *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 (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

This exception merely restates existing law. The subdivision has been made applicable only in a civil action or proceeding, since the admissibility of admissions in criminal actions is governed by subdivision (6).

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 has been omitted. 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, a party has ample opportunity to deny, explain or qualify the statement in the course of the proceeding. These considerations 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~~ *the agency, partnership or employment and* was made before the termination 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;* 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, the liability, obligation or duty of the declarant is in issue* ~~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 , *obligation or duty.* ~~;~~

COMMENT

URE Rule 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 noninculpatory 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).

There are two justifications for the narrow exception provided by paragraph (a). First, because of the relationship which existed at the time the statement was made, it is unlikely that the statement would have been made unless it were true. Second, the existence of the relationship makes it highly likely that the party will be able to make an adequate investigation of the statement without having to resort to cross-examination of the declarant in open court.

Paragraph (a) has been revised in order to make clear that the relationship between the party and the declarant must be established by independent evidence. The revised language 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 revised language makes clear that the conspiracy must be established by independent evidence *before* the statement of the co-conspirator may be admitted. 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 to preclude 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), as revised, 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 (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 the liability, obligation or duty of the third person and the judgment determines that liability, obligation or duty. Together, paragraph (c) and subdivision (21.1) codify the holdings of the cases applying Code of Civil Procedure Section 1851.

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 exception are necessity, the declarant being dead, and trustworthiness in that men do not ordinarily make false statements against their pecuniary or proprietary interest. The Commission believes that these justifications are sound and that they apply equally to the provisions of subdivision (10) which broaden

the common law exception. Unavailability for other causes than death creates as great a necessity to admit the statement. 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 (11): Voter's Statements

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

COMMENT

This exception is not recognized at present in California. There is neither a pressing necessity for the exception nor a sufficient guarantee of the trustworthiness of the statements that would be admissible under it.

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 .~~;~~ ~~or~~

(b) A declarant who is unavailable as a witness as to his state of mind, emotion or physical sensation at a time prior to the statement to prove such prior state of mind, emotion or physical sensation when it is itself an issue in the action or proceeding but not to prove any fact other than such state of mind, emotion or physical sensation.

~~(b)~~ *(c) 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 .~~;~~

(d) 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.

COMMENT

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

Paragraph (b), too, restates a principle now found in the decisions of California courts. Declarations of a previous mental state are now admitted to prove the previous mental state, but they are generally considered inadmissible to prove any fact other than the previous mental state. For example, the statement of the driver of an automobile indicating that he knew there were narcotics in the car at a prior time has been held admissible to prove that he had knowledge of the presence of the narcotics, but the same statement was said to be inadmissible to prove the actual presence of the narcotics. The courts have justified the admission of this kind of statement to prove the prior mental state 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 (b) 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 the previous mental state. Of course, under paragraph (b) the donor's statement would be admissible only to show the prior intent; it could not be used to prove that he had executed and delivered the deed.

In another respect, though, paragraph (b) narrows the state of mind exception as presently declared by the California courts. In a recent criminal case, the California Supreme Court permitted a murder victim's 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 caused 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 (b) 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 (b) supplements paragraph (a) which does not permit evidence of a present memory or belief to be used to prove the fact remembered or believed. These limitations are necessary to preserve the hearsay rule; without them statements of past events could be used as evidence of the occurrence of the events merely by a process of circuitous reasoning and the rule would be absorbed by the exception.

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

The provision that a statement covered by subdivision (12) is not admissible if the judge finds that it was made in bad faith is a desirable safeguard. It is no 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, 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 bookkeeping system, whether original or copies, and whether in book, card, looseleaf or some other form. The case-law rule is satisfactory and Section 1953f.5 may have the unintended effect of limiting the provisions of the Uniform Act.

The words "governmental activity" have been added to the definition of "a business" so that it will be clear 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 now admissible in California.

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 ;~~ *A writing offered as a record or report of an act, condition or event if the judge finds that:*

(a) The writing was made by and within the scope of duty of a public officer or employee of the United States or a state or territory of the United States;

(b) The writing was made at or near the time of the act, condition or event; and

(c) The sources of information and method of preparation are such as to indicate its trustworthiness.

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 record or report may be admitted even though the public officer making the record or 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 subdivision (15), as under existing law, the court may admit an official record or report without requiring a witness to testify as to its identity and mode of preparation if the court has judicial notice or if sufficient independent evidence shows that the record or 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.)

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 proposed in the URE, 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 subdivision as revised is limited to official reports concerning birth, death and marriage. Reports of such events occurring within California 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 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 in the custody of a public officer or employee,* a writing purporting to be a copy *thereof.* ~~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 *public officer or employee who is the* official custodian of the ~~official~~ records ~~of the~~ *in that* office, reciting diligent search and failure to find such record. ~~;~~

COMMENT

Paragraph (a) makes it possible to prove the content of a writing in the custody of a public officer or employee by hearsay evidence in the form of a writing purporting to be a copy thereof, provided the copy meets the requirements of authentication under Rule 68.[6] It should be noted that paragraph (a) does *not* make the *content* of the writing 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 made by the official custodian thereof stating that no such record has been found

[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) 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 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."

after a diligent search, provided the writing meets the requirements of authentication under Rule 69.[7] The phrase "official records of the office" in this paragraph of the original URE rule has been modified to avoid ambiguity and a possible interpretation which is more restrictive than is desirable.

Both exceptions are justified by the likelihood that such statements made by custodians of such writings are accurate and by the necessity of providing a simple and inexpensive method of proving such facts.

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

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. Where the celebrant's certificate is offered, however, 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.)

[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 (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 subdivisions (3) and (3.1) of Rule 63; if the witnesses are still available, they can be called to testify concerning the disputed facts. Moreover, a plea of guilty in a criminal action or proceeding is admissible under subdivision (7) in a subsequent civil action or proceeding involving the same act or omission.

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 ~~in which he seeks~~ *or proceeding* to *:*

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

(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 (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.

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.

Subdivision (22): Judgment Determining Public Interest in Land

(22) To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of ~~the public or of a state or nation or governmental division thereof~~ *a public entity* 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 public entity whose interest or lack of interest was determined was a party. As used in this subdivision, "public entity" means the United States or a state or territory of the United States or a governmental subdivision of the United States or a state or territory of the United States.*

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. 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 subdivision has been revised 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 con-

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

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).

URE 63(23) has been revised 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), language has been added 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 truthworthiness.

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. There is 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) *To prove the truth of the matter reputed,* evidence of reputation among members of a family ~~,~~ if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage ~~,~~.

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 Secton 1870(11) requires that the family reputation in question have existed "previous to the controversy." This qualification is not a necessary 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 (26.1): Entries Concerning Family History

(26.1) 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) *To prove the truth of the matter reputed,* 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. It is not 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. Paragraph (c) as stated in the URE, however, 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 paragraph has been limited to proof by community reputation of the date or fact of birth, marriage, divorce or death.

Subdivision (27.1): Statement Concerning Boundary

(27.1) If the judge finds that 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.

COMMENT

This subdivision restates the substance of existing but uncodified California law found in such cases as *Morton* v. *Folger,* 15 Cal. 275 (1860) and *Morcom* v. *Baiersky,* 16 Cal. App. 480, 117 Pac. 560 (1911).

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

(29) ~~Evidence of~~ A statement ~~relevant to a material matter,~~ contained in a deed of conveyance or a will or other ~~document~~ *writing* purporting to affect an interest in property, ~~offered as tending to prove the truth of the matter stated,~~ if the judge finds that *:*

(a) The matter stated was relevant to the purpose of the writing;

(b) The matter stated would be relevant ~~upon~~ *to* an issue as to an interest in the property ~~:~~ *;* and ~~that~~

(c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement. ~~;~~

COMMENT

This subdivision 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. There is a sufficient likelihood that the statements made in a dispositive document, when related to the purpose of the 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.

Subdivision (29.1): Recitals in Ancient Documents

(29.1) A statement contained in 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.

This subdivision 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 age of a document is not a sufficient guarantee of the trustworthiness of a statement contained therein to warrant the admission of the statement into evidence. Accordingly, this subdivision 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~~ *A* statement ~~s of matters of interest to persons engaged in an occupation~~ *, other than an opinion,* 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 provisions in the California codes authorizing the admission of various types of hearsay evidence. Subdivision (32) will make it clear that hearsay evidence which is admissible under any other statute will continue to be admissible unless such other statute is expressly repealed in connection with the enactment of these rules.

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. 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 ~~admissible~~ *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 inconsistent 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. Multiple Hearsay

Rule 66. A statement within the scope of an exception to Rule 63 ~~shall~~ *is* not ~~be~~ inadmissible on the ground that ~~it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself~~ *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(15). A properly authenticated copy of the report would be admissible under Rule 63(17). Even though "triple hearsay" is here involved, the Commission believes that there is a sufficient guarantee of the trustworthiness of each statement, for each of them must fall within an exception to the hearsay rule.

Rule 66.1. Savings Clause

Rule 66.1. 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 are 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 are 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 considered whether these statutes should be repealed or amended 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 status, the Comission 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.

In many cases where it is hereafter stated that an existing statute is superseded by a provision in the Uniform Rules of Evidence, the provision replacing the existing statute may be somewhat narrower or broader than the existing statute. In these cases, the Commission believes that the proposed provision is a better rule, although in a given case it be broader or narrower than the existing law.

[8] A number of the sections listed below (in the text) 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. Accordingly, 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 and hence is admissible under the general principle that all relevant and material evidence is admissible.

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. Insofar as it deals with hearsay it is superseded by the opening paragraph of Rule 63 and the numerous exceptions thereto. If the section has a broader application, its meaning is not clear and its possible applications are undesirable; hence, there is no justification for retaining the section.

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

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. Insofar as it relates to hearsay, it is superseded by Rule 63(4) providing an exception to the hearsay rule for contemporaneous and spontaneous declarations. Insofar as it relates to declarations that are themselves material, the section is unnecessary; for inasmuch as Rules 62 and 63 make clear that such declarations are not hearsay, they are admissible under the general principle that relevant evidence is admissible.

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 exceptions stated in Rule 63(9)(c) and 63(21.1).

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:

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(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.

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. Insofar as it relates to hearsay, it is superseded by Rule 63(4) relating to contemporaneous and spontaneous declarations. Insofar as it relates to declarations that are themselves material, the section is unnecessary; for inasmuch as Rules 62 and 63 make clear that such declarations are not hearsay, they are admissible under the general principle that relevant evidence is admissible.

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 subdivisions (3) and (3.1) of Rule 63 which relate 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(26.1) 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 writings in the custody of public officers 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 writings in the custody of public officers 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 counry 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 relate to both hearsay and authentication. Insofar as they relate to hearsay, they are superseded by subdivisions (13), (17) and (19) of Rule 63 pertaining to the admissibility of governmental records and copies thereof. In its report on URE Article IX (Authentication and Content of Writings), the Commission will indicate the ultimate disposition of these sections.

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 Rule 63(13), by the exception for reports of public officers or employees in Rule 63(15) and by various specific exceptions that will continue to exist under Rule 63(32) and Rule 66.1.

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 relates to both hearsay and authentication. Insofar as it relates to hearsay, it is superseded by the exception pertaining to copies of official records contained in Rule 63(17). In its report on URE Article IX (Authentication and Content of Writings), the Commission will indicate the ultimate disposition of this section.

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) and by the exception for reports by public officers or employees in Rule 63(15).

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), the official records exceptions contained in subdivisions (15) and (16) and the various specific exceptions which will continue under subdivision (32) and Rule 66.1.

Section 1947 provides:

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

This section relates to both hearsay and the best evidence rule. Insofar as it relates to hearsay, it is superseded by the business records exception contained in Rule 63(13). The ultimate disposition of this section will be indicated in the Commission's recommendation on Rule 70—the URE best evidence rule.

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. There is no reason to require the memorandum to meet the necessarily strict standards that a document purporting to contain recorded memory must meet; for when a witness's recollection is refreshed he testifies to present recollection rather than to the matter contained in the refreshing memorandum. The section should also be revised to grant the adverse party the right to see not only the documents used to refresh a witness' 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 *at the request of the adverse party*, and may be seen by the adverse party~~,~~ who may, if he choose*s*, 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 a 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 (3.1) 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 (3.1). The revised sections would read:

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

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

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A STUDY RELATING TO THE HEARSAY EVIDENCE ARTICLE OF THE UNIFORM RULES OF EVIDENCE *

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* This study was made at the request of the California Law Revision Commission by Professor James H. Chadbourn of the School of Law, University of California at Los Angeles. The opinions, conclusions and recommendations are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions and recommendations of the Law Revision Commission.

INTRODUCTION

The California Law Revision Commission has been authorized to make a study to determine whether the law of evidence in this State should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference.[1]

The present study, made at the request of the Law Revision Commission, is directed to the question whether California should adopt the provisions of the Uniform Rules of Evidence relating to hearsay evidence—*i.e.*, Rule 63 and its 31 exceptions and other related provisions of the Uniform Rules. The study undertakes both to point up what changes would be made in the California law of evidence if the hearsay provisions of the Uniform Rules of Evidence were adopted and also to subject those provisions to an objective analysis designed to test their utility and desirability. In some instances modifications of the provisions of the Uniform Rules are suggested. The problem of incorporating these provisions of the Uniform Rules into the California codes is also discussed. Similar studies of the other Uniform Rules are contemplated.

It should be clear at the outset that, broadly speaking, the Uniform Rules of Evidence are designed to be a complete code of judicial evidence. They are intended to apply to all judicial proceedings and to be the exclusive source of regulations concerning the admissibility of evidence in these proceedings. Thus, Rule 2 makes the Uniform Rules of Evidence applicable in every criminal or civil proceeding conducted

[1] Cal. Stat. 1956, res. ch. 42, p. 263.

The Uniform Rules are the subject of the following law review Symposia: *Institute on Rules of Evidence in Arkansas*, 15 ARK. L. REV. 1 (1960); *Panel on Uniform Rules of Evidence*, 8 ARK. L. REV. 44 (1953); *Symposium—Hearsay Evidence*, 46 IOWA L. REV. 207 (1961); *Symposium—Minn. and the Uniform Rules of Evidence*, 40 MINN. L. REV. 297 (1956); *A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law*, 49 NW. U. L. REV. 481 (1954); *The Uniform Rules of Evidence*, 10 RUTGERS L. REV. 479 (1956); *"Indirect" Hearsay*, 31 TUL. L. REV. 3 (1956); *The "Uniform Rules" and the California Law of Evidence*, 2 U.C.L.A. L. REV. 1 (1954).

See also Brooks, *Evidence*, 14 RUTGERS L. REV. 390 (1960); Cross, *Some Proposals for Reform in the Law of Evidence*, 24 MOD. L. REV. 32 (1961); Gard, *Why Oregon Lawyers Should be Interested in the Uniform Rules of Evidence*, 37 ORE. L. REV. 287 (1958); Levin, *The Impact of the Uniform Rules of Evidence on Pennsylvania Law*, 26 PA. B. ASS'N Q. 216 (1955); McCormick, *Some Highlights of Uniform Rules of Evidence*, 33 TEXAS L. REV. 559 (1955); Morton, *Do We Need a Code of Evidence?*, 38 CAN. B. REV. 35 (1960); Nokes, *Codification of the Law of Evidence in Common-Law Jurisdictions*, 5 INT. & COMP. L. Q. 347 (1956); Nokes, *American Uniform Rules of Evidence*, 4 INT. & COMP. L. Q. 48 (1955).

The Uniform Rules also have been scrutinized by committees appointed by the Supreme Courts of New Jersey and Utah. See REPORT OF THE COMMITTEE ON THE REVISION OF THE LAW OF EVIDENCE TO THE SUPREME COURT OF NEW JERSEY (1955) and FINAL DRAFT OF THE RULES OF EVIDENCE (1959), the report of the Utah Committee on the Uniform Rules of Evidence. A Commission appointed by the New Jersey Legislature also has studied the Uniform Rules. See REPORT OF THE COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE (1956). In 1960, the New Jersey Legislature enacted a portion of the Uniform Rules and granted the New Jersey Supreme Court the power to adopt rules dealing with the admission or rejection of evidence. N.J. Laws 1960, ch. 52, p. 452 (N.J. STAT. ANN. §§ 2A:84A-1 to -49).

by or under the supervision of a court in which evidence is produced.[2] And Rule 7[3] proclaims, *inter alia*, that "all relevant evidence is admissible" except "as otherwise provided *in these Rules.*" (Emphasis added.) Thus, it is contemplated that where the Uniform Rules are adopted, all pre-existing exclusionary rules—that is, rules excluding relevant evidence in judicial proceedings—would be superseded. Only the Uniform Rules would be consulted as the exclusive source of law excluding relevant evidence. If nothing in the Uniform Rules permits or requires the exclusion of an item of relevant evidence, it is to be admitted, notwithstanding any pre-existing law which required its exclusion,[4] for Rule 7 wipes from the slate all prior exclusionary rules. The slate remains clean, except to the extent that some other rule or rules write restrictions upon it.

[2] Except to the extent to which the Uniform Rules of Evidence "may be relaxed by other procedural rule or statute applicable to the specific situation." UNIFORM RULES OF EVIDENCE, RULE 2 (1953) [hereinafter cited as UNIFORM RULES]. If the Uniform Rules were adopted in California, they would be "relaxed," for example, by Section 117g of the Code of Civil Procedure relating to proceedings in Small Claims Courts.

[3] Rule 7 of the Uniform Rules provides: "Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible."

[4] However, evidence inadmissible on constitutional grounds would, of course, remain so under the Uniform Rules. The comment on Rule 7 states: "Illegally acquired evidence may be inadmissible on constitutional grounds—not because it is irrelevant. Any constitutional questions which may arise are inherent and may, of course, be raised independently of this rule."

RULE 62—DEFINITIONS

Rule 62 supplies definitions of some of the terms that are used throughout the various sections relating to hearsay. Rule 62 provides:

> Rule 62. As used in Rule 63 and its exceptions and in the following rules,
>
> (1) "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.
>
> (2) "Declarant" is a person who makes a statement.
>
> (3) "Perceive" means acquire knowledge through one's own senses.
>
> (4) "Public Official" of a state or territory of the United States includes an official of a political subdivision of such state or territory and of a municipality.
>
> (5) "State" includes the District of Columbia.
>
> (6) "A business" as used in exception (13) shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.
>
> (7) "Unavailable as a witness" includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant, or (b) disqualified from testifying to the matter, or (c) unable to be present or to testify at the hearing because of death or then existing physical or mental illness, or (d) absent beyond the jurisdiction of the court to compel appearance by its process, or (e) absent from the place of hearing because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.
>
> But a witness is not unavailable (a) if the judge finds that his exemption, disqualification, inability or absence is due to procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying, or to the culpable neglect of such party, or (b) if unavailability is claimed under clause (d) of the preceding paragraph and the judge finds that the deposition of the declarant could have been taken by the exercise of reasonable diligence and without undue hardship, and that the probable importance of the testimony is such as to justify the expense of taking such deposition.

Rule 62(1) Through Rule 62(6)

The definition of "statement" in Rule 62(1) is of crucial importance. As pointed out in the discussion of the opening paragraph of Rule 63,[1] this definition operates to impose important restrictions upon the concept of hearsay evidence.

[1] See pp. 414-24, *infra*.

No comment is needed at this point on the definitions set forth in Rule 62(2) to 62(6).

Rule 62(7)—Unavailable As a Witness

Unavailability of the declarant is a condition of several of the hearsay exceptions set forth in the subdivisions of Rule 63—*i.e.*, subdivisions (3)(b), (4)(c), (5), (23), (24) and (25). Rule 62(7) defines the sense in which the subdivisions of Rule 63 above specified use the expression "unavailable as a witness."

Thus a person may be unavailable if he is:

(1) Dead.
(2) Too ill to testify.
(3) Beyond the reach of the court's subpoena power.
(4) Absent and his whereabouts is unascertainable.
(5) Disqualified or privileged.

Traditionally, death has been recognized as constituting unavailability. There has been doubt, however, as to the extent to which the other causes enumerated should be regarded as constituting unavailability.[2] There is, however, no doubt under Rule 62(7). The philosophy of this subdivision is that if it is proper to receive the hearsay declarations of a declarant who is unavailable because of death, it must be equally proper to receive such declarations when he is unavailable for any of the reasons listed in Rule 62(7).

The first paragraph of Rule 62(7) differs from present California law in two respects. In California, in those exceptions to the hearsay rule which require that the declarant be unavailable, the circumstances which constitute unavailability vary (without apparent reason) from exception to exception. Thus, whereas the exception for declarations against interest seems to require that the declarant be dead,[3] the exception covering pedigree declarations is applicable when the declarant is dead or "out of the jurisdiction"[4] and the exception relating to former testimony applies when the declarant is dead, out of jurisdiction or "unable to testify."[5] Again, testimony in depositions is admissible (in civil cases) when the deponent is dead, beyond the reach of the court's subpoena powers, too ill to testify, or when he is absent and cannot be found.[6] By way of contrast, Rule 62(7) sets up a uniform concept of unavailability so that what is unavailability in regard to any one exception is likewise unavailability in regard to all. This is the first of the two respects in which Rule 62(7) differs from present California law.

The second point of difference is this: whereas the present law seemingly does not recognize the privilege or disqualification of the declar-

[2] 5 WIGMORE, EVIDENCE §§ 1456, 1481(3), 1481(4) (3d ed. 1940) [hereinafter cited as WIGMORE, EVIDENCE].
[3] CAL. CODE CIV. PROC. §§ 1853, 1870(4), 1946.
[4] CAL. CODE CIV. PROC. § 1852 and the first clause of CAL. CODE CIV. PROC. § 1870(4).
[5] CAL. CODE CIV. PROC. § 1870(8). See note 7 *infra*.
[6] CAL. CODE CIV. PROC. § 2016(d)(3).

ant as making him unavailable,[7] Rule 62(7) accepts these circumstances as constituting unavailability.

In both of the foregoing respects Rule 62(7) is, it is submitted, preferable to the present law. There is need, it seems, for a uniform standard. Moreover, extending the concept of unavailability to include unavailability by reason of disqualification or privilege will not thwart any purpose of the laws relating to disqualification or privilege.

Two illustrations will perhaps elucidate the point just made.

Let us suppose that a crime is committed and shortly thereafter one X relates to attorney L, in professional confidence, certain facts which tend to implicate X. D is charged with the crime. Upon D's trial, D calls X and questions X as to circumstances incriminating X. X's claim of his privilege against self-incrimination is sustained. D then calls L and inquires of L what X told him. X's objection should be sustained. It is true that what X told L is a hearsay declaration describing a recently perceived event (URE 63(4)(c)).[8] It is true also that X is unavailable as a witness (URE 62(7)). These truths, however, mean no more than that X's statement to L is not inadmissible *as hearsay*. If there is some other reason of inadmissibility, the evidence is to be excluded for this other reason. Here, of course, there is such reason, *viz.*, attorney-client privilege (Rule 26).

By way of contrast, if X had made the confidential statement to a doctor and if the statement had been overheard by eavesdropper E, then upon the sustaining of X's claim of incrimination privilege, E could testify to X's statement. Under these circumstances the evidence is not inadmissible as hearsay (it being a narration of a recently perceived event and X being unavailable because of his incrimination privilege). Moreover, since a medical confidence is not privileged as against eavesdroppers (URE Rule 27), there is no reason, hearsay or otherwise, to exclude the evidence.

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[7] In Rose v. So. Trust Co., 178 Cal. 580, 174 Pac. 28 (1918), the Supreme Court held that the words "unable to testify" used in § 1870(8) "refer not to a legal but to a *physical* inability to appear upon the witness stand and there to give testimony." But see Kay v. Laventhal, 78 Cal. App. 293, 248 Pac. 555 (1926) (hearing denied); McKee v. Lynch, 40 Cal. App.2d 216, 104 P.2d 675 (1940) (hearing denied); Corso v. Security-First Nat'l. Bank, 171 Cal. App.2d 816, 342 P.2d 56 (1959) (hearing denied); Hays v. Clark, 175 Cal. App.2d 565, 346 P.2d 448 (1959), all of which hold that a party who is unavailable because he is disqualified from testifying under the Dead Man Statute, CAL. CODE CIV. PROC. § 1880(3), may introduce his own deposition taken by the decedent prior to death. However, Kay v. Laventhal and McKee v. Lynch were both decided at a time when CAL. CODE CIV. PROC. §§ 2022 and 2032 permitted either party to introduce the deposition of any party without regard to the unavailability of the deponent at the trial. Under CAL. CODE CIV. PROC. § 2016, which became effective on January 1, 1958, a party-deponent may now introduce his own deposition only if he is physically unavailable or if the court finds certain undefined "exceptional circumstances." Neither the *Corso* case nor the *Hays* case discusses the effect of the enactment of Section 2016. Although both cases were decided after Section 2016 became effective, both rely only on the authority of the *Laventhal* and *McKee* cases. Query: Is unavailability because of disqualification a ground for the admission of a deposition independent of the grounds specified in Section 2016?

[8] The Law Revision Commission has omitted this exception to the hearsay rule from its revision of the URE. (See the tentative recommendation of the Commission relating to Rule 63(4) *supra.*) However, under the Commission's revision of the URE, the admissibility of declarations against interest—Rule 63(10)—is conditioned on the unavailability of the declarant. Thus, the rulings made in the illustrations given in the text would be the same if the exception involved were the revised exception for declarations against interest.

Similar results would be called for, if, in each case, we assume that X was disqualified to be a witness under Rule 17. (*E.g.*, since revealing his confidence, X has become so insane that he cannot now testify.)

It is believed, therefore, that the URE idea that a declarant may be unavailable because of privilege or disqualification possesses merit and does not in any way conflict with the rules and policies respecting matters inadmissible because of privilege.

The purpose of the second paragraph of Rule 62(7) is to establish safeguards against sharp practices and, in the words of the Commissioners on Uniform State Laws, to assure "that unavailability is honest and not planned in order to gain an advantage." [9] Hence this paragraph provides that physical absence of a person or his incapacity to testify do not make that person "unavailable" insofar as proponent is concerned, if such absence or incapacity is "due to procurement or wrongdoing of the proponent . . . for the purpose of preventing the [person] . . . from attending or testifying" or is due to "the culpable neglect of" proponent. For example, if on the day of the hearing, proponent gives declarant drugged whiskey for the purpose of preventing him from testifying, proponent may not prove declarant's out-of-court statement under any hearsay exception which requires declarant's unavailability.

Moreover, if at the hearing the whereabouts of a declarant is unknown, but it appears that proponent had notice of declarant's intended disappearance and had opportunity to place him under subpoena but neglected so to do, this would probably be regarded as a case of declarant's absence due to proponent's "culpable neglect" and, as such, a case in which proponent could not make use of any hearsay exception requiring declarant's unavailability.

In such a case, the "culpable neglect" of proponent is, of course, neglect with reference to formal process to secure declarant's attendance as witness. Probably no other kind of neglect is intended by the expression "culpable neglect." Nevertheless, the expression is somewhat ambiguous. It might be broadly construed to mean any neglect of a legal duty by the proponent which has caused the declarant to become "unavailable." Moreover, the language of the paragraph does not expressly require that the neglect be related directly to securing declarant's attendance as a witness. For example: There is an intersection collision between cars driven by A and B. C, a passenger in A's car, is killed in the accident. It is conceded that B was negligent and the issue is whether A was contributorily negligent. If "culpable neglect" is given its broadest interpretation, B may not introduce C's dying declaration under subdivision (5) of Rule 63, because C's absence is due to B's "culpable neglect."

This broad interpretation of "culpable neglect" was probably not intended. However, to clarify the meaning of the paragraph, it is recommended that the paragraph be revised to read:

> But a witness is not unavailable (a) if the judge finds that his exemption, disqualification, inability or absence is due to procurement or wrongdoing of the proponent of his statement for the

[9] UNIFORM RULE 62 Comment.

purpose of preventing the witness from attending or testifying, (b) if the judge finds that the proponent because of culpable neglect failed to secure the presence of the witness at the hearing, or (c) if unavailability is claimed under clause (d) of the preceding paragraph and the judge finds that the deposition of the declarant could have been taken by the exercise of reasonable diligence and without undue hardship, and that the probable importance of the testimony is such as to justify the expense of taking such deposition.[10]

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[10] The Committee appointed by the Supreme Court of New Jersey to study the Uniform Rules of Evidence (referred to hereinafter as the N. J. Committee) recommended approval of Rule 62 but also recommended that subdivision (3) of Rule 62 be transferred to Rule 1. REPORT OF THE COMMITTEE ON THE REVISION OF THE LAW OF EVIDENCE TO THE SUPREME COURT OF NEW JERSEY 117 (1955) [hereinafter cited as N. J. COMMITTEE REPORT]. The Commission appointed by the New Jersey Legislature to study the law of evidence (hereinafter referred to as N. J. Commission) also recommended that subdivision (3) of Rule 62 be transferred to Rule 1 and recommended that the remainder of Rule 62 be modified to read as follows:

As used in Rule 63 and its exceptions and in the following rules,

(1) "Statement" means not only an oral or written expression but also nonverbal 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.

* * * * *

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

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

(6) "A business" as used in exceptions (13) *or (14)* shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(7) "Unavailable as a witness" *means that (a) the witness is dead, or (b) the witness is beyond the jurisdiction of the court's process to compel appearance, or (c) the witness is unable to testify because of then existing disability, or (d) the proponent of the statement is unable, despite due diligence, to procure the attendance of the witness by subpoena.* * * *

But a witness is not unavailable * * * *when the condition was brought about by the* procurement, * * * wrongdoing * * * *or* culpable neglect of * * * *the* party *offering his statement,* or *when his* * * * deposition * * * could have been *or can be* taken by the exercise of reasonable diligence and without undue hardship, and * * * the probable importance of the testimony is such as to justify the expense of taking such deposition. [* * * indicates omission from text of URE Rule; *italics* indicates addition to text of URE Rule.]

REPORT OF THE COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE 53-54 (1956) [hereinafter cited as N. J. COMMISSION REPORT]. On the other hand, the Utah Committee on the Uniform Rules of Evidence (hereinafter referred to as Utah Committee) recommended in its report to the Utah Supreme Court the approval of this rule without substantial change. FINAL DRAFT OF THE RULES OF EVIDENCE 33 (1959) [hereinafter cited as UTAH FINAL DRAFT].

RULE 63—HEARSAY EVIDENCE EXCLUDED—EXCEPTIONS

Rule 63 (Introductory Clause)—Elements of Rule

Rule 63 defines hearsay evidence as "evidence of a statement which is made other than by a witness while testifying at the hearing [which is] offered to prove the truth of the matter stated . . . ." The rule provides that such evidence is inadmissible, thus having the effect of restoring the hearsay rule as a general principle of exclusion. As such this rule must, of course, be regarded as an exception to the general provision of Rule 7 that "all relevant evidence is admissible."

In order to appraise this definition of Rule 63 and compare it with existing California law, it is necessary to break the definition down into its several elements and analyze these elements separately.

"Statement . . . Made Other Than By a Witness While Testifying . . ."

The distinction between a statement made by a witness while testifying—an in-court statement—and a statement otherwise made—an extrajudicial, out-of-court statement—is the essence of the traditional hearsay rule. Given an in-court statement, the speaker is under oath and is subject to cross-examination by the party against whom he appears. On the other hand, with reference to an out-of-court statement, the speaker is free of the restraint of an oath and the check of cross-examination. The basic idea of the hearsay rule is that this restraint and this check are so important that the out-of-court statement cannot be used as evidence. Hence, the speaker must be brought into court to make his statement on the witness stand under oath and subject to cross-examination. The importance of cross-examination and the wisdom of recognizing the right to it are thus succinctly stated by Professor Falknor:

> The utility of an intelligent and carefully planned cross-examination lies in its efficacy in bringing to light deficiencies, first, in the witness' observation or in his opportunity or capacity for observation of the facts about which he testifies; second, in the quality of his present recollection of the impressions resulting from that observation; third, in his testimonial expression or narration as a faithful, accurate and complete reproduction of his present recollection; and finally, in the veracity of the witness, that is to say, his determination—at least his willingness and desire—to faithfully, accurately and completely communicate to the tribunal his present recollection.
>
> In respect to an out-of-court assertion offered as proof of the truth of the matter asserted, danger may lie in any or all of these directions. Though the tenor of the declaration may imply otherwise, it is entirely possible that a cross-examination of the declarant would disclose that he either did not see or could not have seen the event to which the declaration relates; moreover, it is not impossible that at the time he made the declaration he had no

> reliable recollection of what he had seen. Then too, there is grave danger either of outright distortion or of incompleteness in such a second hand communication of the declarant's recollection to the tribunal; and finally, he may have been consciously lying.[1]

The traditional hearsay rule recognizes the basic superiority of the in-court statement over the out-of-court statement by providing that, in general, only the former is acceptable. This ancient wisdom is incorporated in and validated by the definition of hearsay stated in Rule 63.

"Offered to Prove the Truth of the Matter Stated . . . ."

Rule 63 preserves the orthodox doctrine that the extrajudicial statement is hearsay only when offered to prove the truth of the matter stated. The rationale here is that if the mere *making* of the statement is a relevant circumstance so that no reliance need be placed upon the truth of the statement, the credibility of the speaker is not involved and a cross-examination to test his credibility is not necessary; all that is needful is cross-examination of the witness who testifies that the speaker made the statement. There are manifold applications of this rationale in admitting the testimony of a witness who testifies to what another has said and in admitting various writings.[2] The rationale is recognized and accepted in California.[3]

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[1] Falknor, *Silence as Hearsay,* 89 U. PA. L. REV. 192, 194-95 (1940).

[2] 6 WIGMORE, EVIDENCE § 1766.

> "The true nature of the Hearsay rule is nowhere better illustrated and emphasized than in those cases which fall without the scope of its prohibition. The essence of the Hearsay rule is the distinction between the testimonial (or assertive) use of human utterances and their non-testimonial use.
>
> "The theory of the Hearsay rule . . . is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but *without reference to the truth of the matter asserted,* the Hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received, according as it has any relevancy in the case; but if it is not received, this is in no way due to the Hearsay rule.
>
> "For example, in a prosecution against a defaulting embezzler Doe, it is desired to show that, after leaving his employment, he concealed himself and passed under a false name; here his statement, 'My name is Roe,' is not offered to evidence that his name was in truth Roe; on the contrary, it will be shown that his name was Doe; and the statement is not used as hearsay. Or, on an issue of insanity, it is offered to show that the party said, 'I am the Emperor of Africa'; here the utterance is not offered as evidence that he was in truth the Emperor, but, on the contrary, as circumstantially indicating his mental aberration. Again, in an action upon a warranty of a horse, it is offered to show that the defendant at the time of the bargain asserted that the horse was only four years old; here the plaintiff will immediately proceed to prove that the horse is nevertheless twelve years old; he has not offered the defendant's statement with any view to using it as evidence of its truth, but with just the contrary purpose. Or (to take an illustration of Lord Abinger's [in Fraser v. Berkeley, 7 C. & P. 625]) suppose, on an issue of mitigation of damages in an action for battery, the defendant offers to prove that the plaintiff, just before the assault, provoked the defendant by asserting that he was a liar; here the defendant by no means desires the jury to take this utterance as evidence of the truth of the fact asserted; he would be much disappointed if they should accept it in that aspect; his purpose is merely by this utterance to evidence the anger which he naturally felt upon hearing it.
>
> "The prohibition of the Hearsay rule, then, *does not apply to all words or utterances merely as such.* If this fundamental principle is clearly realized, its application is a comparatively simple matter. The Hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as *assertions to evidence the truth of the matter asserted." Id.* at 177-78.

[3] Smith v. Whittier, 95 Cal. 279, 30 Pac. 529 (1892) (action for negligent operation of elevator; evidence of information given defendant as to how to operate elevator admitted). The court stated: "Whether in fact such information was or was not correct is immaterial for the purpose of determining its admissibility; and hence it is no objection to its admission that it was not given under the sanction of an oath, or that the opposite party had no opportunity of cross-examining the

"Evidence of a Statement . . . ."

Rule 63 defines "hearsay evidence" in terms of "evidence of a *statement.*" (Emphasis added.) This is conventional.[4] It is also apparently simple, but the appearance of simplicity is deceiving. Truly the matter is complex and, as we shall now attempt to demonstrate, the complexity springs from the ambivalence of the word "statement."

Obviously, words (verbal conduct) can and usually do constitute a statement. Obviously, too, some conduct other than words (nonverbal conduct) can constitute a statement. No one would contend that the sign language of the dumb is any less a statement for hearsay purposes than the verbal assertions of those possessed of vocal powers. But what of conduct which is not intended to be communicative? Under what circumstances, if any, should this kind of conduct be thought of as a "statement" for hearsay purposes? These questions lead us into a marginal area—the "Borderland of Hearsay"[5] in Professor McCormick's colorful phrase—which has been and still is the source of much confusion and uncertainty, both in California and elsewhere.

First, we shall explore this area as it exists today. Then, we shall note what changes would be effected by the adoption of the Uniform Rules. Lastly, we shall attempt to evaluate the wisdom of these changes.

A hypothetical case will illustrate the problem: A man is murdered. A migratory laborer is arrested as the suspected culprit and is charged with murder. At the trial he wishes to fasten guilt upon a boarder in the home of the deceased. In developing this defense, defendant wishes to show that on the day following the murder, the boarder quit his job, "jumped" his board bill and fled to Mexico. Does the conduct of the boarder constitute a *statement?* Today, most courts say that such conduct amounts to an "implied assertion" by the boarder of his own guilt and hold evidence of such conduct inadmissible whenever evidence of an equivalent express assertion would be inadmissible. Under this rationale, the conduct of the boarder in our case amounts to an "implied confession" and for evidentiary purposes it is equated with an express confession. As the California court puts it in *People* v. *Mendez,*[6] "circumstances of flight are in the nature of confessions by such third persons and are, therefore, in the nature of hearsay evidence."[7] Or as Baron Parke stated in a famous English case: "[P]roof of a particular fact, . . . which is relevant only as implying a statement . . . is

informant. The truth of the information is a distinct issue, and must be established by competent evidence; but upon the theory that the information was correct, the plaintiff, in the present instance, had the right to show that the defendants had received such information, and thus obviate any claim that might be made by them that they had exonerated themselves from liability by procuring the elevator to be constructed by a competent and reputable manufacturer." *Id.* at 293, 30 Pac. at 532.

See also Liebrandt v. Sorg, 133 Cal. 571, 65 Pac. 1098 (1901) (action for breach of promise to marry; evidence plaintiff told friends of marriage contract held admissible to show plaintiff's humiliation, inadmissible to show the marriage agreement).

[4] Consider, for example, Professor McCormick's definition: "Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." MCCORMICK, EVIDENCE § 225 at 460 (1954) [hereinafter cited as MCCORMICK, EVIDENCE].

[5] McCormick, *The Borderland of Hearsay,* 39 YALE L.J. 489 (1930).

[6] 193 Cal. 39, 223 Pac. 65 (1924).

[7] *Id.* at 52, 223 Pac. at 70.

inadmissible in all cases where such a statement . . . would be of itself inadmissible . . . .''[8] The issue in that case was one of sanity. The evidence in question was proof that a letter was written to decedent consulting him on business matters. The evidence was offered to show that the writer of the letter believed the decedent to be sane. Baron Parke held the conduct of the writer constituted an ''implied statement'' that the deceased was sane and that the admissibility of evidence of this conduct should stand on the same basis as an explicit statement by him that deceased was sane. Other instances suggested by Baron Parke and his colleagues as appropriate for application of this implied-statement technique are the following: (1) proof that underwriters paid the amount of a policy as evidence of the loss of the insured ship; (2) proof of payment of a wager as evidence of the happening of the event which was the subject of the wager; (3) proof of the election of a person to office as evidence of his sanity; (4) on a question of seaworthiness of a ship, proof that an experienced captain examined the ship and then embarked on her with his family.[9]

In much the same vein is a California will contest case, *Estate of De Laveaga.*[10] Contestants offered evidence tending to show that the family of decedent engaged in conduct indicative of their belief in her incompetence. Of this evidence the court said: ''[T]he manner in which a person whose sanity is in question was treated by his family is not, taken alone, competent substantive evidence tending to prove insanity, for it is a mere extrajudicial expression of opinion on the part of the family . . . .''[11] This again appears to be the implied-assertion technique of Baron Parke.

In all these cases it is more or less clear that the relevancy of the evidence requires reliance upon the belief of the actor. (Assume in any one of the cases that the mind of the actor was blank; his conduct is then irrelevant; therefore it is relevant only by way of supplying an inference as to his belief.) It is equally clear that the actor did not intend that his conduct should serve as a substitute for words in proclaiming his belief. (For example, consider the illustration suggested by Baron Parke where proof of the election of a person to office is offered as evidence of his sanity. In voting for a candidate you, of course, believe him to be sane. Your purpose, however, is not to proclaim your belief in his sanity. Your objective is to get him elected.) The idea underlying the implied-assertion technique seems to be that, although the conduct is nonassertive, the belief of the actor is involved and we therefore should treat the situation *as if* a statement had been made or intended.

The implied-statement cases have been decided for the most part by the courts with scant analysis and a minimum of discussion. Although the judicial treatment of the problem has been niggardly, that of the

[8] Wright v. Tatham, 7 Adol. & Ellis 313, 388-89, 112 Eng. Rep. 488, 516-17 (Ex. 1837).
[9] *Id.* at 386-89, 112 Eng. Rep. at 515-17; McCORMICK, EVIDENCE § 229.
[10] 165 Cal. 607, 133 Pac. 307 (1913).
[11] *Id.* at 624, 133 Pac. at 314.

commentators has been lavish.[12] So far as the many learned articles on the subject can be reduced to anything resembling a consensus, we may say that there is substantial agreement on the following analysis of the idea that conduct is hearsay: If a person states in words what he has experienced we must, if we are to believe him, rely upon (a) his perception at the time of the experience, (b) his present recollection of what he then perceived, (c) his narrative skill in portraying his recollection and (d) his veracity or conscious effort to state correctly what his recollection indicates. These faculties of this person need to be subjected to the test of cross-examination and the sanction of perjury penalties. If, therefore, the statement is an out-of-court statement, it cannot be received in evidence precisely because it is an out-of-court statement. The person must be brought into court to make his statement as a witness. However, if the person acts in a way that indicates his belief in a past experience, but not intending by his act to communicate his belief, his veracity cannot be involved nor can his narrative skill be involved because intent to communicate is absent. Yet, his perception and his recollection are involved if his conduct is relevant only as evincing his belief. This is so because his belief rests upon both the accuracy of his perception at the time of the original experience and the accuracy of his recollection of that perception. Faculties of perception and recall usually need to be checked by cross-examination. Evidence of out-of-court conduct involving reliance on these faculties therefore, as Professor Morgan puts it, "approaches perilously near to conventional hearsay."[13]

It must not be thought, however, that the implied-statement technique is always invoked in all situations to which it logically applies. In California, as elsewhere, it is sometimes either overlooked or disregarded. The outstanding local illustration of this phenomenon is in bookmaking cases. While officers are raiding the suspected establishment the phone rings, the officers answer, the speaker places a bet. Under the reasoning of Baron Parke this should be treated, it would seem, as an implied assertion by the speaker of his belief as to the character of the establishment. Nevertheless, the California courts have thus far rejected the hearsay objection to such evidence[14] despite the protest of one judge to the effect that the evidence is "pure hearsay"

[12] Brown, *The Hearsay Rule in Arizona*, 1 ARIZ. L. REV. 1 (1959); Cross, *The Scope of the Rule Against Hearsay*, 72 L. Q. REV. 91 (1956); Donnelly, *The Hearsay Rule and its Exceptions*, 40 MINN. L. REV. 455 (1956); Falknor, *The "Hear-say" Rule as a "See-Do" Rule: Evidence of Conduct*, 33 ROCKY MT. L. REV. 133 (1961); Falknor, *"Indirect" Hearsay*, 31 TUL. L. REV. 3 (1956); Falknor, *Silence as Hearsay*, 89 U. PA. L. REV. 192 (1940); McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948); Morgan, *Some Suggestions for Defining and Classifying Hearsay*, 86 U. PA. L. REV. 258 (1938); Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1 (1937); Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138 (1935); Powers, *The North Carolina Hearsay Rule and the Uniform Rules of Evidence*, 34 N.C. L. REV. 295 (1956); Rucker, *The Twilight Zone of Hearsay*, 9 VAND. L. REV. 453 (1956); Sellgman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146 (1912); Wheaton, *What is Hearsay?*, 46 IOWA L. REV. 210 (1961); Wright, *Uniform Rules and Hearsay*, 26 U. CINC. L. REV. 575 (1957); Note, 24 N.C. L. REV. 274 (1946); Note, 9 RUTGERS L. REV. 555 (1955); Comment, 4 VILL. L. REV. 117 (1958).

[13] Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1143 (1935).

[14] People v. Allen, 113 Cal. App.2d. 593, 248 P.2d 474 (1952); People v. Lewis, 91 Cal. App.2d 346, 204 P.2d 919 (1949); People v. Klein, 71 Cal. App.2d 588, 163 P.2d 71 (1945); People v. Radley, 68 Cal. App.2d 607, 157 P.2d 426 (1945); People v. Barnhart, 66 Cal. App.2d 714, 153 P.2d 214 (1944); People v. Joffe, 45 Cal. App.2d 233, 113 P.2d 901 (1941); People v. Reifenstuhl, 37 Cal. App.2d 402, 99 P.2d 564 (1940).

and that it is "judicial stupidity" to relax the hearsay rule "just to uphold the conviction of a bookmaker." [15]

It may be that rejection of the implied-statement technique in situations to which it logically applies is prompted by a more or less conscious realization of the potential the present rule possesses for producing absurd results. For example, suppose the issue concerns the state of the weather at a particular time. Evidence is offered that persons were seen carrying umbrellas or wearing overcoats or that they were in shirt sleeves. With impeccable logic it may be urged that we must treat the conduct of these persons as statements to the effect that the weather was inclement or cold or hot.[16] If the issue concerns the time of day and a witness testifies he looked at a clock which indicated 10:00 a.m., it may be argued that we must treat this as an assertion by the manufacturers of the clock.[17] The potential which the implied-assertion technique possesses for reduction to absurdities such as these may well explain those cases (such as the California bookmaking cases) in which the courts simply refuse to recognize it. It cannot be denied, however, that confusion and uncertainty result from such a "now it's hearsay now it's not" approach, as, for example, recognizing the flight of a third person as hearsay and refusing to recognize a "business" call to the alleged bookmaker as hearsay.

Thus far we have partially explored the "Borderland of Hearsay" by noting the hearsay aspects of certain nonverbal, nonassertive action or conduct. The exploration, however, is as yet only partial because there remains for consideration another species of conduct, namely, inaction or failure to act. Professor Falknor states this phase of the problem neatly by posing the following questions:

> What of negative conduct, i.e., inaction? Particularly, what of silence, the failure to speak or write? Suppose, for instance, on an issue as to the quality of goods sold, it appearing that the particular goods were part of a larger lot, the remainder of which had been sold to other customers, the seller proposes to show that no complaints as to quality were received from these other customers. Is the offered evidence inadmissible hearsay? Or, suppose on an issue as to the service of a summons, it is proposed to be shown that the person alleged to have been served never mentioned the writ to the members of his immediate family. May the alleged service be negatived in this fashion against an objection invoking the hearsay rule? [18]

Professor Falknor points out that the judicial treatment of problems of the type posed has been both superficial and dogmatic; that "in none of the cases do we find anything like an adequate discussion of the problem presented"; that in "none is apt authority cited, and in nearly all, the result rests on nothing more than the *ipse dixit* of the

[15] Justice Doran in People v. Barnhart, 66 Cal. App.2d 714, 723, 724, 153 P.2d 214, 219 (1944) (concurring opinion).

[16] Professor Falknor suggests that such evidence would have to be excluded under the orthodox rule as to hearsay conduct. Falknor, *Silence as Hearsay*, 89 U. PA. L. REV. 192, 196 (1940). But see MCBAINE, CALIFORNIA EVIDENCE MANUAL § 742 (2d ed. 1960) [hereinafter cited as MCBAINE].

[17] See Professor Morgan's analysis of the hearsay aspects of testimony based on such mechanisms as clocks, sundials and scales, in Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1145 (1935).

[18] Falknor, *Silence as Hearsay*, 89 U. PA. L. REV. 192, 193 (1940).

court that the evidence is or is not hearsay."[19] His own analysis is as follows:

> In each of the supposed cases it is clear that the relevancy of the offered evidence depends upon inferences from failure to speak to the belief of the silent individual as to the relevant fact (in the first illustration, that the goods sold were of satisfactory quality, in the second that he had not been served) to the relevant fact itself.
>
> * * *
>
> Theoretically, then, evidence of silence when proposed as the basis of an inference to the belief of the silent individual, this belief to form the basis of a further inference to the fact believed, will run afoul of the hearsay rule. And such has been the holding in most of the cases where the hearsay objection has been raised.[20]

In California, however, the holding was otherwise in the only case we have found presenting the problem. The case is *People* v. *Layman*.[21] Defendant was prosecuted for committing perjury in an action he instituted against a railway company. In the latter action he testified he received injuries while pushing his stalled automobile away from streetcar tracks. The evidence of the prosecution in the perjury case was (1) testimony of all the motormen on the line that no such accident occurred, (2) testimony of train dispatchers that they received no report of such an accident. Defendant contended that the testimony of the train dispatchers was received in violation of the hearsay rule. This contention was rejected by the court for the following reasons:

> Appellant complains that it was error, in violation of the hearsay rule, to permit the train dispatchers to testify that they had received no report of an accident. It was not hearsay, but direct proof, of course, of a fact, the fact being that no report had been turned in. This fact was material because of the presumption that the ordinary course of business had been followed . . .; that is, that if there had been an accident it would have been reported to the dispatchers.[22]

Professor Falknor criticizes the case on the following grounds:

> Despite the court's confidence that the evidence was not hearsay, it seems plain that the problem is just as clearly presented as in any of the silence cases, and it is difficult to see how the statute which merely goes to the extent of recognizing that in the ordinary course of business an accident will be reported, disposes of the hearsay question.[23]

Such, then, at least in the broad outline, is the borderland of conduct-hearsay. It has developed as an area of complexity and confusion despite seemingly clear-cut and authoritative definitions of hearsay. The ambiguity of such definitional terms as "statement" or "assertion" has contributed to the development.

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[19] *Id.* at 209.
[20] *Id.* at 193.
[21] 117 Cal. App. 476, 4 P.2d 244 (1931).
[22] *Id.* at 478, 4 P.2d at 245-46.
[23] Falknor, *Silence as Hearsay*, 89 U. PA. L. REV. 192, 213 (1940).

The remedy in the Uniform Rules for the confusion and uncertainty in this zone of trouble is to define the term "statement" in such a way as to eliminate the pre-existing ambiguity of the term. Rule 63, it will be recalled, defines hearsay in terms of "evidence of a statement." This is to be read in connection with Rule 62(1) which defines "statement" as follows:

> "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.

When this definition is considered against the background of the conduct-hearsay confusion, the problem to which it is directed, two significant guides for construing it emerge: (1) The principle *expressio unius est exclusio alterius* should apply and the definition should be regarded as exclusive, and (2) the word-substitute intention provision should be strictly construed. Only such situations as sign-language, symbols and signals *obviously* intended as substitutes for speech should be held to constitute statements within the sense of the definition. In all other cases, absent any special or unusual circumstances manifesting intent to communicate by conduct, no such intention should be inferred.[24]

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[24] Professor McCormick was on the committee which prepared the Uniform Rules for the National Conference of Commissioners on Uniform State Laws and Professor Morgan was adviser to the Committee. See *Prefatory Note* to UNIFORM RULES (1953). Both have advocated this remedy for the conduct-hearsay problem. See 2 MORGAN, BASIC PROBLEMS OF EVIDENCE 221 (1957), where Professor Morgan states that: "it would be a boon to lawyers and litigants if hearsay were limited . . . to assertions . . . by words or substitutes for words. . . . [This] would exclude evidence of a declarant's conduct offered to prove his state of mind and the facts creating that state of mind if the conduct did not consist of assertive words or symbols.

"Professor McCormick states that the 'path to improvement' is to 'limit hearsay to assertions, namely to statements, oral or written, or acts intended to be communicative, such as signals and . . . sign-language. . . . Other acts and conduct, including silence, when offered to show belief to prove the fact believed, would be classed (as many decisions have classed it) as circumstantial evidence.' " *Ibid.* And see MCCORMICK, EVIDENCE § 229, at 479.

Given the participation of Professors McCormick and Morgan in drafting the Uniform Rules, their views, above stated, are a strong indication of the purpose and spirit of Rule 62(1) and bear out the suggestion in the text as to how that rule should be construed.

Since the promulgation of the Uniform Rules commentators have suggested that Rule 62(1) has the meaning suggested in the text. Thus, Professor Falknor, in *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L REV. 43, 45 (1954), said that "it seems very clear from this language [of Rule 62(1)] that it is intended to abrogate what is doubtless the orthodox rule which excludes evidence of conduct, though non-verbal and non-assertive, if its relevancy depends upon inferences from the conduct to the belief of the actor to the truth of the fact believed." And in McCormick, *Hearsay*, 10 RUTGERS L. REV. 620 (1956), Professor McCormick said:

"The definition of hearsay is the standard one, that is, in effect, an out-of-court 'statement' offered to prove the truth of the matter stated (Uniform Rule 63). But the definition of 'statement' appears to settle in a desirable way a controversial question of theory that has exercised the law writers more than it has the courts. This is the question whether evidence of a man's acts or inaction, tendered to show his belief that a fact is true, offered to prove the truth of the fact, is to be classed as hearsay. Thus a letter from a vicar of a parish to a country gentleman suggesting that a business matter in dispute between him and the parish be submitted to arbitration is offered on the issue of sanity as evidence that he believed the gentleman to be sane. Again, on a claim by a customer against a restaurant for injury due to the serving of unwholesome beans, the defendants on the issue of unwholesomeness tenders [sic] evidence that no other customers who ate the beans made any complaint. Such conduct, under the definition, not being 'intended as a substitute for words' in expressing the matter for which it is offered, would not be a 'statement' and hence not hearsay. This leaves it to be handled as circumstantial evidence, and to be admitted or excluded according as the trial judge finds that its probative value is or is not sufficiently substantial to outweigh such dangers as the likelihood of confusing the issues or misleading the jury." *Id.* at 620-621.

Given the rigid interpretation which an understanding of the background and spirit of the rule requires, the Uniform Rules would operate significantly in removing the hearsay taboo from much evidence hitherto excluded thereunder. Under Rules 63 and 62(1), when evidence of the conduct of a person is offered and objected to as hearsay, the judge must determine whether the person intended his conduct as a substitute for words expressive of a matter. If the judge finds that the person did not so intend, that is the end of the matter so far as the hearsay rule is concerned. It is immaterial that the relevancy of the conduct requires reliance on the person's belief and that he has employed his faculties of perception and recollection in formulating his belief. In other words, evidence of nonassertive conduct is not inadmissible under the hearsay rule (Rule 63) for Rules 63 and 62(1) so define hearsay that such conduct is excluded from the concept. Thus, under Rule 7 it is admissible unless some rule other than Rule 63 operates to exclude it.

Is this desirable? What can be said for a new approach admitting evidence of nonassertive conduct (such as flight of a third person to show his guilt) which was hitherto excluded as hearsay? Two factors are of importance in this connection. In the first place, the very fact that the conduct is nonassertive is of significance. As Professor Falknor has so well argued, this is a sound reason for considering nonassertive conduct more reliable than assertive conduct. As he states it:

> [N]on-assertive conduct, although its relevancy depends upon inferences from the conduct to the belief of the actor to the fact believed, is obviously entitled to more favorable appraisal than an assertive utterance. This is so because, by hypothesis, the actor by his conduct did not intend to express or convey an idea. Thus, the actor's veracity (or lack of it) is without relevancy to the trustworthiness of the evidence, and the lack of opportunity to cross-examine the actor becomes definitely less significant. For example, as already noted, evidence of flight of a third party offered in exculpation of the defendant in a criminal action has generally been excluded, the courts in these cases having been content, without very much discussion, to assimilate this conduct to an extra-judicial confession of the third party and thus to exclude it as "pure hearsay". Yet, less superficial treatment of the problem makes it quite clear that the flight evidence has considerably more to be said for it than the out-of-court confession. The confession is assertive, intended by the declarant to convey the idea of his guilt. Upon his veracity, therefore, depends the trustworthiness of the confession. But in the case of flight, nothing to the contrary appearing, it may safely be assumed that the actor fled, not to express or convey the idea of his guilt, but to escape detection and punishment. The conduct being non-assertive, the actor's veracity is not involved in a rational appraisal of the trustworthiness of the evidence.[25]

In the second place, it is significant that, although the relevancy of the conduct requires reliance on the actor's belief, that belief is vouched

[25] Falknor, *Silence as Hearsay*, 89 U. PA. L. REV. 192, 195 (1940).

by the actor's conduct. The argument predicated upon this factor, as stated by Professor Falknor, is:

> The argument, then, is that if the actor was sufficiently satisfied with his observation and recollection of the relevant event or condition to predicate action important to himself upon his belief in that event or condition, there is enough to be said for the trustworthiness of his belief, though uncross-examined, to permit it to be presented to the tribunal as a basis of a possible inference to the event or condition.[26]

It is not enough, however, to conclude that evidence of nonassertive conduct should no longer be barred as *hearsay*. There remains the question whether such evidence should be barred when it reflects the belief or conclusion of an actor whose testimony asserting his belief would be inadmissable in a judicial proceeding.

It will be remembered that the logical chain of reasoning by which evidence of an actor's nonassertive conduct is said to be admissable is (1) that the actor's conduct reflects his *belief* as to the existence or nonexistance of a fact and (2) that such belief tends to establish such existence or nonexistence. Yet we do not always permit a witness on the stand to testify to his belief that a fact is true or not true as the basis for an inference to that effect. Thus, under present California law [27] if a witness is to give direct testimony concerning a material or relevant matter he must possess personal, first-hand knowledge of that matter and, if the matter is such that special expertise is required, the witness must possess the requisite experience, training or education. These commonplace principles are carried forward in that part of Rule 19 of the Uniform Rules which reads as follows:

> As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required.

This language has reference to witnesses in court. But what of hearsay declarants and those engaging in nonassertive conduct? To what extent should knowledge and expertise be required of such declarant? There is, of course, no problem when the declarant has made a *statement* in the sense of Rule 62(1) and that statement does *not* fall within one of the exceptions of Rule 63. Such a statement is inadmissible as hearsay; it need not concern us, therefore, that perchance the declarant lacked knowledge or special skill. Likewise, there is no problem requiring any general amendment of the Uniform Rules when the statement is admissible under any one of the subdivisions of Rule 63. So far as knowledge and expertise are then to be made requirements, this is done by the subdivision in question—as in subdivisions (1), (3), (4), (9), (12).

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[26] *Id.* at 203. This, of course, is a variable factor depending in each case upon the importance to the actor of the conduct in which he engages.

[27] CAL. CODE CIV. PROC. § 1845 provides: "A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible."

However, we do have a special problem requiring special handling when we consider the area of conduct which is now excluded as hearsay but which under Rules 62(1) and 63 would no longer come under the hearsay ban. Should we accept evidence of conduct indicative of the actor's belief when he had no knowledge or, if required, no expertise? Formerly, the possibility that the actor was not knowledgeable or skilled was of no significance because in any event the evidence was to be excluded as hearsay. Today, however, if we are to lift the hearsay ban we must face up to the question whether we should not impose conditions respecting knowledge and expertise. Reconsidering some of the illustrations, *supra*, under the new view: The ship captain's conduct is not hearsay, but should not a foundation qualifying him as an expert be required? Again, payment by the underwriter is not hearsay, but should it not be excluded for want of personal knowledge?

We believe that restrictions in terms of personal knowledge and expertise are desirable. We propose, therefore, that an amendment be made to Rule 19 of the Uniform Rules to deal with this matter. Such an amendment should parallel insofar as feasible the structure and phraseology of Rule 19 and should read as follows:

> As a prerequisite for evidence of the conduct of a person reflecting his belief concerning a material or relevant matter but not constituting a statement as defined in Rule 62(1), there must be evidence that the person had at the time of his conduct personal knowledge of such material or relevant matter or experience, training or education, if such be required.

If the amendment is accepted, Rule 19 should then be regarded as an integral part of the group of Uniform Rules relating to hearsay evidence.

If this amendment to Rule 19 is made, conduct indicative of belief respecting ordinary matters and based on personal knowledge will still be admissible—for example, flight as evidence of guilt. (Conceivably, however, rare cases may occur in which the fleeing person had no knowledge of his culpability.) On the other hand, conduct indicative of lay opinion on professional matters will be inadmissible and conduct indicative of expert opinion will require a foundation showing the expertise of the actor.

Conclusion

It is reasonable to conclude that evidence of nonassertive conduct which is based on the actor's observations or expert opinion, even though classified hitherto as hearsay and even though possessing some of the dangers of typical hearsay, is nevertheless relatively more trustworthy—sufficiently so that it should now be treated like any other non-hearsay evidence. It is recommended, therefore, that the opening paragraph of Rule 63 and Rule 62(1) of the Uniform Rules be adopted in California.[28]

[28] The N. J. Committee, N. J. Commission and Utah Committee all recommended approval of the opening paragraph of Rule 63 without modification. *Cf.* Finman, *Implied Assertions as Hearsay*, 14 STAN. L. REV. 682 (1962).

Rule 63(1)—Previous Statements of Persons Present and Subject to Cross-examination

Rule 63(1) creates a new exception to the hearsay rule which reads as follows:

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

Here we shall consider the scope of this exception, the extent to which its adoption would change current California law and the desirability of such change. A comparison of the exception with existing law can best be made by considering separately the present admissibility of prior consistent and prior inconsistent statements of a witness.

Prior Consistent Statements of a Witness

Plaintiff calls a witness. On direct examination the witness testifies favorably to plaintiff. Defendant cross-examines. Then on redirect examination, plaintiff wishes to have the witness testify that prior to the trial the witness made statements substantially identical with those given on his direct examination; or plaintiff wishes to introduce a written statement executed by the witness prior to the trial reciting the facts as witness testified them to be on his direct examination. Under what circumstances and conditions may plaintiff proceed in this fashion? Today such evidence is as a general rule inadmissible in California [1] and other jurisdictions.[2] The pretrial statement cannot be used as evidence of the facts asserted nor can it be received as cumulative evidence on the merits to corroborate the witness's testimony on the stand.[3] The evidence is hearsay, being an out-of-court statement not made under oath nor subject to cross-examination.[4] It is immaterial that the statement was made by a person presently a witness, for there is no exception to the hearsay rule for out-of-court statements by witnesses. If such evidence is to be received at all, it must be received under the "recent contrivance" or "recent fabrication" theory—*i.e.*,

[1] People v. Kynette, 15 Cal.2d 731, 104 P.2d 794 (1940); Judd v. Letts, 158 Cal. 359, 111 Pac. 12 (1910); Clark v. Dalziel, 3 Cal. App. 121, 84 Pac. 429 (1906); Note, 3 U.C.L.A. L. REV. 262 (1956).

[2] 4 WIGMORE, EVIDENCE § 1124, p. 194; Note, 3 U.C.L.A. L. REV. 262 (1956).

[3] It is, of course, relevant for this purpose. Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43, 52, n.40 (1954), but, for this purpose, it is hearsay. See note 4, *infra*.

[4] MCCORMICK, EVIDENCE § 39 n.1, § 49, nn.14 & 24; 4 WIGMORE, EVIDENCE § 1132; 6 WIGMORE, EVIDENCE § 1792; WITKIN, CALIFORNIA EVIDENCE § 209 (1958); Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43, 49 (1954).

if the witness is attacked by the suggestion that his story as related on the stand was contrived or fabricated at a certain time as a result of such influences as bribes, threats, fears or the like, it then may be shown that *prior* to the time that the witness is claimed to have tailored his story to the influence, the witness related the facts consistently with the story he tells on the stand. To avoid infringing the hearsay rule, however, the evidence is received (and the jury must be so charged) "not to prove the facts of the case, but as tending to show that the witness has not been controlled by motives of interest and that he has not fabricated something for the purposes of the case." [5]

Application of this doctrine presents several difficulties. For example, it is often a difficult and debatable question whether the attack on the witness is of the requisite kind to invoke the doctrine.[6] This produces questionable rulings which encourage appeals and it presents the hazard of reversal for admitting (or excluding) evidence of a witness's prior consistent assertion.[7] A greater difficulty inheres in the fact that the jury frequently cannot understand the charge which is supposed to direct and limit their consideration of the evidence so as not to violate the hearsay rule.

Such, then, is the current law on the admissibility of evidence of a witness's prior consistent statements. The Uniform Rules treat prior consistent statements quite differently. Under Rule 63 itself such a statement is hearsay, for it is "evidence of a statement which is made other than by a witness *while testifying.*" (Emphasis added.) But under Rule 63(1) it is admissible as "a statement previously made by a person who is present at the hearing and *available for cross-examination.*" (Emphasis added.) Furthermore, such evidence will be admissible "to prove the truth of the matter stated." It should be noted, however, that under Rule 45, the judge has discretion to reject it if he finds that the "probative value" of the evidence "is substantially outweighed by the risk that its admission will necessitate undue consumption of time."

The rationale of Rule 63(1) insofar as prior consistent statements are concerned is this: The statement on the stand is under oath and subject to cross-examination; the safeguards are adequate to let the jury consider it as evidence of the facts. Since the out-of-court statement was identical or substantially identical, there can be no objection to letting the jury consider that also. In short, the fact that a statement was made out of court loses its disqualifying significance when

[5] People v. Kynette, 15 Cal.2d 731, 754, 104 P.2d 794, 806 (1940). The court in People v. Walsh, 47 Cal.2d 36, 41, 301 P.2d 247, 251 (1956), refers to this doctrine as "an exception to the hearsay rule." This is erroneous. See 4 WIGMORE, EVIDENCE § 1132 n.1, for a criticism of a similar statement by the Maryland court. Since the evidence is not received "to prove the facts of the case," the proper theory is that the evidence is not hearsay at all. See note 4, p. 425, *supra*. For discussions of the recent fabrication doctrine, see MCCORMICK, EVIDENCE § 49, pp. 108-9; 4 WIGMORE, EVIDENCE §§ 1128-29; WITKIN, CALIFORNIA EVIDENCE § 696 (1958).

[6] See, *e.g.*, People v. Walsh, 286 P.2d 915 (1955) (opinion of District Court of Appeal holding doctrine inapplicable), *superseded*, 47 Cal.2d 36, 301 P.2d 247 (1956) (doctrine held applicable by Supreme Court). And see Bickford v. Mauser, 53 Cal. App.2d 680, 128 P.2d 79 (1942) (doctrine held applicable, but vigorous dissent by Mr. Justice Peters, and two Supreme Court Justices voted for hearing).

[7] See People v. Doetschman, 69 Cal. App.2d 486, 159 P.2d 418 (1945) (error not reversible error in this case). Compare dissent by Mr. Justice Peters in Bickford v. Mauser, note 6, *supra*.

the speaker repeats the same statement on the witness stand and is subject to cross-examination as to both statements.[8]

The merits of recognizing the new exception so far as prior consistent statements are concerned would be these: First, under the new exception the out-of-court statement would be excluded (if at all) on the sensible ground that it was not worth the time (under Rule 45), rather than on the fallacious ground of no oath and therefore no cross-examination. (When the effect of the evidence would be merely cumulative, it is to be expected that the judge would often exercise his discretion to exclude it. Certainly this would be so if several prior consistent statements were offered.) Second, in lieu of regulating the admissibility of prior consistent statements by the perplexing "recent contrivance" doctrine (under which the evidence is inadmissible in all cases as substantive evidence but admissible in some as nonsubstantive), we would have a simple rule of admissibility of such statements as substantive evidence on the merits in all cases, subject only to the judge's discretion to reject them as merely cumulative. The new rule would be simpler for both judge and jury to understand and apply. It would eliminate the present hazard [9] of reversal for erroneous rulings under the "recent contrivance" exception. Exclusionary rulings under Rule 45, being discretionary under the new system, would seldom be questioned. There is no doubt that it would be an abuse of discretion to exclude the pretrial statement in a situation in which it is admissible today under the recent contrivance doctrine. That, however, could readily be avoided by the trial judge by simply admitting the evidence. Under the new system, admitting a prior consistent statement would rarely, if ever, constitute abuse of discretion.

Prior Inconsistent Statements of a Witness

General Considerations. By way of background, let us first think of a witness who contradicts himself while testifying—a person, that is, who makes inconsistent in-court statements. For example, in an automobile collision case, plaintiff wishes to establish that a particular traffic light was green at a certain time. Plaintiff calls an eyewitness who testifies the light was green. On cross-examination defendant persuades the witness to change his story and assert the light was red. On redirect, plaintiff persuades the witness to restate his original story

[8] See Professor Falknor's statement in Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43 (1954): "In the last analysis, the important question appears to be whether cross-examination of the declarant at the trial will prove adequate as a test of the dependability of an alleged prior out-of-court statement. So far as prior *consistent* statements are concerned, it is difficult to see why cross-examination at the hearing is not fully as adequate as it would have been when the statements were made. Here, by hypothesis (we are considering prior declarations 'consistent with and supporting the witness' admissible testimony), the declarant will have personal knowledge of the event and will remember it. It is to be remarked that while the hearsay ban would be lifted as to prior consistent statements, evidence of such may nevertheless be excluded under Rule 45 which accords to the trial judge, generally, discretion to exclude evidence (though otherwise admissible) if he concludes that its probative value is substantially outweighed by the risk that its admission will '(a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise' the opponent. At least where there has been no substantial impeachment of the witness, his prior consistent statements will add very little, if anything, to his in-court testimony; it is to be expected, consequently, that in the ordinary case the trial judge would be very likely to hold that the very slight increment of probative value arising from prior consistent statements would be more than outweighed by the exclusionary factors mentioned in Rule 45." *Id.* at 52-53.

[9] See note 7, p. 426, *supra*.

that the light was green. Now the jury may dispose of the testimony of this turncoat in any one of three ways. First, they may disregard *all* of the witness's statements, being convinced that nothing that he says on the subject is credible. Second, they may find that the light was green on the basis of the witness's statements on direct and redirect examination. Third, they may find that the light was red on the basis of the witness's statement on cross-examination. All of the witness's statements, though contradictory, are in the record as substantive evidence.[10] Once he has made a statement he cannot withdraw it and require the jury to disregard it. That could be accomplished only by a ruling of the court and the situation under consideration is not an appropriate occasion for an order striking any of the evidence.

Now let us suppose the contradiction is between an in-court statement on the witness stand and a previous out-of-court inconsistent assertion. On direct examination the witness testifies for plaintiff that the light was green. On cross-examination, the defendant shows the witness a pretrial written statement in which the witness asserted that the light was red. The witness admits executing the statement and it is admitted in evidence. Now what possibilities lie before the jury? Is their range of choice the same as that in the previous case where the witness contradicted himself in court? Clearly not. Now (as before) the jury may disregard both statements or (again as before) they may find the light was green on the basis of the in-court statement. They may *not*, however, (as they could before) find that the light was red on the basis of the witness's prior statement to that effect. The statement that the light was red is an out-of-court statement by the witness. As evidence that the light was red the statement is hearsay;[11] there is no exception to the hearsay rule permitting the admission of pretrial statements by witnesses generally.

[10] Zimberg v. United States, 142 F.2d 132 (1st Cir. 1944). "[T]he jury had before it two conflicting statements by Biron of equal force as evidence; one made on direct examination to the effect that there had been no arrangement whereby the weights of his purchases were to be overstated and another on cross examination that such an arrangement had been made. Under these circumstances the jury were at liberty to take either version as correct. That is to say, they could believe either that there had or had not been an agreement between Biron and the defendants to exaggerate weights." *Id.* at 136.

[11] For a full collection of California cases see 3 WIGMORE, EVIDENCE § 1018. See also MCCORMICK, EVIDENCE § 39.

The judicial statement most frequently quoted for the orthodox view that the prior contradictory statement is hearsay, if considered as substantive evidence of the facts stated, is the following from State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939):

"The previous statement was when made and remains an *ex parte* affair, given without oath and test of cross-examination. Important also is the fact that, however much it may have mangled truth, there was assurance of freedom from prosecution for perjury.

"The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and becomes unyielding to the blows of truth. . . .

"There are additional practical reasons for not attaching anything of substantive evidential value to extrajudicial assertions which come in only as impeachment. Their unrestricted use as evidence would increase both temptation and opportunity for the manufacture of evidence. . . .

"The hearsay rule, if considered satisfied as to contradictory statements, would be equally so as to declarations agreeing with the testimony of the witness. . . . We hold that it is not satisfied in either case. . . .

"The foregoing we consider entirely consistent with the single purpose of rules of evidence, which is to disclose the truth. That implies the necessity for safeguards against abuse. The general admission of earlier, extrajudicial statements would, in practice, endanger rather than facilitate the truth-finding process." *Id.* at 362-63, 285 N.W. at 901.

To implement this orthodox view that the pretrial statement is inadmissible hearsay when considered as probative of the fact asserted and at the same time is admissible to impeach the witness requires, of course, an explanation to the jury. They must be told, in effect, that while the out-of-court statement may be regarded by them as cancelling the in-court statement, thus wiping the slate clean (the first of the three alternatives stated above), the out-of-court statement cannot be substituted for the in-court statement as affirmative evidence of the fact asserted (the third of the three alternatives stated above). Or, to state the matter in different terms, the jury must be made to realize that they could reason this way in returning a verdict for defendant: witness's statements cancel each other; there is nothing to tell us whether the light was green or red; plaintiff has not discharged his burden of proof. They could *not,* however, reason this way in returning a verdict for defendant: witness once said the light was red; it was! [12]

It scarcely needs to be argued that a jury must find it difficult to perform the mental operations prescribed by the charge and that many a jury (despite the charge) approaches the situation in the wholly natural way of saying: Here are two stories—which is true? Rule 63(1) would validate this natural approach and make it permissible as a matter of legal theory, thus eliminating the futility of charging the jury to refrain from doing what their instinct and common sense dictate.[13]

There is no unfairness to plaintiff in thus using the pretrial statement of his witness as substantive evidence against him. Though at the time he made the statement the witness was not under oath and not subject to examination by plaintiff, *now* he is. On redirect examination plaintiff can attempt to persuade the witness to disavow his pretrial contrary statement and reinstate his original story, explaining as best he can why he has vacillated, proceeding in much the same fashion as if both statements had been made in court. There seems very good reason, therefore, to treat the out-of-court statement, as Rule 63(1) does, as possessing the full evidential value it would have possessed if made on the witness stand. Indeed, it may be argued that it possesses *more* weight because it was made closer in point of time to the event in question.

Now what is the situation if the witness denies having made the contradictory statement? A witness for plaintiff testifies that the light was green. On cross-examination the witness denies having previously told X that the light was red. After P rests, D produces X who testifies the witness told him that the light was red. D rests. In rebuttal P recalls the witness and questions him further about the alleged statement to X. Under Rule 63(1), the jury may (1) believe X and find that the witness made the out-of-court statement that the light was red

[12] See note 11, p. 428, *supra.*

[13] The scholarly writers in the field of evidence unite in urging substantive use of the out-of-court statement. MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW at 59 (1947); MCCORMICK, EVIDENCE § 39; 3 WIGMORE, EVIDENCE § 1018; Falknor, *The Hearsay Rule and its Exceptions,* 2 U.C.L.A. L. REV. 43, 49-55 (1954); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177, 192-196 (1948); Morgan, *The Law of Evidence, 1941-1945,* 59 HARV. L. REV. 481, 545-550 (1946).
See, however, notes 14 and 15, p. 430, *infra* for the qualified positions of Professors McCormick and Falknor.

and (2) believe the witness's statement to X and find the light was in fact red. Is it fair to permit the jury to use the pretrial statement as substantive evidence against plaintiff in this situation? Is there a significant difference between the case where the witness admits and that where he denies his prior contradictory statement? Even though the witness denies having made the statement to X, the fact remains that X has testified otherwise (under oath and subject to cross-examination by plaintiff). Plaintiff has his day in court on the issue of whether the pretrial statement was made by witness. The witness is present to be examined further by plaintiff and to be sized up by the jury under the fire of direct examination, cross-examination and redirect examination. It seems reasonable, therefore, to permit the jury to choose to believe X, and, believing him, to believe that the witness's first story is the true one. Two commentators, however, have argued otherwise. Professor McCormick,[14] swayed by the possibility that X may be mistaken, and Professor Falknor,[15] influenced by the limited opportunities available to plaintiff on redirect examination, prefer the view that the pretrial statement is inadmissible as substantive evidence when the witness denies having made it.

Making a Prima Facie Case by the Pretrial Statement of a Hostile Witness. Let us suppose a two-car collision in an intersection where the traffic is controlled by a traffic light. The driver of one car dies as a result of injuries received in the collision. The action is for damages for his death. Defendant's liability depends upon whether the light guiding decedent was green. Aside from defendant, there is only one eyewitness. Plaintiff's attorney confers with this witness prior to the trial, at which time the witness gives the attorney a written statement to the effect that the light was green. At the trial plaintiff calls this witness. The witness surprises plaintiff by testifying the light was red. Plaintiff then shows the witness the written statement. Witness admits executing it. Plaintiff offers the writing in evidence. Objection overruled. Later plaintiff rests, having produced no other evidence as to the color of the light. Defendant moves for nonsuit. Motion granted.

Under current California law, both rulings are correct. As to the first ruling (objection overruled): though plaintiff is impeaching his own witness by showing his pretrial contradictory statement, this is permissible under Sections 2049 and 2052 of the Code of Civil Procedure.[16] However, the pretrial statement, though admissible to impeach the witness, may not be used as substantive evidence of the fact asserted, that the light was green. For this purpose the evidence is hearsay and, as previously stated, there is currently no exception to the

[14] MCCORMICK, EVIDENCE § 39; McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEXAS L. REV. 573 (1947).

[15] Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43, 49-55 (1954).

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

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

hearsay rule covering a witness's pretrial statement.[17] The result is that, while the pretrial statement may be considered to the extent of cancelling the witness's on-the-stand statement and thus wiping the slate clean, it cannot be considered as a substitute for that statement. Plaintiff thus has no evidence which would permit the jury to find that the light was green and is therefore properly nonsuited.[18]

Under Rule 63(1), the pretrial statement would be admissible as substantive evidence tending to show the light was green and therefore sufficient to avoid a nonsuit. This would be a wholly desirable change. A turncoat witness could no longer keep plaintiff from at least getting his case to the jury.

Relation of Rule 63(1) to Doctrines of Refreshing Memory and Past Recollection Recorded

Refreshed or Revived Memory. A person observes an automobile accident. Shortly thereafter he signs a statement of what he observed. Much later a case involving the accident comes to trial. This person is placed on the witness stand. Preliminary questions develop the fact that his recollection of the accident is now imperfect and vague. The document is handed to him for silent reading. Upon reading it he testifies that now he remembers the accident in detail and is prepared to recite all the circumstances. Thereupon he is examined, cross-examined and dismissed. Upon leaving the stand he returns the document to the attorney who called him. This is the venerable process of refreshing the recollection of the witness or reviving his memory. It is well supported on both legal[19] and psychological grounds.[20] Note that the document was not offered in evidence. The evidence, technically, was not the document—it was the oral statements of the witness.[21]

Past Recollection Recorded. Let us now suppose that preliminary questioning of the witness reveals that he now remembers only that he observed the accident and executed the written statement. All of the details escape him. Suppose, further, that upon reading the document silently his mind remains blank so far as the circumstances of the occurrence are concerned. He is then asked to read the document aloud. This is permitted and is recorded by the reporter as the testimony of the witness. This is the process of past recollection recorded in its original form. Note that, technically, the document is not admitted in evidence. It is neither marked as an exhibit nor formally admitted nor put in custody of the clerk.

These precautions to avoid technical admission of the document in evidence are reflections of the legal theory that the document, being

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[17] See note 11, p. 428, *supra*.

[18] We have found no California cases of this type. That such cases *could* arise is, however, clear beyond doubt. For cases in other jurisdictions see MCCORMICK, EVIDENCE § 39 n.3.

[19] CAL. CODE CIV. PROC. § 2047 provides in part: "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury."
See MCCORMICK, EVIDENCE § 9; Comment, 3 U.C.L.A. L. REV. 616 (1956).

[20] Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L.Q. 391 (1933); Hutchins and Slesinger, *Some Observations on the Law of Evidence—Memory*, 41 HARV. L. REV. 860 (1928).

[21] By Lord Ellenborough in Henry v. Lee, 2 Chitty 124, 125 (1814): "[I]t is not the memorandum that is the evidence, but the recollection of the witness."

an out-of-court statement of the witness, is hearsay and does not fall within an exception to the hearsay rule. To circumvent this difficulty the fiction is constructed that as the witness reads the document aloud he states his present recollection. Realistically, he, of course, is merely rendering a parrot-like reading.[22]

The more modern form of the doctrine is to dispense with this fiction, admit the document in evidence and construct an exception to the hearsay rule to justify this direct approach.[23] By Section 2047 of the Code of Civil Procedure, however, California is committed to the doctrine in its older form and to the fiction attendant upon the doctrine in that form.[24]

Adoption of Rule 63(1) in California would make the document admissible, thus abrogating the clumsy fiction. The document is "a statement previously made by a person who is present at the hearing," that person is "available for cross examination with respect to the statement and its subject matter," and the "statement would be admissible if made by declarant while testifying as a witness." Thus, the document could be directly admitted in evidence, observing all the usual formalities for receiving documentary evidence. It is true that the opportunity of cross-examination as to the subject matter will be restricted because of witness's memory lapse. That, however, did not bar the previous fiction and should not, therefore, bar the new nonfictional approach.

To the extent that direct action is better than indirection and reality is preferable to fiction, the operation of Rule 63(1) in this area would be beneficent. Moreover, there would be advantage in eliminating the present practice which has certain troublesome aspects.

One of the troublesome questions arising under the current doctrine of past recollection recorded is this: if the witness possesses a present recollection, may the document nevertheless be used under the principle of past recollection recorded, that is, be formally admitted under the new view or read aloud by the witness under the old view? Is want of present recollection a condition precedent to use of the record of past recollection? If so, to what degree must present recollection be wanting?[25] Adoption of Rule 63(1) would settle these questions by making the document admissible, irrespective of whether a present

[22] MCCORMICK, EVIDENCE § 276; 3 WIGMORE, EVIDENCE § 754; Comment, 3 U.C.L.A. L. REV. 616, 620-621 (1956).

[23] MCCORMICK, EVIDENCE §§ 276, 278; Maguire and Quick, *Testimony: Memory and Memoranda*, 3 How. L. J. 1 (1957); Morgan, *The Relation Between Hearsay and Preserved Memory*, 40 HARV. L. REV. 712 (1927); Comments, 12 OKLA. L. REV. 165 (1959), 3 U.C.L.A. L. REV. 616, 620-21 (1956). See also the acute criticism of the older view and practice in Curtis v. Bradley, 65 Conn. 99, 31 Atl. 591 (1894).

[24] CAL. CODE CIV. PROC. § 2047: "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution."

See Holbrook, *Witnesses*, 2 U.C.L.A. L. REV. 32, 37-38 (1954); Comment, 3 U.C.L.A. L. REV. 616, 629-630 (1956).

[25] Comment, 3 U.C.L.A. L. REV. 616, 624, 633 (1956) shows the uncertainty on this question, both in California and elsewhere. See also MCCORMICK, EVIDENCE § 277; MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 35-41 (1947).

recollection of the witness exists in whole or in part.[26] Thus under Rule 63(1) an attorney could call a witness possessed of a comprehensive present recollection and merely have the witness identify his written statement, then offer the statement and dispense with the usual presentation in the form of specific questions and answers.[27] Of course, the conventional presentation by way of oral impromptu answers is so much more effective that we may safely predict it would continue to be used as a matter of routine and the new alternative provided by Rule 63(1) would be reserved for rare cases of witnesses excessively stupid or garrulous or possessed of speech defects.

Recorded Memory Involving More Than One Person. Another troublesome question which arises under the current doctrine of past recollection recorded concerns the extent to which that doctrine may be employed when to utilize it requires consideration of (1) the pretrial utterances of two or more witnesses or (2) the pretrial statement of one witness and the present memory of another witness.

To illustrate the first of these situations—the pretrial utterances of two or more witnesses: Suppose a person who speaks only Chinese is tried for perjury. To prove the testimony claimed to constitute the perjury the course pursued is to (a) have the interpreter testify he correctly translated every word defendant said in Chinese into English (interpreter does not now, however, remember what the words were); (b) have the reporter testify he correctly recorded every word uttered in English by the interpreter, though he does not now remember those words. The reporter then identifies his transcribed notes and it is proposed to have him read them (under the fiction as his present recollection). Now, if the interpreter had been also the reporter and if he testified at the perjury trial to the accuracy of his interpreting and his reporting, having no recollection beyond this, there can be no question that the transcription could be used as his past recollection re-

[26] If Rule 63(1) were adopted, the second sentence of Section 2047 of the Code of Civil Procedure would be obsolete and should be deleted. Professor Holbrook has suggested that this deletion might eliminate the present practice of using as past recollection recorded a document written under his [the witness's] direction. Holbrook, *Witnesses*, 2 U.C.L.A. L. REV. 32, 37 n.17 (1954). The second sentence of Section 2047 now authorizes such use. Would any provision of Rule 63(1) similarly authorize it? In our opinion the answer is "Yes." The reference is to a "statement previously made by a person." We believe this would be construed to include documents written under his direction.

The first sentence of Section 2047, dealing with what *aide mémoire* are permissible in the process of refreshing memory, could be left intact. Arguably this should be liberalized. See Comment, 3 U.C.L.A. L. REV. 616, 633-34 (1956). However, we lay that to one side at this point as beyond the scope of the present study. The Uniform Rules do not deal with the problem of refreshing memory.

[27] Theoretically, P could call W, have W testify he observed the event in question and told X all about it, have X testify as to what W said, then replace W on the stand for cross-examination.

Is the following also a possibility? Plaintiff puts on a witness in an accident case. The witness denies that he observed the accident or knows anything about it. Plaintiff then offers to have X testify that X was some distance away at the time of the accident (which he did not observe). He did, however, see witness at the scene, walked up to him and asked what happened and witness told him such-and-such happened. Plaintiff proposes to have X testify to this effect, following which he will put the witness back on the stand for cross-examination by D. Objection. In our opinion the objection should be sustained under Rule 63(1).

This is not a situation in which witness is "available for cross-examination with respect to the statement *and* its subject matter." (Emphasis added.) Conceding D could cross-examine witness as to the statement, gaining from witness a denial he made it, there is no possibility of cross-examining witness as to the subject matter so long as witness adheres to his denial of having observed the accident.

However, Professor Falknor is of the opinion that Rule 63(1) would require the objection to be overruled. He cites the case as one of his objections to the rule in its present form. Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43, 53 (1954).

corded. This (except for the fiction) really involves considering his pretrial statement (the transcription) as evidence of the facts asserted in it. Why should this not be done, too, even though we must consider the pretrial statements of *two* witnesses—interpreter and reporter? *People* v. *John*[28] rules in a brief and cryptic opinion that it cannot be done because "the witness was giving hearsay testimony." Professor Whittier has criticized the case extensively and reviewed other California cases on the point which are both conflicting and confused.[29]

To illustrate the second situation mentioned above—the pretrial statement of one witness and the present memory of another witness—we may take this hypothetical case stated by the court in the *John* case:

> A person charged with crime makes a confession to one John Doe; Doe meets Richard Roe and relates to him what defendant had told him. At the trial John Doe is called as a witness, and testifies that he had truly narrated to Richard Roe what the defendant said. Then it is sought to have Richard Roe state what John Doe had said, instead of asking John Doe such questions. We may suppose John Doe has a poor memory, and has forgotten the particulars of the confession, but will swear positively that he made a true statement to Richard Roe, who does remember. To admit such testimony would be to make a new rule of evidence.[30]

Despite the language in the *John* case, a recent California case permitted admission of evidence of an extrajudicial identification as independent evidence of identity where the evidence consisted of the pretrial statement of one witness and the present memory of another witness. In *People* v. *Gould*,[31] decided in 1960, the facts were as follows: G and M were charged with robbing Mrs. F. In her testimony, Mrs. F stated, respecting G, that he had "some, but not all of the features" of one of the robbers, G being (she said) "very thin" whereas the robber G somewhat resembled "was a heavy man." Insofar as the other robber was concerned, Mrs. F stated that she recognized no one in the courtroom as being that man. Mrs. F testified further that after the robbery she selected two photos from a group of ten, the two selected being of men who "looked similar" to the robbers, but "not all the features were the same." Officer B testified that about one hour after the robbery he showed Mrs. F ten small pictures from which she selected two, choosing photos of G and M as photos of the robbers. The officer testified, moreover, that Mrs. F was "sure" of her identification. There was further testimony to the effect that upon arrest G admitted taking a few dollars from Mrs. F's apartment. It was established, however, that M at all times denied any knowledge of the burglary.

Both defendants were convicted. Upon G's appeal, his conviction was affirmed, his contention that the evidence of Mrs. F's pretrial

[28] 137 Cal. 220, 69 Pac. 1063 (1902).
[29] Whittier, *Account Books in California*, 14 CALIF. L. REV. 263, 280-282 (1926).
[30] People v. John, 137 Cal. 220, 221-22, 69 Pac. 1063, 1064 (1902).
[31] 54 Cal.2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960), noted in 8 U.C.L.A. L. REV. 467. See also, Levin, *Evidence*, 1960 Annual Survey of American Law, 544, 556, 559; Notes, 19 MD. L. REV. 201 (1959), 30 ROCKY MT. L. REV. 332 (1958), 36 TEX. L. REV. 666 (1958).

identification was inadmissible being rejected. Upon M's appeal, his conviction was reversed, because Mrs. F's extrajudicial identification could not sustain his conviction, there being no other evidence tending to connect him with the crime.

The *Gould* case seems to stand for these two propositions:

(1) An extrajudicial identification of an accused which was made by a person who is now a witness at the trial is admissible against the accused as substantive evidence tending to show guilt of the accused. The evidence is admissible whether or not the witness repeats the identification at the trial.

(2) However, such evidence will not sustain a conviction unless confirmed either by identification at the trial or by other evidence tending to connect accused with the crime.

The court's reasoning in support of the first of the two propositions above stated is this:

> Although [Mrs. F's] . . . testimony did not amount to an identification, the evidence of her extrajudicial identification was nevertheless admissible.
>
> Evidence of an extrajudicial identification is admissible, not only to corroborate an identification made at the trial . . . but as independent evidence of identity. Unlike other testimony that cannot be corroborated by proof of prior consistent statements unless it is first impeached . . . , evidence of an extrajudicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. [Citations omitted.] The failure of the witness to repeat the extrajudicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extrajudicial identification tends to connect the defendant with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination. [Citations omitted.] [32]

Although the holding in the *Gould* case is limited to extrajudicial identification, logically both the court's rationale ("the principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination") and the text authority cited by the court (Wigmore, Professors McCormick and Morgan) support Rule 63(1).

In both of these multiple-witness situations (involving (1) the pretrial utterances of more than one witness or (2) the pretrial utterance of one witness and the present recollection of another) the evidence would be admitted under Rule 63(1). In the first situation we are proving the pretrial statements of two persons but each is presently a witness "available for cross examination with respect to [his] . . . statement and its subject matter." In the second situation we are

[32] *Id.* at 626, 354 P.2d at 867, 7 Cal. Rptr. at 275.

proving the pretrial statement of John Doe, but, again, he is "available." It must be confessed, of course, that the possibilities of cross-examination are not great. This, however, has not militated against the classic doctrine of past recollection recorded when only one witness is involved. It should not today be a substantial objection to Rule 63(1) as applied to the multiple-witness situations. Indeed, some jurisdictions other than California have experienced no difficulty in extending the older doctrine of past recollection recorded to make the evidence admissible in such situations.[33]

Calling Declarant to Stand for Direct Examination

The admission of a pretrial written statement as evidence under Rule 63(1) raises the questions of whether the proponent who offers evidence of a statement under Rule 63(1) must call the declarant to the stand as his witness and, if so, how extensively must he examine the witness?

Suppose, for example, that a collision takes place between P's car driven by P and D's car driven by D. W is an eyewitness to the event. P files an action against D. P's attorney interviews W and has W prepare and sign a written statement recounting the circumstances of the collision as observed by W. At the trial W is present in the courtroom. P's attorney, however, proposes to open his case by offering in evidence the document executed by W. D's attorney admits W was an eyewitness to the collision and admits further that the document offered was, in fact, executed by W. Nevertheless, D's attorney objects that the document is not admissible unless P's attorney has W called and sworn as a witness.

Now the document constitutes—in the language of Rule 63(1)—"a statement previously made by a person who is present at the hearing." It constitutes further a "statement [which] would be admissible if made by declarant while testifying as a witness." However, Rule 63(1) requires that the declarant must be "available for cross examination with respect to the statement and its subject matter." What

[33] Professor McCormick summarizes the present law as follows: "The typical and classic record of past recollection was a one-man affair. The verifying witness was the man who originally observed the facts and the man who wrote them down in the memorandum. One deviation from this pattern, however, we have already mentioned. This is the situation where the written statement is made by someone other than the witness, but the witness verifies it for admission by testifying that when his own memory of the facts was fresh, he read the memorandum and knew that it was true. Here only the witness who recognized the truth of the memorandum need be called.

"A second instance of cooperative reports occurs when a person, who may be known as R reports orally the facts known to him, and another person, W, writes down a memorandum of the oral report. In commercial practice, this is familiarly seen when the salesman or time-keeper reports sales or time to the book-keeper. Here the record comes in when R swears to the correctness of his oral report (though he may not remember the detailed facts) and W testifies that he faithfully transcribed the oral report.

"A third and much debated question arises when W, to whom R has reported orally, does not write down the facts, but trusts to his unaided memory in testifying to what R reported. Again R appears and vouches for the correctness of what he reported. May the testimony of the two be received as evidence of the facts, of which R perhaps now has no memory, originally reported by R? It certainly does not rise to the height of a record of past recollection, for W's memory is no record, and it is the existence of this written memorial that has been one of the chief elements in the recognition of the reliability of such records. Accordingly, some courts have excluded this combination of testimonies. On the other hand, since both R and W vouch for their respective fact-contributions and submit themselves to at least a limited cross-examination thereon, it may well be urged that when the report of R was made at a time when the facts were fresh in his memory and the facts reported are relatively simple so that an ordinary man might be expected to remember them, the combined evidence should come in." MCCORMICK, EVIDENCE § 279, at 594-95.

is "available for cross examination" in this sense? Is a person so available in all cases merely by virtue of his physical presence? Clearly no because, though physically present, he may be disqualified to testify by reason (for example) of insanity, recently incurred. Does "present at the hearing and available for cross examination" then mean physically present and qualified to testify when the proponent offers the document and when the opponent is making out his case? If this is the meaning, then it follows that in our case (assuming W is presently qualified) the objection of D's attorney should be overruled. The document should be received in evidence. Later when the time comes for presenting the evidence of the defense, D's lawyer may, of course, call and examine W as D's witness. This will constitute cross-examination in the sense of the rule. (If such examination is impossible because the witness disappears or suffers supervening disability to testify, the document previously admitted will be stricken.)

The foregoing are the consequences *if* "present" and "available for cross examination" mean only that the witness must be physically present and qualified to testify at the time the prior statement is offered and at the time the opponent makes out his case.

If, however, the term "available for cross examination" is used in Rule 63(1) in the traditional, technical sense of that term, W is not available to D for cross-examination unless and until P first calls W and directly examines him. The historic meaning of cross-examination is given as follows in Section 2045 of the Code of Civil Procedure:

> The examination of a witness by the party producing him is denominated the direct examination; the examination of the same witness upon the same matter, by the adverse party, the cross-examination.

When cross-examination is thought of in these terms, there is only one possible circumstance that can make W available for cross-examination by D and that is the circumstance that P first calls and examines W directly.

Do the Commissioners on Uniform State Laws use the term "cross examination" in Rule 63(1) in this time-honored sense? They tell us that Rule 63(1) "adopts A.L.I. Model Code of Evidence Rule 503(b)." Rule 503(b) reads as follows:

> Evidence of a hearsay declaration is admissible if the judge finds that the declarant
>
> * * *
>
> (b) is present and subject to cross-examination.

Since Rule 63(1) is intended to "adopt" Model Rule 503(b), the meaning of Rule 503(b) is by adoption the meaning of Rule 63(1). It is profitable therefore to inquire what Professor Morgan (Reporter for the A.L.I. Model Code of Evidence) and the members of the American Law Institute considered the meaning of Rule 503(b) to be.

We begin by stating our conclusion and then follow with substantiation thereof. The conclusion is that the intent of Rule 503(b) (and therefore of Rule 63(1)) is that when the proponent of the former statement offers it he must either at that time place the declarant under

oath as his witness or the proponent must undertake to place the declarant under oath as his witness at some time before the close of the trial. If the proponent adopts the second alternative and fails to make good on his undertaking, the evidence of the declarant's statement previously received must be stricken upon demand by the opponent.

There is in the report of the *Proceedings of the American Law Institute* [34] significant (though fragmentary) evidence that the meaning above stated was intended. Thus Professor Morgan in briefly explaining Rule 503(b) stated:

> (b) certainly gives the adversary every opportunity for cross-examination because the witness who gives the statement is there, is present under oath and subject to cross-examination.[35]

Here we remark that if the witness is "present *under oath* and subject to *cross*-examination," (emphasis added) this seems to mean the proponent has put him under oath. Again, at another point in the *Proceedings*,[36] the following exchange took place between Professor Morgan and Delegate Moser:

> Clarence P. Moser (New York): I should like to ask the Reporter whether I correctly understand that pursuant to Rule 603 there is anything to prevent counsel from preparing and submitting a carefully prepared statement of a witness and then offering the witness for cross-examination.
>
> Mr. Morgan: I think not. That is the point Mr. Burns raised. You mean 603(b). [Rule 503(b) was at that time numbered Rule 603(b).] [37]

It seems clear that what Mr. Moser meant by "offering the witness for cross-examination" is that the proponent of the statement put the witness under oath as his witness.

Finally, we rely on a statement by Professor Morgan made while he was in the process of drafting the American Law Institute Model Code. At that time he wrote a law review article entitled *Some Observations Concerning A Model Code of Evidence*.[38] He advocated the following as a desirable feature of such a code:

> [T]hat evidence of hearsay should be admitted if the court finds that the person making the hearsay assertion is unavailable as a witness, or if the court finds that he is available and that before the close of the trial or hearing he will be produced *by the proponent* for cross-examination on demand of the adversary.[39] [Emphasis added.]

Here production of the person by the proponent for *cross*-examination seems clearly to mean that the proponent must put the person under oath as his witness.

Returning to the case stated at the outset, D is entitled, under Rule 63(1) as we construe it, to require P to call W as P's witness either

[34] 18 A.L.I. PROCEEDINGS *passim* (1940-41).
[35] *Id.* at 134.
[36] *Id.* at 104.
[37] *Ibid.*
[38] 89 U. PA. L. REV. 145 (1940).
[39] *Id.* at 161.

at the time P offers the document or later. Since the judge possesses discretion as to the order of proof, he may either require P to call W before the statement is admitted or he may admit the document even though W has not been called and sworn, without prejudice to a later motion to strike if P fails to call W.

If, under Rule 63(1), the proponent of W's statement must call W, how extensively must he examine W in order to make him "available for cross examination with respect to the statement and its subject matter"? If we are to retain our present rule restricting cross-examination to "facts stated [on] . . . direct examination or connected therewith," [40] it is obvious that to make W available to D for cross-examination respecting the statement and its subject matter P must examine W fully about such statement and such subject matter.

Conclusion

Adoption of Rule 63(1) would change California law in the several respects pointed out in the foregoing discussion. Each such change is desirable and, therefore, the adoption of Rule 63(1) is recommended.[41]

[40] CAL. CODE CIV. PROC. § 2048.

[41] The N. J. Committee recommended approval of this subdivision. N. J. COMMITTEE REPORT 119. The N. J. Commission, however, did not approve of this subdivision and substituted for it language that would admit written recorded recollection only. N. J. COMMISSION REPORT 54-55. The Utah Committee also disapproved the subdivision. The Utah Committee substituted the following language for that contained in the Uniform Rules: "(1) *Prior Statements of Witnesses.* A prior statement of a witness, if the judge finds that the witness had an adequate opportunity to perceive the event or condition which his statement narrates, describes or explains, provided that (a) it is inconsistent with his present testimony, or (b) it contains otherwise admissible facts which the witness denies having stated or has forgotten since making the statement, or (c) it will support testimony made by the witness in the present case when such testimony has been challenged. When admitted, such statements shall be received as substantive evidence;" UTAH FINAL DRAFT 34.

Rule 63(2)—Affidavits

Rule 63(2) creates an exception to the hearsay rule which reads as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> * * *
>
> (2) Affidavits to the extent admissible by the statutes of this state;

An affidavit is hearsay evidence under Rule 63 if offered at a trial or hearing to prove the truth of the matter stated by the affiant.[1] However, under Rule 63(2) such affidavits are admissible to the extent that statutes of the State make them admissible.

Thus if Rule 63(2) were adopted in California, Section 2009 of the Code of Civil Procedure would remain in full force and effect. That section provides as follows:

> An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, and in uncontested proceedings to establish a record of birth, or upon a motion, and in any other case expressly permitted by some other provision of this code.

If California were to adopt the Uniform Rules scheme for codifying the hearsay rule and its exceptions, Rule 63(2) would preserve intact this and all other statutory provisions[2] making affidavits admissible. No reason for changing these statutes is apparent. Therefore adoption of Rule 63(2) is recommended.

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[1] This, of course, is the orthodox and California view. People v. Plyler, 126 Cal. 379, 58 Pac. 904 (1899).

[2] *E.g.*, CAL. PROB. CODE § 1170. See also Swain, *The Use of Affidavits as Evidence*, 22 CALIF. S.B.J. 144 (1947).

Rule 63(3)—Depositions and Prior Testimony

Rule 63(3)(a)—Testimony or Depositions in Same Action

Rule 63(3)(a) reads as follows:

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

Under the definition of hearsay evidence in Rule 63 statements made in a deposition are hearsay if offered to prove the truth of the matters asserted in such statements.[1] Thus, it becomes necessary to construct an exception respecting depositions. This is done in Rule 63(3)(a). This exception *might* have been set up as a mere incorporation by reference of present law, as is done in Rule 63(2) with reference to affidavits. However, Rule 63(3)(a) incorporates the present law in part only; as to the part not incorporated, it makes substantial and significant changes. We are now to see what these changes are and whether they are meritorious.

Our present deposition laws deal with (1) circumstances under which depositions may be *taken* and the manner in which they shall be taken and (2) circumstances under which depositions may be *used* (admitted) at the trial.[2] As to the first phase, Rule 63(3)(a) merely incorporates by reference existing law (referring to "a deposition taken in compliance with the law of this state"). Thus adoption of Rule 63(3)(a) would not affect any of the provisions made by the 1957 deposition and discovery legislation (Sections 2016-2035 of the Code of Civil Procedure) insofar as this legislation concerns the *taking* of depositions. Adoption of Rule 63(3)(a) would, however, make substantial changes insofar as the *use* of depositions is concerned.

Section 2016(d) of the Code of Civil Procedure, added in 1957, provides 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 depo-

[1] Some authorities, however, classify depositions as non-hearsay. See 5 WIGMORE, EVIDENCE § 1370 (quoted with approval in People v. Bianchi, 140 Cal. App. 698, 35 P.2d 1032 (1934)); MODEL CODE OF EVIDENCE [hereinafter cited as MODEL CODE], Rule 501(2) (1942). Professor McCormick, and other authorities prefer the view that depositions are hearsay. MCCORMICK, EVIDENCE § 230, p. 480. The Uniform Rules adopt this latter view. See note 10, p. 447, *infra* as to former testimony.

[2] Civil cases: CAL. CODE CIV. PROC. §§ 2016-2035. Criminal cases: CAL. PEN. CODE § § 686, 1335-1362.

sition 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 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 a witness by subpoena; or (v) 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.

(4) Subject to the requirements of this section, a party may offer in evidence all or any part of a deposition, and if such party introduces only part of such deposition, any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

To the extent that Section 2016(d) conditions the use of a deposition upon the unavailability of the deponent, it differs from Rule 63(3)(a). Under Rule 63(3)(a), even though the deponent is present in person at the trial, the proponent of the deposition need not call deponent to the stand for any purpose whatsoever.[3] Rather, he may simply introduce the deposition. There is no doubt that the Commissioners on Uniform State Laws intend to go this far, for they say in their comment on the rule that "Clause (a) does not require that the deponent be unavailable as a witness in order for the deposition to be used at the trial of the action in which the deposition was taken."

[3] Compare Rule 63(1) which requires that the declarant be put upon the stand so that he is available for cross-examination.

To illustrate the difference between Rule 63(3)(a) and Section 2016(d) of the Code of Civil Procedure, let us suppose proponent offers a deposition as substantive evidence. The deponent is not a party or other person mentioned in Section 2016(d)(2). The deponent lives within 150 miles of the place of trial, is in good health and would attend, if subpoenaed. If, upon "application and notice," the court, having "due regard to the importance of presenting the testimony of witnesses orally in open court," refuses to find "that such exceptional circumstances exist as to make it desirable, in the interest of justice . . . to allow the deposition to be used," [4] the deposition is inadmissible under Section 2016(d). On the other hand, the deposition is admissible and may be used as substantive evidence under Rule 63(3) (a).

Several points may be made in behalf of Rule 63(3)(a):

1. When the foundation for introducing a deposition must be laid under Section 2016(d)(3), the proponent may be burdened with a difficult and time-consuming task. He must comply with all the rules of evidence in establishing the foundation. He cannot, for example, establish the death of the deponent by affidavit or other hearsay evidence [5] (unless, of course, the evidence is admitted under some exception to the hearsay rule). But under Rule 63(3)(a) it is immaterial whether deponent is available as a witness.

2. A deposition consists of statements closer in point of time to the events in question than any statements deponent (assuming him to be available) could now make as a witness at the trial. In terms of the validity of deponent's recollection and the recency of his memory, the deposition is thus preferable to present testimony. Viewed in this light, our present practice (so far as depositions not falling under Section 2016(d)(2) are concerned) really excludes the superior of two forms of statement because the inferior form is available.

3. Under Rule 63(3)(a) the proponent of the evidence would be under no compulsion to use the deposition. Under that provision he would have his option to call the deponent to the stand and examine him. (Having done so he could then also introduce the deposition under Rule 63(1) or Rule 63(3)(a), subject, however, to the judge's discretion under Rule 45.)

4. Other recognized exceptions to the hearsay rule, such as those covering declarations of bodily and mental condition and excited utterances, do not require any showing that the declarant is unavailable.[6] Deposition statements are under oath and subject to cross-examination. As such they would seem to be at least as trustworthy as ordinary declarations expressive of mental, physical or emotional condition or excited statements.[7] Since availability is immaterial under the latter exceptions and is likewise immaterial as to depositions made admissible by Section 2016(d)(2), there can be no valid objection to making availability immaterial so far as *all* depositions are concerned.

[4] CAL. CODE CIV. PROC. § 2016(d)(3)(v).
[5] People v. Frank, 193 Cal. 474, 225 Pac. 448 (1924) (illustrates difficulties of proving "diligent search"); People v. Plyler, 126 Cal. 379, 58 Pac. 904 (1899) (death of deponent cannot be established by affidavit); People v. Kuranoff, 100 Cal. App. 2d. 673, 224 P.2d 402 (1950) (same); People v. Hermes, 73 Cal. App.2d 947, 168 P.2d 44 (1946) (same). *But cf.* People v. Bernstein, 70 Cal. App.2d 462, 161 P.2d 381 (1945) ("diligent search" held established).
[6] MCCORMICK, EVIDENCE § 238, p. 500.
[7] *Id.* § 238.

The principal argument against Rule 63(3)(a) is that it enables the proponent of the deposition to shift to his adversary the burden of calling the deponent as a witness. Thus, if plaintiff elects to open his case by introducing the deposition without calling the deponent and if defendant wishes to have the jury observe deponent's demeanor under examination by the parties, defendant must wait until plaintiff rests and then call the deponent as his witness. This does not give the defendant the psychological advantage he would have had if plaintiff had been required to call the deponent. Then defendant would be *cross*-examining *plaintiff's* witness and avoiding the voucher of credibility the jury is prone to impute to his act of calling the witness. On the other hand, it must not be overlooked that plaintiff would pay a price in maneuvering defendant into this position of having to call the deponent. Plaintiff runs a considerable risk of arousing the suspicions of the jury in choosing to use a document rather than the witness who made it. It may well be that this is a factor of such importance that, on balance, the advantage is really with the defendant. It should be pointed out also that, under the Uniform Rules system, defendant could impeach the witness, despite the fact that he called him. Rule 20 abandons present restrictions on impeaching one's own witness.

It is probably safe to hazard the guess that, if Rule 63(3)(a) were adopted, most attorneys in most cases would still call the deponent to the stand if he were available. If this is so, the major change wrought by Rule 63(3)(a), as a practical matter, would be that in cases where the deponent is unavailable, the proponent of the deposition is relieved from the present burdensome requirement of establishing such unavailability under Section 2016(d)(3) of the Code of Civil Procedure.

If there is persuasive merit in the proposition that a deposition taken in an action should be admissible at the trial of the action irrespective of the availability of the deponent, it would seem that when the action is tried more than once there should be a comparable rule respecting testimony of a witness given at a prior trial. Presently this situation is governed by subdivision (8) of Section 1870 of the Code of Civil Procedure which provides in part as follows:

> [E]vidence 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 makes such prior testimony admissible but conditions admissibility upon the unavailability of the witness.

It must have been the intent of the Commissioners on Uniform State Laws that under the Uniform Rules testimony given in a previous trial of the action should be treated in all respects like a deposition taken in the action. That is, it must have been their intent that such former testimony is admissible, without regard to the present availability of the person who gave the former testimony. Yet, as we read

Rule 63(3), it omits altogether any provision touching prior testimony in the same action. Rule 63(3)(a) extends only to depositions taken in the action. Rule 63(3)(b) relates only to testimony and depositions in "another action." In the belief that the situation of prior testimony given at a previous trial of the action is in all significant respects analogous to the situation of a deposition taken in the action, we suggest that the failure of the Commissioners on Uniform State Laws to provide for the former is the result of oversight. Accordingly, we recommend an appropriate amendment, the text of which is set forth below.

A second amendment is also desirable for the following reason. Section 2021(c) of the Code of Civil Procedure (as amended in 1961) reads as follows:

> (c)(1) Objection to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.
>
> (2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.
>
> (3) Objections to the form of written interrogatories submitted under Section 2020 of this code are waived unless such objections, together with a notice of hearing thereon, are served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within three days after service of the last interrogatories authorized.

These reasonable requirements that obviable defects be promptly objected to preclude the opponent of a deposition from withholding objections that could be met during the taking of the deposition and presenting such objections at the trial when it is too late to meet them. By way of contrast, Rule 63(3) seems to allow the opponent to succeed with this tactic. Rule 63(3) makes testimony in the form of a deposition "subject to the same limitations and objections as though the declarant were testifying in person." We recommend that this be amended to qualify the word "objections" as follows: "objections except objections waived under Section 2021 of this code."

If amended in both of the respects discussed above, Rule 63(3)(a) would read as follows (new matter in italics):

> Subject to the same limitations and objections *except objections waived under Section 2021 of this code* 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 *testimony*

given as a witness in a prior trial of the action, or testimony given as a witness in the preliminary hearing of the charge being tried, or [8]

As so amended, Rule 63(3)(a) would be a desirable enactment and it is recommended for adoption.[9]

Rule 63(3)(b)—Testimony or Depositions in Another Action

Rule 63(3)(b) provides:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> * * *
>
> (3) . . . (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;

Unavailability. This exception to the hearsay rule deals with testimony or depositions in *another* action, stating the conditions under which such evidence is admissible in *this* action. One of these conditions is that the declarant must now be unavailable. Why is such unavailability made a condition under this provision, whereas no such condition is included under Rule 63(3)(a)? The answer, we believe, is that, since Rule 63(3)(a) deals with two phases of the *same* action, the present parties (or their predecessors in interest) will have had personal opportunity to examine the witness or deponent in question. On the other hand, under Rule 63(3)(b)(ii) the evidence may be admissible, although originally given in another action between other parties wholly different from the present parties. This curtails the right of personal examination by the present parties. The theory is that such curtailment should not take place unless there is a necessity

[8] Section 1870 of the Code of Civil Procedure now provides as follows respecting former testimony in the same action: "[E]vidence 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."

Penal Code Section 686 now provides in part: "[T]he 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." The section also makes admissible at the trial testimony given at the preliminary hearing if the witness is now dead or insane or cannot with due diligence be found within the State. The proposed amendment to Rule 63(3) would preserve the substance of these sections, except those provisions respecting unavailability.

[9] We are aware, however, of the possible unwisdom as a practical matter of advocating substantial changes at this time in legislation so recently enacted as the 1957 Deposition and Discovery Act. CAL. CODE CIV. PROC. §§ 2016-2035. If, for the time being at least, it is best to leave the 1957 enactment intact, Rule 63(3)(a) should be amended to incorporate the existing law both as to the taking *and* as to the use of depositions.

for so doing which arises from the present unavailability of the witness or deponent.[10]

Rule 63(3)(b)(i)—Testimony Offered Against a Party Who Offered It Before. Let us suppose there are two trials of the action *A* v. *B*. At the first trial A calls and examines W. B cross-examines. A examines further on redirect. Subsequently there is a retrial of the action. Now W is dead and B offers the transcript of W's testimony given at the first trial. A objects on the ground of want of opportunity to cross-examine. Should the opportunity A had of direct and redirect examination in the first action be treated as the equivalent of his right to cross-examine in the second action? The answer in California and elsewhere is "Yes" and A's objection should be overruled.[11] Under the amendment we have suggested above to Rule 63(3)(a) the result would be the same under the Uniform Rules of Evidence.

Let us now change the facts to suppose that the action first tried is *A* v. *B*. The second action is *A* v. *C*. Would the transcript now be admitted against A? Not under current California law.[12] The reason is that our present statute, subdivision (8) of Section 1870 of the Code of Civil Procedure, provides that testimony given at one trial is admissible in another only if the former action was between the same parties. Under Rule 63(3)(b)(i), however, the transcript would be admitted, since the testimony is "given as a witness in another action" and "is offered against a party who offered it in his own behalf on the former occasion" and the witness is now unavailable. This is a desirable change. In both of our illustrative cases A's previous direct and re-

[10] Rule 62(7) defines unavailability as follows:

"'Unavailable as a witness' includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant, or (b) disqualified from testifying to the matter, or (c) unable to be present or to testify at the hearing because of death or then existing physical or mental illness, or (d) absent beyond the jurisdiction of the court to compel appearance by its process, or (e) absent from the place of hearing because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

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

This Uniform Rules definition of unavailability is broader in scope than subdivision (8) of Section 1870 of the Code of Civil Procedure; that is, it is more liberal in regard to unavailability. Thus, "unable to testify" in the California statute means physical disability and does not include legal incapacity. Rose v. Southern Trust Co., 178 Cal. 580, 174 Pac. 28 (1918). Whereas under Rule 62(7) "'unavailable as a witness' includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant, or (b) disqualified from testifying to the matter." Both the California statute and Rule 62(7) recognize death, physical inability and absence from the jurisdiction as constituting unavailability. Rule 62(7)(e) adds: "[A]bsent from the place of hearing because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts." There is a difference of opinion as to how to classify former testimony. Wigmore takes the view that it is not hearsay at all. 5 WIGMORE, EVIDENCE § 1370. Professor McCormick prefers the view that it is hearsay but admissible as an exception to the hearsay rule. MCCORMICK, EVIDENCE § 230. The California courts have vacillated. Rose v. So. Trust Co., 178 Cal. 580, 584, 174 Pac. 28, 29 (1918) ("purely hearsay"); People v. Bianchi, 140 Cal. App. 698, 700, 35 P.2d 1032 (1934) ("clearly . . . not hearsay"). The A.L.I. adopts the view that it is hearsay, MODEL CODE Rule 511 Comment 4, and the Uniform Rule view is that the evidence is hearsay. See UNIFORM RULE 63(3) Comment. *Cf.* as to depositions, note 1, p. 441, *supra*.

[11] MCCORMICK, EVIDENCE § 231; 5 WIGMORE, EVIDENCE § 1389; People v. Bird, 132 Cal. 261, 64 Pac. 259 (1901); Gates v. Pendleton, 71 Cal. App. 752, 236 Pac. 365 (1925).

[12] As to admitting such evidence on the theory of admissions, see MCCORMICK, EVIDENCE § 246.

direct examination should suffice as a substitute for A's present opportunity to cross-examine.[13]

Rule 63(3)(b)(ii)—Cross-examination by Another as Satisfying Present Party's Right. Rule 63(3)(b)(ii) would change current California law in several important respects. For example, let us suppose X and A are injured due to the derailment of a train operated by Railroad B upon which they were passengers. X sues B. X calls W. W testifies favorably to X on direct examination. B's attorney cross-examines. W dies. Now A sues B. A shows W's death and offers the transcript of W's testimony. Under subdivision (8) of Section 1870 of the Code of Civil Procedure the offer must be rejected because the two actions are not between the same parties.[14]

Such a result ensuing from the requirement of identity of parties has been much criticized—and justly so.[15] Under Rule 63(3)(b)(ii), the evidence would be admitted. Obviously the "adverse party on the former occasion had the right and opportunity for cross examination with an intent and motive similar to that which the adversary has in the action in which the testimony is offered," for the simple reason that the adversary on both occasions is the self-same party. Here the impact of Rule 63(3)(b)(ii) is beneficial and we venture to say without further debate—obviously so.

Now we turn to the debatable aspect of Rule 63(3)(b)(ii). Let us suppose that in the action *X* v. *B*, B offers W. W testifies favorably to B. X cross-examines. In the action *A* v. *B*, B shows W is dead and offers the transcript of W's former testimony. A objects. Under subdivision (8) of Section 1870, A's objection must be sustained because the two actions are not between the same parties. However, under Rule 63(3)(b)(ii) A's objection would be overruled. X "on the former occasion had the right and opportunity for cross examination with an interest and motive similar to that which" A now has. Ergo, the evidence is admissible against A. A must be satisfied with X's previous opportunity for cross-examination. Wigmore has justified this result as follows:

> The principle, then, is that where the interest of the person was calculated to induce equally as thorough a testing by cross-examination, then the present opponent has had adequate protection for the same end. Thus, the requirement of identity of parties is after all only an incident or corollary of the requirement as to identity of issue.
>
> It ought, then, to be sufficient to inquire *whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-exami-*

[13] Note, however, that if A took but did not introduce a deposition in the action of *A* v. *B*, in the action of *A* v. *C*, C could not introduce the deposition against A. Query: Should Rule 63(3)(b)(i) be amended to change this?

[14] Smith v. Schwartz, 35 Cal. App.2d 659, 96 P.2d 816 (1939). *Cf.* as to disbarment proceedings: Werner v. State Bar, 24 Cal.2d 611, 150 P.2d 892 (1944).

[15] McCORMICK, EVIDENCE § 232; 5 WIGMORE, EVIDENCE § 1388. Consider also Professor McCormick's brief comment on McInturff v. Insurance Co. of No. Am., 248 Ill. 92, 93 N.E. 369 (1910):

> "M was tried on criminal charge for arson; after trial he kills T., witness for state; M. then sues on fire insurance policy; held, insurance company cannot use testimony of T. given at the criminal trial; surely this is a flagrant sacrifice of justice on the altar of technicalism." McCORMICK, EVIDENCE § 232 n.9.

> *nation that the present opponent has;* and the determination of this ought to be left entirely to the trial judge.[16]

Of course, if we look at the matter from A's point of view, it may be hard to convince *him* that Wigmore is right in saying he has had "adequate protection." Especially would this be so if, as Professor Falknor points out,[17] X had omitted to cross-examine altogether or had cross-examined inexpertly or inadequately. Nevertheless, if W is now dead, the choice lies between foregoing all use of his knowledge or admitting the transcript; and the choice practically may be the same when his unavailability is because of illness or because his whereabouts is unknown. On balance, it seems best to choose the alternative of admitting the transcript.[18] Even though this cuts off the right of personal cross-examination, there is better reason here for doing so than there is in the case of many presently recognized exceptions to the hearsay rule. Professor McCormick makes this last point with telling force as follows:

> . . . I suggest that if the witness *is* unavailable, then the need for the sworn, transcribed former testimony in the ascertainment of truth is so great, and its reliability so far superior to most, if not all the other types of oral hearsay coming in under the other exceptions, that the requirements of identity of parties and issues be dispensed with. This dispenses with the opportunity for cross-examination, that great characteristic weapon of our adversary system. But the other types of admissible oral hearsay, admissions, declarations against interest, statements about bodily symptoms, likewise dispense with cross-examination, for declarations having far less trustworthiness than the sworn testimony in open court, and with a far greater hazard of fabrication or mistake in the reporting of the declaration by the witness.[19]

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[16] 5 WIGMORE, EVIDENCE § 1388, p. 95.

[17] Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43, 58 (1954).

[18] Consider the argument to this effect in the following excerpt from Bartlett v. Kansas City Public Serv. Co., 349 Mo. 13, 160 S.W.2d 740 (1942): "As against the admissibility of former testimony where identity of parties does not exist, it may be urged that cross-examination conducted by different counsel varies greatly in its force and effectiveness; that even though the party-opponent in the former case had an opportunity to cross-examine, such a cross-examination might not have been as effective and searching as one conducted by counsel chosen by the party-opponent in the subsequent case. Furthermore, it is quite true that the effectiveness of cross-examination sometimes depends upon the information furnished to examining counsel by his client. It cannot be said therefore that the fact that a witness is cross-examined or may be cross-examined by the party-opponent in the former case is altogether equivalent to cross-examination by the party-opponent in the second case.

"On the other hand there should be weighed against these considerations another of great importance. Where, as here, the witness is merely absent from the State, it is possible in a civil case and under ordinary circumstances to obtain his deposition. But where the witness is dead or has become insane, his testimony could not be had at all in the second case unless the introduction of the former testimony be permitted. Thus the exclusion of the former testimony would in many instances deprive the tribunal of most valuable aid in determining the true facts of the controversy. When this fact is weighed against the consideration mentioned in the preceding paragraph, and when it is considered that a party-opponent, who has the same motive to thoroughly cross-examine as the present party-opponent would have, has been afforded the opportunity so to do, and that the former cross-examination will usually be effective to disclose any falsity or inaccuracy in the evidence, it will be seen that reason and logic are against the requirement of absolute identity of parties in the two cases." *Id.* at 18, 160 S.W.2d at 743.

See also Glicksberg, *Former Testimony Under the Uniform Rules of Evidence and in Florida*, 10 U. FLA. L. REV. 269 (1957); Notes, 46, IOWA L. REV. 356 (1961), 11 W. RES. L. REV. 471 (1960).

[19] MCCORMICK, EVIDENCE § 238, p. 501.

In conclusion, Rule 63(3)(b)(ii) would liberalize our present law respecting prior testimony by abolishing the requirement of identity of parties [20] and substituting for such requirement the requirement of identity of motive and interest.[21] In our judgment such liberalization is desirable and Rule 63(3)(b)(ii) is recommended for adoption.

Constitutionality of Rule 63(3) as Applied to Criminal Cases

The official comment on Rule 63(3) states with respect to the application of the rule to criminal cases that:

> A question may be raised with respect to the use of former testimony by the prosecution in a criminal case, whether such use would violate the right of the accused to be confronted by his witnesses. As in several other areas, the constitutional question may or may not be a barrier to the use of the testimony. We are dealing in this rule with the question of hearsay and with that subject only.

In this section we propose to explore the constitutional problem thus suggested. For convenience of discussion it will be well to consider first, the constitutionality of Rule 63(3) as a federal measure applicable to federal criminal prosecutions, and second, the constitutionality of Rule 63 as a California measure applicable to criminal prosecutions in this State.

As a Federal Measure. The Sixth Amendment to the Constitution of the United States, adopted in 1791, requires that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." [22] The United States Supreme Court has said that the general intent of this provision is

> [T]o secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination.[23]

If this right were enforced without any qualification whatsoever but with "technical adherence to the letter of a constitutional provision" [24] the result would be that no hearsay whatsoever could be received against a defendant in a federal criminal trial. This would follow irrespective of the fact that such hearsay was in a form (such as a dying declaration or former testimony) traditionally admissible at common law. However, the constitutional provision has not been

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[20] The requirement of identity of parties never required actual literal identity. See Briggs v. Briggs, 80 Cal. 253, 22 Pac. 334 (1889) (successors in interest); Fredericks v. Judah, 73 Cal. 604, 15 Pac. 305 (1887) (executor and heir); Gates v. Pendleton, 71 Cal. App. 752, 236 Pac. 365 (1925) (one of original parties omitted in second action).

[21] The A.L.I. Rule did not require even identity of interest and motive. MODEL CODE Rule 511 Comment.

[22] Almost all state constitutions contain similar provisions. 5 WIGMORE, EVIDENCE § 1397. However, the California Constitution does not contain such a provision.

[23] Dowdell v. United States, 221 U.S. 325, 330 (1911).

[24] Mattox v. United States, 156 U.S. 237, 243 (1895).

literally applied to this extent. The right of confrontation is so construed that it is subject to the traditional exceptions to the hearsay rule.[25] Furthermore, as Mr. Justice Cardozo puts it, these "exceptions are not . . . static, but may be enlarged from time to time if there is no material departure from the reason of the general rule." [26]

Would Rule 63(3) be constitutional if enacted by Congress or if adopted by the Supreme Court in the exercise of its rule-making power? Assuming provision were made for taking depositions by the government in federal criminal prosecutions,[27] Rule 63(3)(a) would make such depositions admissible irrespective of the availability of the deponent. In this aspect Rule 63(3)(a) is of dubious validity. In *Motes* v. *United States* [28] the government offered against defendants the transcript of the testimony of a witness given at the preliminary hearing (at which defendants cross-examined or had an opportunity to cross-examine the witness). It appeared that, although the witness was absent at the time the transcript was offered, his absence was the result of the negligence of the government. The transcript was admitted by the trial court. This was held to be error "in violation of the constitutional right of the defendants to be confronted with the witnesses against them" because:

> We are unwilling to hold it to be consistent with the constitutional requirement that an accused shall be confronted with the witnesses against him, to permit the deposition or statement of an absent witness (taken at an examining trial) to be read at the final trial when it does not appear that the witness was absent by the suggestion, connivance or procurement of the accused, but does appear that his absence was due to the negligence of the prosecution.[29]

Plainly, if the right of confrontation is violated by use of the prior testimony when the absence of the witness is the fault of the prosecution, it would be so violated by such use when the witness is not absent at all. Plainly, too, it is immaterial whether the former testimony is embodied in a deposition or in a transcript of testimony at a preliminary hearing or former trial. We must conclude, therefore, that as a federal measure applicable to criminal prosecutions Rule 63(3)(a) would run afoul of the Sixth Amendment. It would, in Mr. Justice Cardozo's language, be a "material departure from the reason of the general rule." (We hazard, too, the speculation that in a state

[25] Dowdell v. United States, 221 U.S. 325 (1911); Mattox v. United States, 156 U.S. 237 (1895).

[26] Snyder v. Massachusetts, 291 U.S. 97, 107 (1934).

[27] In the federal courts and in two-thirds of the states the prosecution is *not* authorized to take and use depositions. McCORMICK, EVIDENCE § 231. California is one of the minority jurisdictions in which the prosecution is so authorized.

The last sentence of Article I, Section 13 of the California Constitution provides as follows: "The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial." This is implemented by Penal Code Sections 686 and 1335-1345. Under these provisions (speaking generally) the people may (1) take the deposition of a person likely to be unavailable to testify in person at the trial, and (2) introduce such deposition in evidence, provided the person is in fact unavailable at the trial.

Rule 63(3)(a) would eliminate the proviso last stated. The Commissioners on Uniform State Laws state in their comment that clause (a) "does not require that the deponent be unavailable as a witness in order for the deposition to be used at the trial of the action in which the deposition was taken."

[28] 178 U.S. 458 (1900).

[29] *Id.* at 474.

having a constitutional provision for confrontation the measure would be likewise invalid.) As Wigmore puts it: "When a deposition is offered, [by the prosecution in a criminal case] the principle of Confrontation requires that the witness' *personal attendance be shown impracticable* before the deposition may be used"[30] or, as Professor McCormick puts it: "In criminal cases . . . the present requirement of unavailability is embodied in the constitutional guaranty of confrontation . . . ."[31]

Now let us consider the validity under the Sixth Amendment of Rule 63(3)(b)(ii) as a federal measure. In *Kirby* v. *United States*,[32] Kirby was indicted for receiving property alleged to have been stolen by Wallace, Baxter and King from a United States Post Office. Upon their trial for the theft, Wallace and Baxter pleaded guilty and King was convicted upon his plea of not guilty. Upon Kirby's trial, the only evidence of the Wallace-Baxter-King theft was the record of their trial which was admitted over Kirby's objection. The court charged that the record was prima facie evidence (although a statute provided it was conclusive evidence). Kirby's conviction was reversed by the Supreme Court, which held that the statute was unconstitutional and, furthermore, that there was "fundamental error" in the trial below in admitting the evidence, even as prima facie evidence. The Court reasoned as follows:

> Kirby was not present when Wallace and Baxter confessed their crime by pleas of guilty, nor when King was proved to be guilty by witnesses who personally testified before the jury. Nor was Kirby entitled of right to participate in the trial of the principal felons. If present at that trial he would not have been permitted to examine Wallace and Baxter upon their pleas of guilty, nor cross-examine the witnesses introduced against King, nor introduce witnesses to prove that they were not in fact guilty of the offence charged against them. If he had sought to do either of those things —even upon the ground that the conviction of the principal felons might be taken as establishing *prima facie* a vital fact in the separate prosecution against himself as the receiver of the property— the court would have informed him that he was not being tried and could not be permitted in anywise to interfere with the trial of the principal felons. And yet the court below instructed the jury that the conviction of the principal felons upon an indictment against them alone was sufficient *prima facie* to show, as against Kirby, indicted for another offence, the existence of the fact that the property was stolen—a fact which, it is conceded, the United States was bound to establish beyond a reasonable doubt in order to obtain a verdict of guilty against him.
>
> One of the fundamental guarantees of life and liberty is found in the Sixth Amendment of the Constitution of the United States, which provides that "in all criminal prosecutions the accused shall . . . be confronted with the witnesses against him." Instead of confronting Kirby with witnesses to establish the vital fact

[30] 5 WIGMORE, EVIDENCE § 1376, p. 58.
[31] McCORMICK, EVIDENCE § 238, p. 501.
[32] 174 U.S. 47 (1899).

that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution, with which he had no connection and the evidence in which was not given in his presence. The record showing the result of the trial of the principal felons was undoubtedly evidence, as against *them,* in respect of every fact essential to show *their* guilt. But a fact which can be primarily established only by witnesses cannot be proved against an accused—charged with a different offence for which he may be convicted without reference to the principal offender—except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.[33]

* * *

[O]ne accused of having received stolen goods with intent to convert them to his own use knowing at the time that they were stolen, is not within the meaning of the Constitution confronted with the witnesses against him when the fact that the goods were stolen is established simply by the record of another criminal case with which the accused had no connection and in which he was not entitled to be represented by counsel.[34]

Under Rule 63(3)(b)(ii) the testimony of the witnesses against King would be admissible against Kirby, provided the witnesses were now unavailable in the sense of Rule 62. There was identity of motive and interest between King and Kirby in respect to King's guilt. Under these rules, therefore, Kirby's interests are regarded as adequately protected by King's opportunity to cross-examine the witnesses. Nevertheless, it seems too clear to require any extended argument that, under the reasoning of the Supreme Court above set forth, this cannot be regarded as adequate protection under the standards of adequacy prescribed by the Sixth Amendment's confrontation provision. The present unavailability of the witnesses would not, in our opinion, alter the situation. It is true that the Supreme Court has approved admitting prior testimony of non-available witnesses against defendants in federal criminal prosecutions, but in these cases the prior testimony was given in *defendant's* presence with the opportunity for cross-examination by *him.* In excusing the enforcement of literal confrontation in such cases, the court has emphasized that confrontation requires at least a prior opportunity of *defendant* to cross-examine. As stated by the court in *Mattox* v. *United States:*[35]

> The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-exam-

[33] *Id.* at 54-55.
[34] *Id.* at 60.
[35] 156 U.S. 237 (1895).

> ination. This, the law says, he shall under no circumstances be deprived of . . . .[36]

Conceivably, the Supreme Court might be persuaded to change its previous interpretations of the confrontation provision and to regard the new exception of Rule 63(3)(b)(ii) as within Mr. Justice Cardozo's proposition that the exceptions to the confrontation provision are not static.[37] Professor McCormick suggests this possibility in the following passage:

> Do the confrontation provisions in state and Federal constitutions limit the use for the prosecution of hearsay declarations falling within the exceptions to the hearsay rule? This was once a matter of doubt but it has now been established for a hundred years that those exceptions which were accepted when these provisions were included in the earliest American constitutions were not intended to be abrogated. Most if not all of the common-law exceptions were so accepted by the 1780's. Accordingly the prosecution's use of dying declarations, official written statements, and regular entries in the course of business is frequent and approved. There seems no reason to doubt that the other traditional exceptions as developed and liberalized by judicial decisions should be similarly treated. New statutory liberalizations of the hearsay exceptions should likewise, it seems, meet with no obstacle from these provisions, so long as the traditional bases for the hearsay exceptions, namely that hearsay may be admitted when it is (a) specially needed and (b) specially trustworthy, are preserved in the statutory extensions.
>
> Wigmore's exposition of confrontation has brought light into the dark corners of the subject, and has greatly contributed to the present liberal interpretation of the constitutional provisions. Consequently, strict and literal interpretations from the pre-Wigmore era must be read with caution.[38]

Nevertheless, it must be confessed that the body of federal precedents militating against the validity of Rule 63(3) as a federal measure applicable to criminal prosecutions is so considerable that we must entertain grave doubts as to whether the Supreme Court would sustain the rule under the Sixth Amendment.

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[36] *Id.* at 244. This statement cannot be taken literally. To do so would exclude the case of the dying declaration offered against defendant. The court expressly approves admitting such declarations. *Id.* at 243. The statement quoted must be qualified by the thought that traditional exceptions to the hearsay rule (even though defendant is deprived of cross-examination at any time) are acceptable under the Sixth Amendment of the Constitution. Consider also Mr. Justice Cardozo's statement that the exceptions are not static. Snyder v. Massachusetts, 291 U.S. 97, 107 (1934).

[37] Snyder v. Massachusetts, 291 U.S. 97, 107 (1934).

[38] McCORMICK, EVIDENCE § 231, pp. 486-87. Consider also the following statement from United States v. Leathers, 135 F.2d 507 (2d Cir. 1943): "The appellant Thomas argues that the records in question would not be admissible under the early common law rules and that the recent judicial and statutory changes we have referred to are in contravention of the Sixth Amendment. But statements by relatives as to pedigree, declarations against interest, and most important of all in criminal trials, dying declarations, have long been recognized as admissible. It is not necessary to say what limits the Sixth Amendment may set to the extension of exceptions to the rule against hearsay. Probably the permissible extension is a question of degree. We think that business records kept as a matter of ordinary routine are often likely to be more reliable than dying declarations. It cannot be reasonably argued that the extension of the common law book entry rule which we discussed . . . *supra*, or the statute cited above [The Federal Business Records Act], involve any violation of the Sixth Amendment." *Id.* at 511.

As a California Measure. In this State the right of confrontation is not guaranteed by the Constitution. The right is, however, provided for in Penal Code Section 686. It is possible to argue, therefore, that since our right of confrontation is a legislative grant, it may be withdrawn or restricted by legislation—that insofar as personal opportunity to cross-examine, or unavailability of the former witness or deponent, are now conditions precedent to the prosecution's use of the former testimony as elements of the right of confrontation, that right, being a gift of the legislature, may be restricted by legislative action.[39] Can we be altogether confident, however, that this argument would meet with favor in both the state and federal courts?

The Sixth Amendment is not, of course, directly applicable to the states. The Fourteenth Amendment is. If California were to adopt Rule 63(3), would this violate the Fourteenth Amendment so far as the application of the rule to criminal prosecutions is concerned? Does that amendment incorporate the Sixth Amendment, as interpreted by the decisions cited in the previous section, and, as thus incorporated, impose that amendment and those interpretations upon the states as elements of federal due process? The recent case of *Stein* v. *New York*[40] suggests that the answer is "No." There, Cooper, Stein and Wissner were jointly tried for murder in a New York court, found guilty, and sentenced to death. Cooper and Stein had made written confessions which were received in evidence. Each such confession implicated all three defendants. Wissner moved that all references to him be stricken from such confessions. This motion was denied, but the judge did charge the jury that they should not consider a statement by one defendant as any evidence of guilt against any other defendant. Wissner took the case to the United States Supreme Court which affirmed his conviction. His argument and the Court's answer are revealed in the following excerpt from its opinion:

> Wissner, however, contends that his federal rights were infringed because he was unable to cross-examine accusing witnesses, *i.e.*, the confessors. He contends that the "privilege of confrontation" is secured by the Fourteenth Amendment, relying on one sentence in *Snyder* v. *Massachusetts*, 291 U.S. 97, 107.[41] However, the words cited were quoted verbatim from *Dowdell* v. *United States*, 221 U.S. 325, 330, in which the language was used to describe the purpose of the Sixth Amendment provision on confrontation in federal cases. It was transposed to *Snyder* solely to point out the distinction between a right of confrontation and a

[39] A comparable argument has been made in upholding Section 969(b) of the Penal Code providing for proof of prior conviction by the record thereof. See People v. Beatty, 132 Cal. App. 376, 22 P.2d 757 (1933) to this effect: "Although the right of a defendant to be confronted by witnesses is fundamental, it is not expressly guaranteed by the Constitution of this state, and the provisions of the sixth amendment to the federal Constitution are not applicable here. [Citation omitted.] The right in this state is guaranteed by section 686 of the Penal Code, and the defendant can be deprived of the same only by statutory authority to the contrary. [Citation omitted.] Section 969b of the Penal Code falls squarely within the category of legislation of this character." *Id.* at 380, 22 P.2d at 759.
The court also rejected the contention that the section violates due process.

[40] 346 U.S. 156 (1953).

[41] The court, quoting from the *Snyder* case, noted: "'It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination.' Petitioner Wissner erroneously assumes that 'It' at the beginning of the sentence refers to the Fourteenth Amendment." *Id.* at 195 n.38.

> mere right of an accused to be present at his own trial.[42] The Court in *Snyder* specifically refrained from holding that there was any right of confrontation under the Fourteenth Amendment,[43] and clearly held to the contrary in *West* v. *Louisiana*, 194 U.S. 258,[44] in which it was decided that the Federal Constitution did not preclude Louisiana from using affidavits on a criminal trial.
>
> Basically, Wissner's objection to the introduction of these confessions is that as to him they are hearsay. The hearsay-evidence rule, with all its subtleties, anomalies and ramifications, will not be read into the Fourteenth Amendment.[45]

We read this passage as constituting a clear license to the states to modify the traditional hearsay rule in criminal cases at least to the extent that Rule 63(3)(b)(ii) modifies it and we conclude that Rule 63(3) would not infringe the Fourteenth Amendment even though extended to state criminal cases.

Would courts of this State hold that Rule 63(3) violates state due process? There is considerable authority which suggests that they would not. The present provisions of Section 686 of the Penal Code making former testimony admissible where the witness is unavailable have been attacked as violation of due process and have been upheld.[46] Section 969b of the Penal Code, making the record proof of a former conviction, has been attacked on like grounds and has also been up-

[42] The court further noted: "*Snyder* involved a contention by a state convict that he was denied due process when the court prevented him from going along when the jury went to view the area where the crime was committed. Among the many bases for deciding against the defendant, the Court, through Mr. Justice Cardozo, pointed out that even if he had a federal right to confrontation (and the Court indicated he did not) his exclusion from a view would not offend it. Hence the use of the language quoted describing the nature of the right of confrontation." *Id.* at 195 n.39.

[43] In addition, the court noted that: " 'For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, though this has not been squarely held.' " *Id.* at 195 n.40.

[44] Twining v. New Jersey, 211 U.S. 78, 98 (1908), likewise interpreted the *West* case as deciding "in effect" that the right of confrontation contained in the Sixth Amendment is not guaranteed by the Fourteenth Amendment.

Mr. Justice Jackson states that the *West* case involved the use of affidavits. This is erroneous. The evidence consisted of depositions. Assuming affidavits had been involved, the case would be even stronger authority for freeing the states from the restraints of the right of confrontation.

Mr. Justice Jackson's proposition that the Fourteenth Amendment does not incorporate the hearsay rule was earlier suggested by Mr. Justice Cardozo's dissenting opinion in Gt. Northern Ry. v. Washington, 300 U.S. 154, 173 (1937).

In People v. Ashley, 42 Cal.2d 246, 267 P.2d 271 (1954), the California court was asked by defendant to find that the Fourteenth Amendment guarantees the right of confrontation. The court assumed the point arguendo and decided that there was no violation of the right thus assumed.

[45] Stein v. New York, 346 U.S. 156, 195-196 (1953).

[46] People v. Chin Hane, 108 Cal. 597, 41 Pac. 697 (1895). "It is contended that the deposition of an absent witness, taken at the preliminary examination in a case of homicide, cannot be used at the trial, for the reason that such a proceeding is violative of Section 13, Article I, of the California Constitution. This provision of the Constitution has been construed contrary to the appellant's contention in the case of People v. Oiler, 66 Cal. 101." *Id.* at 607-08, 41 Pac. at 700. Note, however, that the opinion in the case cited was not specifically based on the due process clause of the section.

Compare the following statement from People v. Ashley, 42 Cal.2d 246, 267 P.2d 271 (1954): "Defendant contends that the reading of Mrs. Neal's testimony at the trial deprived him of the right of confrontation in violation of the United States Constitution. Even if this right is guaranteed under the due process clause of the Fourteenth Amendment to the United States Constitution as contended by defendant . . . there is no merit in the contention. 'The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face-to-face, and of subjecting him to the ordeal of cross-examination.' [Citation omitted.] Defendant had that advantage at the preliminary hearing." *Id.* at 272-73, 267 P.2d at 287-88. Presumably the ruling would have been the same if state due process had been urged. See People v. Morine, 54 Cal. 575 (1880) (question presented by defendant but not decided).

held.[47] Likewise, the practice of submitting the case on the transcript of the preliminary hearing has been attacked on due process grounds and has been upheld.[48] However, none of these situations involves so substantial a departure from tradition as Rule 63(3). We cannot, therefore, flatly predict that Rule 63(3) would be upheld upon these cases. A surer index, we believe, is the parallel between state and federal due process. If the federal courts would uphold Rule 63(3) under the Fourteenth Amendment (as the *Stein* case indicates they would), it seems not unlikely that the state courts would uphold it under state due process provisions. Thus, we hazard the guess that the California courts would follow the lead of the Supreme Court and that, as that Court refuses to read confrontation into the Fourteenth Amendment to the United States Constitution, the California court would refuse to read it into Article I, Section 13 of the California Constitution. If this prediction be correct, Rule 63(3) is invulnerable to attack on due process grounds.[49]

Conclusion

We conclude that Rule 63(3) is desirable as a matter of policy and that it is constitutional. It is, therefore, recommended for adoption.[50]

[47] People v. Purcell, 22 Cal. App.2d 126, 70 P.2d 706 (1937); People v. Beatty, 132 Cal. App. 376, 22 P.2d 757 (1933); People v. Russell, 131 Cal. App. 646, 21 P.2d 959 (1933).

[48] People v. Valdez, 82 Cal. App.2d 744, 187 P.2d 74 (1947). The court here assumes arguendo that state due process includes the right of confrontation. The assumption is based on Snyder v. Massachusetts, 291 U.S. 97 (1934). Query: Would a like assumption be indulged in in view of the *Stein* case? See discussion in text at notecall 40, p. 455, *supra* and note 42, p. 456, *supra*.

In People v. Wallin, 34 Cal.2d 777, 215 P.2d 1 (1950), the court stated: "The defendant has not been deprived of his rights under the United States Constitution where, as here, his attorney cross-examined the prosecution's witnesses at the preliminary hearing, in the defendant's presence, and thereafter the defendant waived his right of confrontation during the trial by stipulating that the People's case be submitted upon the transcript of the preliminary hearing." *Id.* at 871-82, 215 P.2d at 4. Presumably the ruling would have been the same if state due process had been urged.

[49] Apparently the last sentence of Article I, Section 13 of the California Constitution would present no constitutional barrier to enactment of Rule 63(3). See People v. Sierp, 116 Cal. 249, 48 Pac. 88 (1897). See generally McKay, *The Right of Confrontation*, 1959 WASH. U. L. Q. 122; Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204 (1960); Slovenko, *Constitutional Limitations on the Rules of Evidence*, 26 U. CINC. L. REV. 493 (1957).

[50] The N. J. Committee approved this subdivision, but recommended that clause (b)(ii) be limited to civil cases. N. J. COMMITTEE REPORT 123. The N. J. Commission revised the subdivision to read as follows:

> *Subject to Rule 64, and* subject to the same limitations and objections as though the declarant were testifying in person, *a statement is admissible* (a) *when it is* testimony in the form of a deposition taken *in the cause* * * * *but only to the extent it is admissible under* the * * * *statutes or rules of court* of this state * * *, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, *when it is* testimony given *by him* as a witness in another action or in a deposition * * * *which was admissible* in the trial of another action, * * * *and* (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) *in a civil case or when offered by the defendant in a criminal case,* 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; [* * * indicates omission from text of URE subdivision; *italics* indicates addition to text of URE subdivision.]

N. J. COMMISSION REPORT 55. The Utah Committee revised paragraph (a) to incorporate the existing limitations on the use of depositions contained in the Utah Rules of Civil Procedure and approved the remainder of the subdivision. UTAH FINAL DRAFT 35.

Rule 63(4)—Contemporaneous Statements and Statements Admissible on Grounds of Necessity Generally

Rule 63(4) provides:

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

This language creates three exceptions to the hearsay rule, lettered (a), (b) and (c). Each exception is phrased in part in terms of "statement" and "perception." These are words of art deriving their meaning from the following definitions given in Rule 62:

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

Under these definitions one can make a "statement" without using words; one can "perceive" without using his eyes. Thus one who smells a stench "perceives" it. If he holds his nose to indicate his perception to another he makes a "statement."

Each of the three exceptions deals with perception (in the sense above) of both "events" and "conditions." These terms are not, however, specifically defined.

The exception created by Rule 63(4)(c) applies only if the declarant is "unavailable as a witness." This expression is defined as follows by Rule 62(7):

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

place of hearing because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

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

Rule 63(4)(a) and (b) deal with certain spontaneous or contemporaneous statements which for convenience we may designate respectively as (a) "Statements of Present Perception" and (b) "Excited Statements." Rule 63(4)(c) deals with statements of perception which need not necessarily be either contemporaneous or spontaneous but must be "recent." For convenience we may label this exception (as do the Commissioners on Uniform State Laws) "Statements Admissible on the Ground of Necessity Generally."

Rule 63(4)(b) ("Excited Statements") is merely declaratory of existing law. Rule 63(4)(a) ("Statements of Present Perception") may or may not be. Both exceptions, however, are of narrow scope. On the other hand, Rule 63(4)(c) ("Statements Admissible on the Ground of Necessity Generally") is clearly a new exception of broad scope and of large importance. We begin, therefore, with a consideration of this exception.

Rule 63(4)(c)—Statements Admissible on the Ground of Necessity Generally

This exception is applicable only "if the declarant is unavailable as a witness." Now when it is impossible to apply the test of cross-examination to the statements of a declarant because he cannot be produced in court to make his statements as a witness on direct examination, the dilemma presents itself of either receiving his statements without the test of cross-examination or of leaving his knowledge altogether unutilized. There is the necessity to take the untested statement or none at all from this declarant. Conceivably the law of evidence *might* have so developed that in *all* situations presenting these alternatives the choice would have been to receive the untested statement. Unavailability of the declarant would then have been a sufficient foundation to make admissible any out-of-court statement of the declarant which he could have made in court as a witness upon direct examination. This rationale could have been advanced in support of such a rule: while the test of cross-examination is important enough to require statements to be so tested when it is possible to do so, it is not so important as to require the exclusion of statements when cross-examination is impossible. A trial is a more rational investigation—a better mechanism in the search for truth—if we accept the best that can be got from an allegedly knowledgeable declarant instead of rejecting altogether his professions of knowledge.

This, we say, might have become the law. But, of course, in fact the development in Anglo-American law has been otherwise. As Wigmore[1] pointed out many years ago, necessity (in the sense considered above) has not produced a general exception to the hearsay rule admitting the hearsay declarations of all unavailable declarants. Rather, there have evolved only special exceptions based on *both* necessity *and* special circumstances which are considered to constitute an adequate substitute for cross-examination, such as that the declarant was speaking against his interest or that the declarant thought he was dying and hence was speaking with awareness of imminent divine punishment if he lied. These special exceptions do not, of course, cover the whole field of hearsay statements of unavailable declarants. They leave many gaps. The result is that much, probably most, of what those now dead or otherwise unavailable once said or wrote cannot be considered in court, however much a litigant may need to have it considered to establish his claim or his defense.

Has the time come to close these gaps altogether? If not, are we ready to close some of these gaps? If so, which ones and on what basis? These are the basic aspects of the problem with which Rule 63(4)(c) deals. The problem is by no means a new one, nor is Rule 63(4)(c) by any means the first effort that has been made to solve it. Thus Rule 63(4)(c) can be best understood if considered against the background of some of the prior efforts which have been exerted and some of the previous proposals which have been advanced.

In 1898 the Massachusetts Legislature, prompted by a suggestion from James Bradley Thayer, enacted as follows:

> No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant.[2]

Less than a moment's reflection is needed to evoke the question whether this is not a so-far-so-good-but-not-far-enough measure. What reason can there be for recognizing necessity created by death and refusing to

[1] 5 WIGMORE, EVIDENCE §§ 1420-1423.

[2] Mass. Acts & Resolves 1898, ch. 535, p. 522, carried forward today with slight changes as MASS. ANN. LAWS ch. 233, § 65 (1956). Rhode Island has a comparable statute, R.I. GEN. LAWS § 9-19-11 (1956). Lawyers and judges in Massachusetts seem to be well satisfied with the act. At least most of those responding to the questionnaire submitted to them some years ago by the Commonwealth Fund so expressed themselves. See MORGAN, THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM 39-49 (1927). For Wigmore's approbation, see 5 WIGMORE, EVIDENCE § 1576(2).

The English Evidence Act of 1938 is another instance of an attempt to liberalize the hearsay rule along fairly broad lines. The act, however, is very complex and is applicable only to written hearsay statements. See MCCORMICK, EVIDENCE § 303; 5 WIGMORE, EVIDENCE § 1576 n.4; Note, 70 L. Q. REV. 30 (1959).

Wigmore advocates (1) adoption of the Massachusetts-type statute and (2) giving the trial judge discretion to admit hearsay generally. 5 WIGMORE, EVIDENCE § 1427. His formulation to vest this discretion in the trial judge is as follows:

"(1) The Hearsay rule need not be enforced in the examination of a qualified witness, if in the opinion of the trial Court its strict enforcement would needlessly interrupt the narrative and if the hearsay incidentally testified to would not be likely to mislead the jury in their understanding of the facts.

"(2) But the opposing party, or the judge in his discretion, may require that any other person whose statement is thus reported by hearsay shall be called for examination before the close of the trial.

"(3) Any written statement, duly authenticated, by a person not called to the stand, may be introduced without calling him, unless in the opinion of the Court the statement is of such importance that on demand of the opposite party the person should be called for cross-examination." [Emphasis omitted.]

Query: If the discretion is to be that of the judge should not the expression "the opposing party" be eliminated from subsection (2)?

recognize real necessity for any cause? Add to the statute a provision for the receipt of declarations of persons now insane (as the American Bar Association proposed in 1938) [3] and you merely change the question to: why not recognize necessity arising from causes other than death and insanity?

In 1942 the American Law Institute came boldly to grips with this question and proposed the following sweeping provision as Rule 503(a) of the Model Code of Evidence:

> Evidence of a hearsay declaration is admissible if the judge finds that the declarant
>
> (a) is unavailable as a witness, . . .[4]

This is the rule we mentioned at the outset as the one which the law might have adopted in its evolution—a rule making necessity alone the basis for a comprehensive exception to the hearsay rule. As we there pointed out, however, the evolution to date has been otherwise.

The Commissioners on Uniform State Laws reject the Massachusetts statute and they reject the proposal of the American Bar Association to amend the statute to include declarations of insane persons. Their reason is as follows:

> In the tentative draft on hearsay presented at the 1951 meeting of the Conference an exception was included in the language of the 1938 recommendation of the American Bar Association, letting in hearsay statements of persons who are unavailable as witnesses because of death or insanity. A statute has existed in Massachusetts since 1898 recognizing death as the justifying factor. The Committee after carefully reconsidering the problem has felt that there was no sound basis for recognizing necessity on account of death or insanity as distinguished from real unavailability for any cause.[5]

The Commissioners on Uniform State Laws also reject the American Law Institute proposal. Their reasoning is as follows:

> In no instance [of the Uniform Rules of Evidence hearsay rule and its exceptions] is an exception based solely upon the idea of necessity arising from the fact of the unavailability of the declarant as a witness. In this respect this rule is a drastic variation from A.L.I. Model Code of Evidence Rule 503(a) which recognizes a finding of unavailability as the sole criterion for the admissibility of a large body of hearsay statements. The Model Code theory is that since hearsay is evidence and has some probative value it should be admissible if relevant and if it is the best evidence available. That policy is rejected by the Conference of Commissioners on Uniform State Laws. 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

[3] VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION, 321, 338 (1949); 5 WIGMORE, EVIDENCE § 1576(2).

[4] The Model Code, however, limited the application of Rule 503(a) to declarations by persons with personal knowledge and empowered the trial judge to exclude hearsay whenever its probative value was outweighed by the likelihood of waste of time, prejudice, confusion or unfair surprise. See MODEL CODE Rules 501(3) and 303. See also MCCORMICK, EVIDENCE § 304, p. 631-32.

[5] UNIFORM RULE 63(4) Comment.

any value at all depends primarily upon the circumstances under which the statement was made.[6]

Thus, the Commissioners on Uniform State Laws propose Rule 63(4)(c), which, they say, is "new" but is "a carefully considered middle ground between the liberal extreme of the A.L.I. Model Code of Evidence and the ultra conservative attitude opposing any liberalization in the exceptions to the rule against hearsay."[7]

Rule 63(4)(c) admits, "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 has been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action."

This exception is not based solely on necessity. Rather, there are the following additional justifying factors: (1) recency of perception; (2) clarity of recollection; (3) good faith; and (4) *ante litem motam.*

We shall now attempt to illustrate in several situations the impact of these factors as conditions limiting the receipt of evidence, comparing in each instance the middle-of-the-road Uniform Rules position with the "extreme" Model Code position.

Suppose that a man is injured when he alone is present. Later he dies. The circumstances of his injury become material in an action for insurance benefits. Evidence is offered by plaintiff of the man's declarations as to the circumstances of his injury, the declarations having been made (a) the day after his injury (b) two months later. Under Model Code Rule 503(a) both offers would be accepted.[8] Under Rule 63(4)(c) of the Uniform Rules the second offer might be rejected because the test of recency of perception is not satisfied.[9] The Uniform Rules idea is this: the smaller the time lapse between the event and the declaration, the more trustworthy the declaration. If the gap becomes large enough the declaration should not be received unless subjected to the test of cross-examination. *Ergo,* only statements of *recent* perception are admissible without that test. Stale statements of perception cannot be utilized albeit they are needed because the declarant is unavailable. As to stale statements, the interests of the one party in testing statements adverse to him by cross-examination must prevail over the needs of the other party to make out his case or defense.

Again, suppose the injured person in our hypothetical case makes his statement the day after the injury but the tenor of his statement or surrounding circumstances or both indicate that his memory is unclear. Element (2) of the four conditions of Rule 63(4)(c) would require the judge to reject an offer to prove the statement. Here the idea is that, even though the declaration is recent, statements by one whose memory is hazy and meandering cannot safely be received without being subjected to the test of cross-examination.

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[6] UNIFORM RULE 63 Comment.
[7] UNIFORM RULE 63(4) Comment.
[8] Unless the judge exercised the discretion described in note 4, p. 461, *supra.*
[9] We are assuming, of course, that the declarations would not be admissible under any of the standard exceptions to the hearsay rule. We are thinking, for example, of a declaration like "I tripped and fell down the stairs." Under current law both offers would be rejected.

Now suppose that an injured person makes his statement the day after the injury and that the form of the statement and the surrounding circumstances raise no doubts as to the clarity of his memory. Still, under Rule 63(4)(c) the judge should reject an offer of the statement if he thinks that the declarant made the statement in bad faith. What does this mean? Realistically, it probably means that the judge, acting *pro hac vice* like a juryman, may simply conclude "I do not believe his statement" [10] and for this reason the judge may reject the offer of proof. Here we have the unusual safeguard that the judge passes preliminarily on the credibility of the evidence. In other words, if evidence is admitted under Rule 63(4)(c) and if a verdict is based upon such evidence, there has been a double-check upon the credibility of such evidence at the hands of both the judge and the jury. In contrast, Model Code Rule 503(a) requires the judge to let the jury hear evidence of the statement irrespective of his personal opinion of the credibility of the statement.

The concept underlying the *ante litem motam* condition and its operation is too obvious to require comment. It is interesting to note, however, that not even this limitation is included in Model Code Rule 503(a).

Finally, it should be noted that under Rule 63(4)(c) the judge must find that the declarant actually made the statement. That is, the judge may disbelieve the witness who testifies that the declarant made the statement and reject the offer on that basis. Manifestly, if the judge does not believe that the statement was made at all, he simply cannot make the findings necessary for admission and must therefore reject the offer.[11] This again is in marked contrast to Model Code Rule 503(a) under which the judge passes only on the unavailability of the declarant, leaving all other questions to the jury.

From the foregoing discussion it must be obvious that the Commissioners on Uniform State Laws are right in saying that under Rule 63(4)(c) the "trial judge is necessarily given considerable discretion." Just how extensive this discretion is may be illustrated by taking a specific case, noting the possible rulings available to the judge.

Let us suppose an action against the administrator of the maker of a promissory note. The defense is payment. Defendant's offer of proof: X to testify that on June 1 deceased said to X "I paid the note off yesterday." Under Rule 63(4)(c) the judge may make any of the following rulings [12] for the reasons indicated:

1. He may disbelieve X and therefore reject the offer.

[10] This seems to be the practical effect of the good faith provision of the Massachusetts statute. Thus defendant, charged with the murder of X, offers a cellmate of one E to testify that E told the cellmate that E murdered X. E is now dead, having been executed at the state prison. The trial judge rejects the offer, finding that E did not make his statement in good faith. The appellate court approves the ruling. Commonwealth v. Wakelin, 230 Mass. 567, 120 N.E. 209 (1918). Is it not clear that the trial judge simply did not believe E and that this is what he meant by his finding that E spoke in bad faith? See also Glidden v. United States Fid. & Guar. Co., 198 Mass. 109, 114, 84 N.E. 143, 144 (1908) "Such a declaration as this hardly could have been made in good faith unless actually known at the time by the declarant to be true." Does this not make "good faith" synonymous with "true"?

[11] McCormick, Evidence § 304, p. 633.

[12] Uniform Rule 1 provides as follows: "(8) 'Finding of fact' means the determination from proof or judicial notice of the existence of a fact. A ruling implies a supporting finding of fact; no separate or formal finding is required unless required by a statute of this state."

Professor Falknor is of the opinion that (a) the requisite findings for admissibility under Rule 63(4)(c) should be express findings entered in the record, and

2. He may believe X but disbelieve the deceased and therefore reject the offer.

3. He may believe both X and deceased and therefore accept the offer.

4. He may believe X and believe therefore that deceased made the statement but find himself unable to decide whether or not he believes deceased unless he is given more information. Now under Rule 8 [13] he may place upon defendant the burden of supplying further information. In default of such information the ruling will be rejection of the offer.

Enough has probably been said to establish the point that Rule 63(4)(c) is indeed a cautious, carefully guarded, middle-of-the-road measure. Probably there will be no dissent from the statement made by the Commissioners on Uniform State Laws that "(c) is drafted so as to indicate an attitude of reluctance and require most careful scrutiny in admitting hearsay statements under its provisions." [14] Despite these cautionary features, the fact remains that Rule 63(4)(c) would empower the courts to admit a great deal of much needed, credible evidence. Its operation would be highly beneficent in such current situations of potential injustice as cases of fatal accidents to solitary workmen and cases involving transactions with persons now dead.

Should California adopt Rule 63(4)(c)? It must be frankly acknowledged that this is the most significant inroad upon the hearsay rule of any of the Uniform Rules. To evaluate its merits requires a judgment on the basic validity of the hearsay rule itself, which in turn requires a careful balancing of the need of justice to the party relying on hearsay against the need of the other party to cross-examine the witnesses against him. It cannot be denied, therefore, that Rule 63(4)(c) touches fundamentals. The writer agrees wholly with the following statement by Mr. Justice Learned Hand:

> When a witness is not available at all or available only with a disproportionate expense of time, let us hear what he has said on

(b) as drafted, Rule 63(4)(c) does not make it clear that the determination of unavailability is for the judge. Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43, 64-65 (1954).

As to Professor Falknor's point (a), we dissent. The requirement of express findings entered in the record would, it is feared, deter too many judges from using Rule 63(4)(c) as a mechanism for *admitting* evidence. As drafted, the rule puts enough obstacles in the way. Let us not erect more. His point (b) seems well taken. Accordingly, it is suggested that Rule 63(4)(c) be amended by inserting after the initial word "if" the following: "the judge finds that."

[13] UNIFORM RULE 8 is as follows: "When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility."

Note that the burdens are to be fixed "as implied by the rule under which the question arises." In our case the question arises under Rule 63(4)(c). It seems clearly implied by this rule that the proponent of the evidence has the burdens, especially in the light of the comment that Rule 63(4)(c) is "drafted so as to indicate an attitude of reluctance and require most careful scrutiny in admitting hearsay statements under its provisions."

Wigmore states that, generally, the burden is upon the proponent. 1 WIGMORE, EVIDENCE § 18(E).

[14] UNIFORM RULE 63(4) Comment.

> the matter, just as we do in every other concern of life, even in affairs which may involve our lives or the safety of the state. You will perhaps, with the instinct of lawyers, recoil at what seems so far-reaching an innovation. I do not complain; I agree that it involves chances, but in answer I argue that, as the law now stands, the party who has only such proof is deprived of any chances at all. It would of course be undesirable to open the doors to hearsay evidence when better was available, but I ask you whether Baron Gilbert was not right in saying that men should use in their disputes the best means they can get to reach the truth? [15]

Agreeing with this basic philosophy, the writer thinks that Rule 63(4)(c) is (to borrow Professor McCormick's expression) a "reform [which] might well have gone farther but it is hard to maintain that it has gone too far." [16]

Rule 63(4)(b)—Excited Statements

Rule 63(4)(b) deals with the problem of statements made "under the stress of a nervous excitement." There is an inveterate and apparently incurable judicial habit (abetted, no doubt, by counsel) of dealing with this problem in terms of *res gestae,* a protean phrase which according to Wigmore should be wholly "repudiated as a vicious element in our legal phraseology"—a phrase "not only entirely useless, but even positively harmful." [17]

Many years ago and with powerful insight Wigmore discovered that, looking at facts and results of certain cases and disregarding the *res gestae* language of decision, these cases could be synthesized into the generalization of an exception to the hearsay rule for excited statements. Thus guided "by what the Courts do and not by what they say," Wigmore proclaimed that the time had come "to call these doings by their true name,—in other words, to recognize the existence of this Exception to the hearsay rule." [18] He then stated the principles and elements of the exception [19] as we shall outline them in a moment.

Rule 63(4)(b) follows the course charted by Wigmore. The rule is formulated as an exception to the hearsay rule. The expression *res gestae* is sedulously avoided. The elements of the exception, as stated by Wigmore, are evidently intended to be incorporated in the formulation.

In California, after many years of confusion and after many contradictory decisions,[20] the Supreme Court finally adopted Wigmore's views. In *Showalter* v. *Western Pacific R.R.*[21] the Supreme Court frankly said:

> Courts in general have been in considerable confusion as to the rule of *res gestae.* In this respect the courts of this state are not different.[22]

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[15] *The Deficiencies of Trials To Reach the Heart of the Matter,* 3 N.Y. CITY BAR ASS'N LECTURES ON LEGAL TOPICS, 1921-22, p. 99, quoted in MCCORMICK, EVIDENCE § 302, p. 628-29.

[16] McCormick, *Hearsay,* 10 RUTGERS L. REV. 620, 624 (1956). See also, Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence,* 75 HARV. L. REV. 932 (1962).

[17] 6 WIGMORE, EVIDENCE § 1767, p. 182. See also MCCORMICK, EVIDENCE § 274.

[18] 6 WIGMORE, EVIDENCE § 1746, p. 135.

[19] *Id.* §§ 1747-1757.

[20] Discussed in McWilliams, *The Admissibility of Spontaneous Declarations,* 21 CALIF. L. REV. 460 (1933).

[21] 16 Cal.2d 460, 106 P.2d 895 (1940), noted in 29 CALIF. L. REV. 433 (1941).

[22] *Id.* 16 Cal.2d at 465, 106 P.2d at 898.

The court then approved and adopted Wigmore's view (and overruled cases to the contrary), acknowledging both the existence of the exception and its elements in the following terms:

> The foundation for this exception is that if the declarations are made under the immediate influence of the occurrence to which they relate, they are deemed sufficiently trustworthy to be presented to the jury. (Wigmore on Evidence, [2d ed.], sec. 1747 et seq., and cases cited.)
>
> The basis for this circumstantial probability of trustworthiness is "that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief." To render them admissible it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it. (Wigmore on Evidence, [2d ed.], sec. 1750.)[23]

Subsequent cases in California have applied the Wigmorian doctrines,[24] which therefore now seem to be firmly established as the law of this State. Since Rule 63(4)(b) incorporates these doctrines, its adoption in California would be merely a declaration of existing law.

The question remains of the relationship between Rule 63(4)(b) and Rule 63(4)(c). If the declarant is unavailable and if his statement measures up to the "made under stress of nervous excitement" condition of Rule 63(4)(b) it would seem that a fortiori it would measure up to the "recency" and other conditions of Rule 63(4)(c). Rule 63(4)(b) is thus not needed so far as excited statements of unavailable declarants are concerned and must be justified, if at all, on the basis that it is desirable to make an excited utterance admissible notwithstanding the fact that the declarant is available. This is the law today.[25] The idea seems to be that the excited statement is so far superior to an in-court statement tested by cross-examination that the latter will not be required, although readily and easily producible. This idea seems to possess merit. We shall encounter a comparable idea when we study Rule 63(10) which makes declarations against interest admissible and Rule 63(12) which makes statements of physical or mental condition admissible, irrespective in each instance of the availability of the declarant. Of course, if Rule 63(4)(c) is not adopted Rule 63(4)(b) becomes more important.

Rule 63(4)(a)—Statements of Present Perception

Rule 63(4)(a) deals with statements of sense impressions which are *precisely* contemporaneous with the event or condition producing the impression. For example, pedestrian P sues motorist D for injuries

[23] *Id.* at 468, 106 P.2d at 900.
[24] McBAINE § 1053.
[25] McCORMICK, EVIDENCE § 272; 6 WIGMORE, EVIDENCE § 1748.

received when D's car struck P in a pedestrian cross-walk. To establish contributory negligence, D offers W to testify that W and X were in a position to see the occurrence; that X said to W, "See that fellow jump in front of that car." [26] Or suppose P, to establish the identity of the car which struck him, offers A to testify that A and B were in a position to see the occurrence; that the car drove away after striking P; that A said to B "Get the license number"; that B said to A "It's California SCN 592." [27] These are illustrations of statements "made while the declarant was perceiving the event or condition which the statement narrates, describes or explains."

What can be said in behalf of Rule 63(4)(a)? To what extent would its adoption change our current law? Taking the latter question first, we must confess that we have found no cases in point in California. Elsewhere the authorities are conflicting in their results and are confused in their reasoning owing to the tendency to discuss the problem only in terms of *res gestae*.[28]

As long ago as 1922 Professor Morgan advanced the proposal to recognize and validate a special exception to the hearsay rule along the lines of Rule 63(4)(a).[29] Professor McCormick lends his support to the cause. He states the arguments succinctly as follows:

> If a person observes some situation or happening which is not at all startling or shocking in its nature, nor actually producing excitement in the observer, the observer may yet have occasion to comment on what he sees (or learns from other senses) *at the very time that he is receiving the impression.* Such a comment, as to a situation then before the declarant, does not have the safeguard of impulse, emotion, or excitement, but as Morgan points out there are other safeguards. In the first place, the report at the moment of the thing then seen, heard, etc., is safe from any error from defect of *memory* of the declarant. Secondly, there is little or no *time* for calculated misstatement, and thirdly, the statement will usually be made to another (the witness who reports it) who would have equal opportunities to observe and hence to check a misstatement. Consequently, it is believed that such comments, limited to reports of *present* sense-impressions, have such unusual reliability as to warrant their admission under a special exception to the hearsay rule for declarations of present sense-impressions. At least one court has clearly accepted this view, and others have admitted evidence of declarations of this sort under the benison of the res gestae phrase.[30]

Admission of declarations of present sense-impressions should not be left in the vague area of *res gestae*. Rather, it is desirable, as Professors Morgan and McCormick and others [31] have argued, to recog-

[26] Facts suggested by Wrage v. King, 114 Kan. 539, 220 Pac. 259 (1923), in which, however, the evidence was excluded.
[27] Facts suggested by Neusbaum v. State, 156 Md. 149, 143 Atl. 872 (1928), in which the evidence was excluded.
[28] Decisions pro and con the admissibility of such evidence are collected in McCORMICK, EVIDENCE § 273, n.4.
[29] Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 236-239 (1922).
[30] McCORMICK, EVIDENCE § 273. The instance referred to of one court which has "clearly accepted this view" is Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942).
[31] Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43, 60-62 (1954); Note, 46 COLUM. L. REV. 430 (1946).

nize a special exception to the hearsay rule for this purpose. Because Rule 63(4)(a) does so, it is a desirable measure and is recommended for adoption in California.

There remains to note the relationship between Rule 63(4)(a) and (4)(b) and Rule 63(4)(a) and (4)(c). There is an overlap between Rule 63(4)(a) and (4)(b) if the declaration is an excited statement of present perception. There is an overlap between Rule 63(4)(a) and (4)(c) if the declarant of a declaration of present perception is unavailable. The narrow area covered by Rule 63(4)(a) alone is the unexcited declarations of present perception of an available declarant. As with Rule 63(4)(b),[32] the underlying idea is that the out-of-court statement is so far superior to an in-court statement tested by cross-examination that the latter is not required even though producible. Again, of course, if Rule 63(4)(c) is not adopted Rule 63(4)(a) becomes more important.

"Bootstrap Cases" Under Rule 63(4)(a), (4)(b) and (4)(c)

Suppose that the issue in a case is whether at a certain time X fell down a certain stairway. At the trial the offer of proof is W to testify that on the occasion in question W was in the yard outside the building containing the stairway and W heard X shout: "I am falling down the stairs!" The evidence is hearsay under Rule 63. It is admissible under Rule 63(4)(a) only if the judge finds that X made the statement and he made it while he "was perceiving the event . . . which the statement narrates." Thus, if the judge is to submit this evidence to the jury *he* must first find both that X said he was falling down the stairs and that X was, in fact, falling down the stairs when he made the statement. In making this finding is the judge restricted by the rule against hearsay? If so, he reaches an impasse and must reject the offer of proof because X's statement is hearsay. It comes in under Rule 63(4)(a) only if X was in fact falling when he made the statement. Yet the only evidence that X was falling is the very statement itself. The judge would reason in a circle if, being bound by the hearsay rule, he nevertheless considered the statement for the purpose of establishing the very fact which is the condition precedent to his original consideration of that statement. He would, to use the hackneyed but respected figure, permit X's declaration to lift itself into evidence by its own bootstraps.

Similar problems may arise under Rule 63(4)(b) and (4)(c). Thus, suppose the offer of proof is W to testify that X came out into the yard and said, "I just fell down the stairs." To accept this offer of proof under Rule 63(4)(b) the judge must find that X was "under the stress of nervous excitement" caused by perceiving the event which X "narrates, describes or explains." Yet the only evidence of these facts is the very evidence which the judge cannot consider until he finds these facts.

Again suppose the offer of proof is W to testify that X told W, "Yesterday I fell down the stairs." To admit the evidence under Rule 63(4)(c) the judge must find, *inter alia*, that "the matter had been recently perceived" by X, but again the only evidence of this is the evidence in dispute.

[32] See the text at note 25, p. 466, *supra*.

No doubt many cases of this type would arise under Rule 63(4)(a), (b) and (c). Therefore the utility of these exceptions will be much curtailed if the judge is to be bound by the hearsay rule in making his preliminary determination, assuming the judge understands this and carries it through to its logical conclusion as stated above. Is he so bound today? Would he be so bound under the Uniform Rules?

Wigmore states categorically that in "*preliminary rulings* by a judge on the admissibility of evidence, the ordinary rules of evidence do not apply." [33] Other scholars, however, have demonstrated that, as sensible as Wigmore's view is, it is not adhered to generally and consistently either in England or in this country.[34] California is said to be the outstanding jurisdiction repudiating and "throwing the gauntlet down before Wigmore." [35] We may, therefore justly fear that adoption of

[33] 5 WIGMORE, EVIDENCE § 1385, p. 79.

[34] Maguire & Epstein, *Rules of Evidence in Preliminary Controversies As to Admissibility*, 36 YALE L.J. 1101 (1927). As the authors suggest, Wigmore probably did not intend to intimate that rules of *privilege* were inapplicable.

[35] See Maguire & Epstein, *supra* note 34, at 1117-1122. The leading California case is People v. Plyler, 126 Cal. 379, 58 Pac. 904 (1899). The following extract shows the facts and holding:

"One Bradley testified at the preliminary examination of the defendant. He was a very important witness. At the trial, his evidence taken at the preliminary examination was offered, supported by an attempted showing that he had since died. Section 686 of the Penal Code provides that this kind of evidence may be introduced 'upon it being satisfactorily shown to the court' that the party is dead or insane, or cannot, after due diligence, be found in the state. The sole showing made by the prosecution going to the fact of the death of the witness was in the form of an affidavit made by his sister, to the effect that he was dead. This affidavit was admitted under objection. Any evidence introduced to show the death of the witness was as much a part of the trial as any other part of it. And the fact that the witness was dead could no more be shown by affidavit than the fact that declarations could be shown by affidavit to have been made under the sense of impending death, or that the contents of a written document could be shown, supplemented by an affidavit to the effect that the document was lost. The statute says the fact of death must be satisfactorily shown to the court. It means the fact of death must be shown by relevant and competent evidence. We know of no case where it has ever been held that an affidavit may be introduced as evidence at the actual trial of a defendant. The statute (Cal. Code Civ. Proc., sec. 2029) forbids it. The only answer found in the brief of the attorney general to appellant's contention in this particular, is the claim that an affidavit may be used upon the hearing of a motion, and that the introduction of this evidence partook of the character of a motion. We cannot endorse this contention. Almost every state constitution in the Union has a provision declaring that a defendant is entitled to be confronted at his trial by the witnesses against him. While our constitution has no such provision, yet that declaration is found in the Penal Code of the state, and, while there are a few statutory exceptions made to the rule there declared, still the right thus given to a defendant by the statute is deemed a most substantial one. If the practice here adopted could be allowed, then a defendant would be deprived of the right to cross-examine the witnesses against him, a right of the highest importance." *Id.* at 381-82, 58 Pac. at 905.

Here it will be noted that the court discusses three illustrations of preliminary controversies as to the admissibility of an item of evidence. (1) A deposition is offered. Admissibility depends upon the death of deponent. Affidavit (being hearsay) is inadmissible to prove death. (2) Murder case. Prosecution offers victim's statement accusing the defendant of the crime. Admissibility depends upon whether victim thought he was dying when he made statement. Affidavit inadmissible to prove this. (3) Witness is offered to testify to the contents of a document. Admissibility depends upon whether the document is lost. Affidavit is inadmissible to prove loss.

It is clear that in each instance the preliminary question was one to be determined by the judge. CAL. CODE CIV. PROC. § 2102; MCBAINE §§ 775, 785, 1101. It seems clear also that, if the hearsay rule applies to the judge in these instances of determining facts preliminary to the admission of evidence (so that he cannot receive affidavits), the rule must likewise apply in other instances of determining such preliminary facts.

People v. Frank, 193 Cal. 474, 225 Pac. 448 (1924) is a neat illustration of the working of the California view in a "bootstrap" situation. Admissibility of depositions depends upon whether deponents are out of the State. Depositions are taken in Los Angeles. Deponents depose that they intend to return to Texas where they reside. Held, depositions are inadmissible. No "proper foundation having been laid for the admission in evidence of these depositions, their contents could not be considered for any purpose, not even for the purpose of laying the foundation for their own admission." *Id.* at 478, 225 Pac. at 449.

For brief discussions of bootstrap cases, see MCCORMICK EVIDENCE § 272 n.8; Maguire & Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101, 1122-1125 (1927); Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392, 429-430 (1927).

Rule 63(4) in California would be of limited benefit unless some other part of the Uniform Rules abrogates the California view and is adopted concurrently with the adoption of Rule 63(4).

The general Uniform Rules provision respecting preliminary inquiry by the judge is Rule 8 which is as follows:

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

The general provision respecting the scope of the Uniform Rules is Rule 2 which is as follows:

> Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, these rules shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced.

Neither rule contains any clear-cut provision rendering any of the other Uniform Rules inapplicable to preliminary inquiries by the judge. Possibly the Commissioners on Uniform State Laws have in mind that the exception in Rule 2 concerning relaxation "by other procedural rule" should incorporate Wigmore's rule as to preliminary inquiries. This, however, is too tenuous a speculation to inspire confidence. Accordingly it is recommended that Rule 8 be amended by adding the following after the word "credibility" in the last line:

> In the determination of the issue aforesaid, exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege.[36]

[36] The language of the proposed amendment is suggested by a comparable provision in Uniform Rule 3. That rule reads as follows: "If upon the hearing there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege." See generally, Quick, *Hearsay, Excitement, Necessity, and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204 (1960); Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224 (1961).

Conclusion

We conclude that Rule 63(4) is desirable [37] and (with the modification suggested in note 12, pages 463-64) it is, therefore, recommended for adoption.[38] Its utility would, of course, be enhanced if Rule 8 were also modified as suggested above.

[37] *Cf.* Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932 (1962).

[38] The N. J. Committee recommended the adoption of this subdivision. N. J. COMMITTEE REPORT 128. The N. J. Commission, however, recommended approval of paragraphs (a) and (b) only: "A statement *is admissible when* (a) * * * *it* was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) * * * *it* was made while the declarant was under * * * *nervous* stress * * * *or* excitement caused by such perception." (* * * indicates omission from text of URE subdivision; *italics* indicates addition to text of URE subdivision.) N. J. COMMISSION REPORT 56. The Utah Committee approved the subdivision, but conditioned the admissibility of evidence under paragraph (c) upon compliance with Rule 64 and required that the evidence admissible under paragraph (c) be in writing. UTAH FINAL DRAFT 35.

Rule 63(5)—Dying Declarations

Rule 63(5) broadens and liberalizes the present principle respecting dying declarations and includes that principle, as thus reconstructed, in the exceptions to the general proposition of Rule 63 that hearsay is inadmissible. Rule 63(5) reads as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
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> * * *
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> (5) A statement by a person unavailable as a witness because of his death if the judge finds that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery;

Comparison With Present Law

Section 1870 of the Code of Civil Procedure now provides in part as follows:

> [E]vidence may be given upon a trial of the following facts:
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> 4. . . . 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 is a narrow provision of rigidly limited scope. The provision applies only "in criminal actions," which is construed to mean "criminal cases of homicide."[1] Thus, if D is prosecuted for the murder of X the provision is applicable to X's dying declaration respecting the cause of his death. But if D is sued in a civil action for the wrongful death of X the provision is inapplicable to such declaration.

The provision is applicable only to dying declarations that deal with the cause of *declarant's* death.[2] Thus, D is prosecuted for the murder of X. X was killed when only he, his wife (who was incurably ill) and the killer were present. The provision is inapplicable to the wife's deathbed statement that D killed X because the declaration does not concern the cause of *her* death. For the same reason the provision would be inapplicable if the wife's statement had been that she killed X. Furthermore, the provision would be inapplicable to X's recital of the history of his relations with D, even though X made these recitals in his deathbed statement. The expression "cause of his death" means *immediate* cause.[3]

These restrictions and limitations are typical.[4] Nevertheless, they are arbitrary and irrational. If we are willing to receive certain state-

[1] Thrasher v. Board of Med. Examiners, 44 Cal. App. 26, 29, 185 Pac. 1006, 1007 (1919).
[2] People v. Hall, 94 Cal. 595, 30 Pac. 7 (1892).
[3] People v. Cipolla, 155 Cal. 224, 100 Pac. 252 (1909).
[4] McCormick, Evidence §§ 258-263; 5 Wigmore, Evidence §§ 1430-1451. See also Quick, *Some Reflections on Dying Declarations*, 6 How. L. J. 109 (1960); Notes, 46 Iowa L. Rev. 375 (1961), 61 W. Va. L. Rev. 132 (1959).

ments of the dying *victim* in *homicide* cases, what reason can we give to refuse to receive the statements of any dying person in any case? Whatever the case may be, whoever the declarant may be, whatever the subject matter of the declaration may be, should we not receive the statements of a dying person touching any and all of those things to which he could have testified if alive? That we should do so is the philosophy underlying Rule 63(5). Sweeping away the restrictions (long since damned by Wigmore as "heresies" of the last century which have not even the sanction of antiquity),[5] Rule 63(5) thus applies in "every proceeding, both criminal and civil, conducted by or under the supervision of a court";[6] it applies to any relevant statement[7] of any person unavailable as a witness because of his death; it provides for the admission of such statement subject only to the judge's finding that the statement was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery.

One further finding, however, should be required. There should be included in Rule 63(5) the requirement of a finding by the judge that the dying declarant possessed personal knowledge and based his statement thereon. Probably the failure to include this was the result of oversight. Accordingly, Rule 63(5) should be amended by inserting "was made upon the personal knowledge of the declarant, and that it"[8] after the phrase "if the judge finds that it."

Comparison With Rule 63(4)(c)

Rule 63(4)(c) provides as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
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> * * *
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> (4) . . . (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;

We have studied this provision and recommended its adoption *supra.* But if Rule 63(4)(c) is adopted, what is the necessity or wisdom of adopting Rule 63(5) also?

The two provisions do overlap to a considerable extent. Thus a man dies of a gunshot wound. Aside from himself and his assailant, there were no eyewitnesses to the shooting. Believing that he is dying and

[5] 5 WIGMORE, EVIDENCE § 1463, p. 229. See Wigmore's criticism of the rule that the declaration must concern the dying declarant's death. He labels it an "irrational and pitiful absurdity . . . of legal cerebration." *Id.* § 1433, at 225.

[6] See UNIFORM RULE 2 on the scope of the rules.

[7] "Statement" is defined as follows in Uniform Rule 62(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."

[8] Professor Falknor calls attention to the omission and suggests the amendment. Falknor, *The Hearsay Rule and Its Exceptions,* 2 U.C.L.A. L. REV. 43, 66-67 (1954). Professor McCormick agrees. MCCORMICK, CASES ON EVIDENCE 529 n.54 (3d ed. 1956).

entertaining no hope of recovery, he states "D shot me an hour ago." The evidence is offered in the trial charging D with homicide. The judge may find that the statement qualifies under Rule 63(5) as a "statement by a person unavailable as a witness because of his death" and "made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery." The judge may also find, however, that the statement qualifies for admission under Rule 63(4)(c) as a statement made by a declarant now unavailable and made "at a time when the matter had been recently perceived by him and while his recollection was clear," and "in good faith prior to the commencement of the action." So far as Rule 63(4)(c) is concerned, it is immaterial that the declarant was conscious of his impending death (except insofar as this circumstance bears upon his good faith).

Is Rule 63(5) therefore superfluous? While the two provisions do overlap considerably, they are not wholly coextensive. There is a small residuum of cases which come under Rule 63(5) alone and which are sufficiently numerous and important to justify its existence. These are (1) cases of dying declarations describing events or conditions *not* recently perceived. (For example, a case involving death by *slow* poisoning, the dying declaration relating to events and conditions antedating the declaration by a considerable amount of time); (2) cases of dying declarations in which the declarant's recollection is unclear; and (3) cases of dying declarations made after action is filed. In these three situations the statement would not qualify under Rule 63(4)(c) but may qualify as a dying declaration under Rule 63(5).

Conclusion

It is our opinion that the impact of Rule 63(5) is desirable in these situations.[9] That is, we believe that the conditions of Rule 63(4)(c) as to recency of perception, clarity of recollection and *ante litem motam* are not desirable restrictions when the justifying factor of consciousness of impending death is present. Hence, we believe that Rule 63(5) is a meritorious measure covering an area which is not included under Rule 63(4)(c) and in which admissibility should be provided. Rule 63(5) (with the modification suggested in the text at note 8, page 473) is, therefore, recommended for adoption.[10]

[9] In California practice the judge who has admitted a dying declaration submits to the jury the question whether the statement was made under a sense of impending death. MCBAINE § 786. This practice is incompatible with Uniform Rule 8. See discussion respecting admission of confessions, *infra* pp. 475-82.

[10] The N. J. Committee recommended the approval of this subdivision without change. N. J. COMMITTEE REPORT 131. The N. J. Commission limited the subdivision to statements "made in respect to the fatal event from which death ensues." N. J. COMMISSION REPORT 56-57. The Utah Committee added the requirement that the judge find the declarant "had an adequate opportunity to perceive the event or condition which his statement narrates, describes or explains." UTAH FINAL DRAFT 35-36.

Rule 63(6)—Confessions

Rule 63(6) provides:

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

Adoption of Rule 63(6) in California would have the following consequences: (1) the present grounds for excluding evidence of confessions would remain substantially intact; (2) the procedure for determining the admissibility of evidence of confessions would be altered; and (3) evidence of admissions not amounting to confessions would be excluded on the same grounds and by the same procedure applicable to evidence of confessions.

Grounds for Exclusion

That adoption of Rule 63(6) would not materially change the present grounds for excluding evidence of confessions is shown by the following considerations:

Under Rule 63(6) evidence of defendant's confession is excluded unless defendant "was conscious and was capable of understanding what he said and did." California is in accord. Thus evidence that defendant confessed while asleep is inadmissible.[1]

Under Rule 63(6) evidence of defendant's confession is excluded if he was "induced to make the statement under compulsion." The concept "under compulsion" is, of course, a flexible concept. The result is that insofar as Rule 63(6) requires exclusion on this general ground, it is an exclusionary rule without precisely fixed limits. The same is true, however, of the present California rule. As is said in *People* v. *Siemsen:*[2]

[1] People v. Robinson, 19 Cal. 40 (1861). See also Notes, 52 Nw. U. L. Rev. 666 (1957), 34 Tex. L. Rev. 472 (1956).
[2] 153 Cal. 387, 95 Pac. 863 (1908).

> [W]hether a confession is free and voluntary is a preliminary question addressed to the trial court and to be determined by it, . . . and a considerable measure of discretion must be allowed that court in determining it. The "admissibility of such evidence so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases." As the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion.[3]

Under Rule 63(6) evidence of defendant's confession is excluded if he was "induced to make the statement" by "infliction or threats of infliction of suffering upon him or another." This humane restriction is, of course, likewise applicable under California law.[4]

Under Rule 63(6) evidence of defendant's confession is inadmissible if he "was induced to make the statement" by "prolonged interrogation under such circumstances as to render the statement involuntary." California cases have emphasized the point that protracted questioning, in and of itself, is not alone ground for exclusion.[5] These cases, however, should not be read as suggesting that the length of the interrogation is never a material factor. No doubt it is the intent of the California decisions that the extent of the questioning should be considered and that prolongation of the inquiry along with other circumstances may "render the statement involuntary."

Under Rule 63(6) evidence of defendant's confession is inadmissible if he was "induced to make the statement" 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." California also excludes such confessions upon the rationale "that the prisoner, in making a

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[3] *Id.* at 394, 95 Pac. at 866.

[4] People v. Loper, 159 Cal. 6, 112 Pac. 720 (1910); People v. Mellus, 134 Cal. App. 219, 25 P.2d 237 (1933).

> "The theory, of course, is that the prisoner, in making a confession obtained by the influence of hope or fear, applied by a third person to his mind, may be induced by such pressure to admit facts unfavorable to him, *without regard to their truth*, in order to secure the promised relief or avoid the threatened danger." (Emphasis added.) People v. Piner, 11 Cal. App. 542, 552-53, 105 Pac. 780, 784 (1909).
>
> No doubt the theory of excluding hope-induced confessions is their probable untruth. A striking case is People v. Thompson, 84 Cal. 598, 24 Pac. 384 (1890) where the circumstances motivating the confession were as follows:
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> > The defendant was about eighteen years of age, and had evidently heard of some persons accused of crime who had gotten off by confessing, and, imbued with this notion, he sought an interview with the officer, and after ascertaining that his impression, to a certain extent, was true, inquired of the sheriff whether it would be better for him to make a statement of the facts, and the sheriff replied: 'I told him that I didn't think the truth would hurt anybody. It would be better for him to come out and tell all he knew about it if he felt that way.' *Id.* at 605, 24 Pac. at 386.
>
> As to fear-induced confessions, is not the predominant reason for exclusion the desire to discourage third-degree practices? In other words, are not such confessions excluded (and wisely so) even when probably true? See Professor McCormick's forceful argument to this effect, MCCORMICK, EVIDENCE § 109; and note that under Rule 63(6)(a), dealing with fear-induced statements, probable falsity of the statement is not a requisite for exclusion of the statement, whereas under Rule 63(6)(b), dealing with hope-induced confessions, such an element is a requisite for exclusion.

[5] People v. Mehaffey, 32 Cal.2d 535, 197 P.2d 12 (1948); People v. McEvers, 53 Cal. App.2d 448, 128 P.2d 93 (1942).

confession obtained by the influence of hope . . . applied by a third person to his mind, may be induced by such pressure to admit facts unfavorable to him, without regard to their truth, in order to secure the promised relief."[6] Since this is the rationale, it is, of course, appropriate in California—as under Rule 63(6)—to limit the exclusion to those situations in which the circumstances are "likely to cause the accused to make such a statement falsely." Note that under Rule 63(6) the third person need not be in fact "a public official," but must be "a person whom the accused *reasonably* believed to have the [requisite] power or authority." (Emphasis added.) In other words, under Rule 63(6) accused must believe the person had authority and that belief must be reasonable. Dicta in two California cases indicate that the second requirement is not currently a feature of our law.[7] Here we disagree with Rule 63(6) and approve instead the existing law. In our opinion the reasonableness of accused's belief should be disregarded both as a matter of logic and of policy. Given the other conditions stated, the confession should be excluded notwithstanding the fact that others than the accused now think that he was unreasonable in believing the person holding out inducements to him had authority to perform.[8]

There remains the question of the effect which adoption of Rule 63(6) would have on the corpus delicti doctrine.[9] Given compliance with all the conditions of Rule 63(6), the result is that the evidence is "admissible." Now, of course, an item of evidence may be "admissible" notwithstanding the fact that in and of itself it does not possess enough probative force to make a prima facie case or defense.[10] Thus plaintiff opens his case by offering such an item. Objection overruled. Plaintiff then rests. Motion for nonsuit granted. The two rulings are wholly consistent. Plaintiff's evidence was *admissible* but did not possess sufficient probative force. (Strictly a motion to strike the evidence should be denied since the evidence *is* admissible.) Again, an item of evidence may be admissible and may possess enough natural probative force to make out a prima facie case or defense but there may be a special rule forbidding it to exert this natural force and requiring it to be corroborated.[11] In such event the evidence is admissible; but, standing alone, it does not present a jury issue because of the rule of corroboration.[12] (Again in strictness a motion to strike should be denied.)

[6] People v. Piner, 11 Cal. App. 542, 552-53, 105 Pac. 780, 784 (1909).
[7] People v. Luis, 158 Cal. 185, 190, 110 Pac. 580, 582 (1910); People v. Piner, 11 Cal. App. 542, 552, 105 Pac. 780, 784 (1909).
[8] The Model Code was criticized for including the requirement of reasonableness. 18 A.L.I. PROCEEDINGS 146 (1941).
[9] " 'It is elementary that the corpus delicti must be established before extrajudicial statements and admissions of a defendant are admissible in evidence, and can be considered as tending to establish the fact to which they relate.'" Hall v. Superior Court, 120 Cal. App.2d 844, 847, 262 P.2d 351, 352 (1953).
However, the order of proof is of no consequence if the *corpus delicti* is eventually established independently of defendant's extrajudicial statement. Furthermore, only prima facie proof is required, not proof beyond a reasonable doubt. People v. Ray, 91 Cal. App. 781, 267 Pac. 593 (1928).
[10] 1 WIGMORE, EVIDENCE § 12.
[11] 7 WIGMORE, EVIDENCE § 2030.
[12] Wigmore states that the rule of corroboration is, from the viewpoint of the party required to produce the corroboration, a rule as to the admissibility of the item required to be corroborated "in a broad but real sense." *Id.* § 2030, at 240. This is, of course, to be contrasted with the meaning of admissibility of the narrow, technical sense.

Now Rule 63(6) provides only for admissibility. It does not therefore touch the question whether corroboration is necessary. Thus it does not affect in any way the current doctrines requiring defendant's admissions and confessions to be corroborated by independent evidence of the corpus delicti. However, this point is obscured by two circumstances as follows: First, California decisions discuss the corpus delicti requirement in terms of admissibility.[13] Second, they recognize a motion to strike as appropriate.[14] As to the first factor, we suggest that the terminology should be regarded as loose rather than technical.[15] As to the second, we think that is a refinement without significance. At any rate Wigmore and other scholars class the corpus delicti doctrine as a requirement of corroboration rather than one of admissibility.[16] Presumably the Commissioners on Uniform State Laws so regard it and in providing for admissibility do not intend to reach questions of weight and corroboration. The adoption of Rule 63(6) in California would not, therefore, change the effect of our present corpus delicti rule. It might, however, lead the courts to rephrase the rationale in terms of corroboration rather than admissibility.

Procedure to Determine Admissibility

In discussing the procedure for determining the admissibility of a confession it is necessary to consider the functions of judge and jury respecting the question. The discussion will be facilitated if we employ the terms "competency" (or admissibility) and "weight and credibility." First it is well to illustrate the meanings attached to these terms.

A question is asked a witness. Objection. The circumstances are such that the objection should be sustained unless the witness is an expert. The judge overrules the objection. The witness answers. The judge is requested to charge the jury that they must wholly disregard the answer of the witness unless and until *they* find that he is an expert. Request denied. In overruling the objection the judge determined the question of the competency (admissibility) of the answer of the witness. He determined that such answer should be included as an item of evidence in the case which (if the case is submitted to them) the jury *must* consider. It was the judge's function to decide that question and to decide it finally.

When the case is submitted to the jury they, of course, pass on the credibility and weight of the answer of the witness—that is, they consider whether to believe it and, if so, how much weight to attach to it. On these questions they may be guided by their beliefs as to whether the witness is an expert and, if so, how good or honest an expert. But the jury *must* consider and evaluate the statement, because (as the judge has ruled) it is an admissible item of evidence. It would be improper for the jury to refuse consideration and evaluation because they think that the statement should never have been brought before them.

Thus the judge decides the question of *competency* (admissibility). The jury decides *credibility* and *weight*. This is the orthodox, tradi-

[13] See, *e.g.*, Hall v. Superior Court, 120 Cal. App.2d 844, 847, 262 P.2d 351, 352 (1953).
[14] People v. Ray, 91 Cal. App. 781, 267 Pac. 593 (1928).
[15] See note 11, p. 477, *supra*.
[16] McCORMICK, EVIDENCE § 110; 7 WIGMORE, EVIDENCE § 2070-75. See also the extensive note in Note, 103 U. PA. L. REV. 638 (1955).

tional view.[17] It is the view adopted by the Uniform Rules and stated as follows in Rule 8:

> Rule 8. When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

How does this view operate when applied to the question of the admissibility of a confession? The Supreme Court of Indiana gives the following lucid explanation in its opinion on rehearing in *Hauk* v. *State*:[18]

> Counsel for appellant . . . insist . . . that the court erred in refusing to instruct the jury that if they believed that the confession was made under the influence of fear produced by threats, they should reject it, and give it no consideration.
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> It is contended that it was the province of the jury to determine whether the confession of the accused was made under the influence of fear produced by threats, and if they believed such to be a fact, they must reject it as evidence. Or, in other words, we are asked to virtually adjudge that the jury ought to have been permitted to exercise the prerogative of the court and decide the question of competency of the confession as evidence. . . . The competency of any character of evidence is a question exclusively for the determination of the court. The weight or credibility, however, to which it is entitled is a matter exclusively for the decision of the jury in accordance with the rules of law relative to that question.
>
> The rule affirmed by the authorities cited by the court in the original opinion, and the correct one, we think, is that which requires the court to determine at the trial as a preliminary question, whether the confession of the person accused of the crime is incompetent upon the ground that it is the offspring of fear produced by threats.
>
> When the court holds the confession admissible as evidence, it must be received by the jury, and it is not within their province to reject it as incompetent. The credibility, effect, or weight to which it is entitled, as in other evidence, is a question which the jury has the right and must determine for themselves. In deciding this question, they may and ought to look to, and consider all of

[17] McCORMICK, EVIDENCE § 53; 9 WIGMORE, EVIDENCE § 2550.
[18] 148 Ind. 238, 47 N.E. 465 (1897).

> the facts and circumstances under which the alleged confession was made. The credibility of the confession being a legitimate subject of inquiry upon the part of the jury, it may be impeached by the defendant in any authorized manner. While the jury may believe it to have been involuntarily made by reason of the hopes or fears of the confessor having been unduly excited, still, if there is evidence which confirms or corroborates it, so as to impress the jury with the belief of its truth to their satisfaction, in that event they would not be justified in rejecting the confession solely upon the ground that they believed it to have been involuntarily made.
>
> In deciding upon the credibility of a confession, or upon the effect, or weight to which, if any, it is entitled, the jury has the right to subject it to the same tests, as far as applicable, as they would in ascertaining the credit or weight due to other evidence, and after performing this duty, if they consider it unworthy of credit, it is their right and duty then to reject it. The instruction in question was not framed so as to present to the jury the correct test to be applied by them in determining the credit or weight to be given to the confession as evidence, and was properly refused by the trial court.[19]

It is of special interest to note that the jury may find that the confession is involuntary (thus disagreeing with the judge on this question) and may nevertheless conclude (and properly so) that they believe the confession. This is because the judge has decided once and for all that they must consider and evaluate the confession.

The California practice is significantly different. Here the view prevails that "although the question as to the admissibility of a confession is, in the first instance, necessarily one of law for the trial judge, . . . if the evidence is received 'it is for the jury to determine whether the confession was freely and voluntarily made and therefore entitled to consideration.' "[20] Thus "it is the function of the court in the first instance to resolve any conflict in the evidence on the subject."[21] Having resolved the conflict in favor of admitting the evidence, the court must nevertheless charge the jury to "disregard such alleged confession entirely from [their] consideration" unless they believe it was freely and voluntarily made.[22] This, of course, submits the question of competency to the jury and is in marked contrast to the orthodox view which permits only the questions of weight and credibility to be submitted to the jury.

Which procedure is preferable? Both contemplate a judicial determination of the question of voluntariness. Both place upon the judge the duty to exclude the evidence if he is convinced of incompetency. It is arguable, however, that the California system provides a tempta-

[19] *Id.* at 264-66, 47 N.E. at 465-66.
[20] People v. Fox, 25 Cal.2d 330, 340, 153 P.2d 729, 734 (1944).
[21] People v. Gonzales, 24 Cal.2d 870, 876, 151 P.2d 251, 254 (1944).
[22] People v. Fox, 25 Cal. 330, 339, 153 P.2d 729, 733 (1944).

tion to shirk this duty and to "pass the buck" to the jury.[23] If this is so and if the judge yields to the temptation and thus admits the evidence, it can scarcely be thought that defendant really receives a clear-cut determination upon the issue of competency at the hands of either the judge or jury, since the jury almost certainly will merge the question of competency with the ultimate question of guilt. From this point of view the orthodox procedure seems preferable.

The orthodox view is also preferable when considered in connection with the problem of jury exclusion. The obvious merit of excluding the jury during the preliminary inquiry is to prevent their hearing evidence which later they must try to forget in the event that the judge excludes the confession. But what happens if the judge excludes the jury and then admits evidence of the confession? Under the California system there must be a repetition of all the evidence as to competency in order to enable the jury to pass on the matter. Under the orthodox view there need be repetition of only as much of the evidence as defendant wishes to bring forth on the issues of credibility and weight. Thus jury exclusion is a more feasible expedient if the orthodox view of the functions of judge and jury prevails.

Our judgment is in favor of the Uniform Rules system which adopts this orthodox view and also requires the judge to exclude the jury when so requested (currently a matter of discretion in California practice).[24]

Confessions and "Mere" Admissions

The provisions of Rule 63(6) are applicable to *any* previous statement by the accused "relative to the offense charged" and offered against him. The expression "relative to the offense charged" is probably intended to have the same meaning as "relevant evidence of the offense charged." "Relevant evidence" is defined in Rule 1(2) as "evidence having any tendency in reason to prove any material fact." The coverage of Rule 63(6) is thus quite broad. All previous statements by the accused are included so long as such statements are relevant evidence (whether strong or weak or comprehensive or fragmentary) and are offered against him. If these conditions are met, neither admissibility nor the procedure for determining admissibility depends on the content of defendant's statement.

Prior to the decision of the California Supreme Court in *People* v. *Atchley*,[25] the California courts drew a distinction between a defendant's statement which constituted a "confession" and a defendant's statement which constituted a "mere admission."[26] The term "confession" was restricted to a complete acknowledgement of guilt,[27] and a confession was held inadmissible if made by the defendant involuntarily.[28] An "admission" was said to be something less than a confession, although constituting an acknowledgement of facts and circum-

[23] McCORMICK, EVIDENCE § 112; Cross, *The Functions of the Judge and Jury with Regard to Confessions*, 1960 CRIM. L. REV. 385; Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317, 329 (1954); Stevens, *Confessions and Criminal Procedure—A Proposal*, 34 WASH. L. REV. 542 (1959); Notes, 46 IOWA L. REV. 388 (1961), 104 U. PA. L. REV. 708 (1956); Comment, 15 RUTGERS L. REV. 122 (1960).

[24] People v. Gonzales, 24 Cal.2d 870, 151 P.2d 251 (1944).

[25] 53 Cal.2d 160, 346 P.2d 764 (1959), noted in 48 CALIF. L. REV. 697 (1960) and 8 U.C.L.A. L. REV. 193 (1961).

[26] We borrow the expression "mere admission" from Professor McCormick. McCORMICK, EVIDENCE § 113.

[27] People v. Parton, 49 Cal. 632, 637-38 (1875).

[28] People v. Berve, 51 Cal.2d 286, 332 P.2d 97 (1958).

stances which would tend toward the proof of the ultimate fact of guilt.[29] An involuntary "admission" was, at least in some circumstances, admitted as evidence.[30] Because of the distinction between the involuntary confession and the involuntary admission, the prosecution had the burden of laying a foundation for the admitting of a confession but had no such burden where a "mere admission" was offered in evidence.[31]

In *People* v. *Atchley*,[32] the California Supreme Court, relying in part on Model Code Rule 505 and Uniform Rule 63(6),[33] swept away the distinction between "confessions" and "mere admissions" with these words:

> Involuntary confessions are excluded because they are untrustworthy, because it offends "the community's sense of fair play and decency" to convict a defendant by evidence extorted from him, and because exclusion serves to discourage the use of physical brutality and other undue pressures in questioning those suspected of crime. [Citations omitted.] All these reasons for excluding involuntary confessions apply to involuntary admissions as well.[34]

Thus, inasmuch as Rule 63(6) makes no distinction between the confession involuntarily made and an admission involuntarily made, its enactment would merely codify the rule stated in the *Atchley* case.

Conclusion

In view of the foregoing discussion, it is recommended that Rule 63(6)—with the word "reasonably" deleted from (6)(b)—be adopted in California.[35]

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[29] The distinction between a confession and a mere admission is drawn as follows in People v. Ferdinand, 194 Cal. 555, 568-69, 229 Pac. 341, 346 (1924):

> "An admission as applied to criminal law is something less than a confession, and is but an acknowledgment of some fact or circumstance which in itself is insufficient to authorize a conviction, and which tends only toward the proof of the ultimate fact of guilt. On the other hand, a confession by a defendant leaves nothing to be determined, in that it is a declaration of his intentional participation in a criminal act, and must be a statement of such a nature that no other inference than the guilt of the defendant may be drawn therefrom."

[30] People v. Ammerman, 118 Cal. 23, 32, 50 Pac. 15, 18 (1897), holding defendant's statement admissible as a mere admission but pointing out that "if this statement it [*sic*] to be regarded in the light of a 'confession,' it is brought dangerously near, if it does not overstep, the border line of involuntary admissions made upon inducement sufficient to render them inadmissible." *Cf.* People v. Adams, 198 Cal. 454, 245 Pac. 821 (1926); People v. Wilkins, 158 Cal. 530, 111 Pac. 612 (1910); People v. Le Roy, 65 Cal. 613, 4 Pac. 649 (1884); People v. West, 34 Cal. App.2d 55, 61, 93 P.2d 153, 156 (1939).

[31] In People v. Gibson, 63 Cal. App.2d 632, 635, 146 P.2d 971, 972-73 (1944), the court stated:

> "It is true that if the foregoing statement may be deemed to constitute a confession of guilt of the crime charged it would have constituted error to receive the evidence in the absence of preliminary proof that it was made voluntarily without coercion or promise of leniency [Citation omitted]. However, we consider the statement a mere admission of certain facts which does not amount to a confession. Therefore the statement was admissible in evidence without preliminary proof that it was voluntarily made."

[32] 53 Cal.2d 160, 346 P.2d 764 (1959).

[33] *Id.* at 170, 346 P.2d at 769.

[34] *Ibid.*

[35] The N. J. Committee and the Utah Committee recommended the approval of this subdivision without change. N. J. COMMITTEE REPORT 133; UTAH FINAL DRAFT 36. The N. J. Commission recommended amendment of paragraph (b) by deleting the qualifying phrases "with reference to the crime" and "and made by a person whom the accused reasonably believed to have the power or authority to execute the same." N. J. COMMISSION REPORT 57. As modified by the N. J. Commission, this subdivision would permit the admission of a confession only if "the accused when making the statement was conscious and was capable of understanding what he said and did, and if he was not induced to make the statement (a) by 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, likely to cause the accused to make such a statement falsely."

Rule 63(7), (8) and (9)—Admissions: By Parties, Authorized, Adoptive and Vicarious

Rule 63(7), (8) and (9) provide:

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

* * *

(7) As against himself a statement by a person who is a party to the action in his individual or a representative capacity and if the latter, who was acting in such representative capacity in making the statement;

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

(9) As against a party, a statement which would be admissible if made by the declarant at the hearing if (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or (b) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination, or (c) 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;

Rule 63(7)—Personal Admissions

Rule 63(7) states the orthodox principle that what a party has said prior to the trial is admissible against him at the trial. What rationale supports this principle? When the declarant is someone other than the adverse party and that party objects on the ground of hearsay to the pretrial statement, he thereby requires his adversary to call and directly examine the declarant so that cross-examination becomes possible. Thus, when a party invokes the hearsay rule, he enforces his right of cross-examination. But, when the declarant is the party himself, it would be somewhat strange to permit him to insist upon this procedure—that is, to claim the right to be called as a witness by his adversary.

The principle of admissions which Rule 63(7) embodies therefore makes pretrial statements of the party freely admissible against him.[1] It is not required that the statement be based on personal knowledge [2] nor that it be in a form appropriate for testimony given in court.[3] Hence the party cannot successfully object either on the ground that his statement was in terms of a conclusion or opinion or on the ground that he had no direct knowledge of that whereof he spoke.

The foregoing doctrines are well established generally and in California.[4] Adoption of Rule 63(7) would operate, therefore, merely to continue rules presently prevailing.

Rule 63(8)(b)—Adoptive Admissions

Section 1870 of the Code of Civil Procedure now provides in part as follows:

> [E]vidence 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.

"Conduct" has been held to mean, however, only conduct "of such character as to amount to admissions by" the party.[5] As thus limited, this section merely codifies the orthodox principle of adoptive admissions.[6] Rule 63(8)(b) states the same principle; its adoption would make no change in California law.

Rule 63(8)(a) and Rule 63(9)(a)—Authorized and Vicarious Admissions

Rule 63(8)(a) embodies the doctrine of authorized admissions which holds that, if a party to an action authorizes an agent to make statements on his account, such statements may be introduced against the party under the same conditions as if they had been made by the party himself. California recognizes and approves this doctrine.[7] The prin-

[1] McCORMICK, EVIDENCE § 239; 4 WIGMORE EVIDENCE § 1048; Harper, *Admissions of Party-Opponents,* 8 MERCER L. REV. 252 (1956); Hetland, *Admissions in the Uniform Rules: Are They Necessary?,* 46 IOWA L. REV. 307 (1961); Lev, *The Law of Vicarious Admissions—An Estoppel,* 26 U. CINC. L. REV. 17 (1957); Morgan, *Admissions,* 1 U.C.L.A. L. REV. 18 (1953); Morgan, *Admissions as an Exception to the Hearsay Rule,* 30 YALE L. J. 355 (1921); Simeone, *Admissions of a Party-Opponent,* 5 ST. LOUIS U. L. J. 469 (1959); Note, 25 U. CINC. L. REV. 70 (1956).

The principle is codified in California by Code of Civil Procedure Section 1870 which reads in part as follows:

> "[E]vidence may be given upon a trial of the following facts: . . . 2. The . . . declaration, . . . of a party, as evidence against such party. . . ."

[2] McBAINE § 837; McCORMICK, EVIDENCE § 240; 4 WIGMORE, EVIDENCE § 1053(1).

[3] McCORMICK, EVIDENCE § 241; 4 WIGMORE, EVIDENCE § 1053(3). See also Shields v. Oxnard Harbor Dist., 46 Cal. App.2d 477, 116 P.2d 121 (1941), discussed in the text at notecall 18, p. 487, *infra,* receiving on admissions principles a statement in effect as follows: "I guess it kind of looks like I am in the wrong." See also Note, 36 TEX. L. REV. 514 (1958).

[4] See references in notes 1-3, *supra.*

[5] Adkins v. Brett, 184 Cal. 252, 255, 193 Pac. 251, 252 (1920).

[6] For expositions and applications of this principle, see McBAINE, § 931; McCORMICK, EVIDENCE § 246; 4 WIGMORE, EVIDENCE §§ 1069-75; Heller, *Admissions By Acquiescence,* 15 U. MIAMI L. REV. 161 (1960); Note, 29 N.Y.U. L. REV. 1266 (1954); Comment, 6 U.C.L.A. L. REV. 593 (1959).

[7] See, *e.g.,* the following formulation of the doctrine in Manson v. Wilcox, 140 Cal. 206, 210, 73 Pac. 1004, 1005 (1903):

> "Admissions by a third party against the interest of another are not competent against such other, unless there is an agency, and the admission is made while the agency exists, and in the course of the business which the agent has authority to transact. In other words, it must be an authorized admission."

ciple is codified by Section 1870 of the Code of Civil Procedure which reads in part as follows:

> [E]vidence may be given upon a trial of the following facts: . . . 5. After proof of [an] . . . agency, the act or declaration of [an] . . . agent of the party, within the scope of the . . . agency, and during its existence.

The crucial and often difficult question in applying the doctrine is, of course, the question of authorization. This question is freed of all difficulty only when the party has expressly authorized the agent to make the specific statement which is offered against the party.[8] Absent this simplifying factor, the question must be resolved in the light of such relevant factors as the nature and purpose of the agency. A good illustrative case is *Peterson Bros.* v. *Mineral King Fruit Co.*[9] Plaintiff entered into a contract with the company to purchase the entire crop of dried prunes grown on the company's ranch near Visalia. The contract provided that the fruit should be "sound and merchantable and of choice quality." Plaintiff paid $1,000 down at the time of executing the contract. The tender of the crop took place at defendant's warehouse and dry-yards, plaintiff being represented by its agent, Morelock, and defendant by its agent, Fleming. Plaintiff refused the tender and sued for the return of the down payment, claiming that the prunes were not up to contract specifications. At the trial plaintiff proposed to have Morelock testify to "admissions made by Fleming . . . [which] went to the condition of the prunes and strongly corroborated Morelock's testimony, and, if he made them, were highly prejudicial to the case of Fleming's employers."[10] As foundation of this offer plaintiff called Fleming who testified as follows as to his duties:

> At that time I had charge of the ranch and the warehouse and the prunes in it. My employment was for the purpose of taking charge of the ranch and work it, gather the fruit and dry it and put it in the warehouse, and haul it to and from the orchard to the bins, and I attended to its grading and superintended that, and it was my judgment that was exercised in determining when the fruit should be ready to take from the trays in the process of drying, and I did attend to all these duties. I had absolute charge of the ranch and of the warehouse, and of the company's interest at that end of the state.[11]

Thereupon Morelock was put on the stand and asked to state the conversation he had with Fleming at the time of the tender. The trial court sustained an objection and, according to the California Supreme Court, properly so. The Supreme Court reasoned as follows:

> Was Fleming such agent of his employer as would make his admissions binding upon it? Did his authority as superintendent of the business of curing and preparing the prunes for market include the authority to sell, or to make admissions to a purchaser that the prunes were not merchantable? We think these questions must be answered in the negative. Fleming's position was no different

[8] As in Guberman v. Weiner, 10 Cal. App.2d 401, 51 P.2d 1141 (1935).
[9] 140 Cal. 624, 74 Pac. 162 (1903).
[10] *Id.* at 629, 74 Pac. at 164.
[11] *Ibid.*

> from that of the ordinary superintendent employed to superintend the manufacture of goods for his employer. It is not pretended that he was authorized to sell or represent the employer in making sales. His duty was to prepare the goods for market and to manage the ranch generally, but he was neither the actual nor ostensible agent to speak for his employer in disposing of the goods. Appellant cites numerous authorities to the effect that "where the acts of the agent will bind the principal, there his representations, declarations, and admissions, respecting the subject-matter will also bind him, if made at the same time, and constituting a part of the *res gestae*. They are in the nature of original evidence, and not of hearsay." Subdivision 5 of section 1870 of the Code of Civil Procedure is cited. But that provision is, that evidence may be given of the following facts: "After proof of . . . agency, the act or declaration of . . . the agent of the party, within the scope of the . . . agency, and during its existence." The Civil Code (sec. 2295) declares that "An agent is one who represents another, called the principal, in dealings with third persons." Unless Fleming was so connected with the sale of the prunes as to make him an agent in the transaction of their purchase by plaintiff, his admissions cannot bind his principal . . . . We do not think that the evidence established such a relation to his employer. The error of appellant is in assuming that because Fleming was employed to superintend the preparation of the prunes for sale he was therefore the agent in the transaction of the sale.[12]

There is much diversity in the fact situations in the cases presenting the question of authorization *vel non*.[13] One group of these cases, however, does present a fairly definite pattern. We refer to the cases of injury inflicted by an instrumentality under the control of an employee whose unexcited declaration is offered against his employer. This is an area of special importance for our present purposes since, as we shall see, Rule 63(9)(a) makes important changes in the area.

Consider these situations: (1) A child is run over by a train; after the child is extricated and carried a quarter of a mile away the locomotive engineer makes a statement as to how the injury occurred.[14] (2) A bucket being hoisted out of a 200-foot shaft falls to the bottom and injures plaintiff who is working there; several minutes later and after plaintiff has been removed from the shaft the operator of the lifting mechanism makes a declaration to plaintiff respecting the cause of the injury.[15] (3) After the excitement of the event has subsided a street car motorman tells a passenger injured in a wreck of the car how the accident took place.[16] In each instance the evidence is offered against the employer of the declarant. In each instance it is held inadmissible because there was no authorization of the employee to speak

[12] *Id.* at 629-30, 74 Pac. at 164-65.
[13] For a collection of cases see NIELSON, CALIFORNIA ANNOTATIONS, RESTATEMENT OF AGENCY §§ 286, 288.
[14] Durkee v. Central Pac. R.R., 69 Cal. 533, 11 Pac. 130 (1886).
[15] Luman v. Golden Ancient Channel Mining Co., 140 Cal. 700, 74 Pac. 307 (1903).
[16] Kimic v. San Jose-L.G. Interurban Ry., 156 Cal. 379, 104 Pac. 986 (1909). See also Baker v. Western Auto Stage Co., 48 Cal. App. 283, 192 Pac. 73 (1920); Shaver v. United Parcel Service, 90 Cal. App. 764, 266 Pac. 606 (1928).

for the employer and the employee's statement did not qualify as an excited utterance (*res gestae*).[17]

However, two fairly recent cases diverge sharply from this pattern of inadmissibility. In *Shields* v. *Oxnard Harbor Dist.*[18] the facts were as follows:

> On June 17, 1939, defendant Oxnard Harbor District, was engaged in constructing a harbor in the county of Ventura. Defendant McDougall was employed by his codefendant Oxnard Harbor District as port director with the duty of supervising the construction of the harbor and its operation. On the 17th of June in an automobile owned by his codefendant, defendant McDougall drove to Santa Barbara, where he inspected the harbor facilities. He then drove to a cafe, where he consumed alcoholic beverages, leaving the cafe around 2:00 a.m. on June 18, 1939, to return to his home, which was located in the city of Oxnard. At about 3:30 a.m., while driving the automobile belonging to his codefendant in a southerly direction on the state highway between Ventura and Santa Barbara, the car which defendant McDougall was driving collided with an automobile in which plaintiffs were traveling in a northerly direction on the same highway. As a result of the accident plaintiffs suffered serious injuries.[19]

Plaintiff testified to the following conversation which apparently took place some considerable time after the accident: "I said, 'Well, it kind

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[17] The following from the *Luman* case (discussed in the text at note 15, p. 486, *supra*) is typical of the reasoning in such cases:

"It appeared that the plaintiff was brought out of the shaft several minutes after the occurrence of the accident. It having been shown that Haskins, the superintendent, was present at the time, the plaintiff was asked: 'Did you make an inquiry of Mr. Smith at the time in regard to what caused the accident, and, if so, state what your inquiry was, and what was his reply?' This was objected to upon the ground that the declaration of Smith could not bind the corporation, and the objection was sustained. The plaintiff then offered to prove, for the purpose of rebutting the evidence as to negligence of the fellow-servant, 'that about ten minutes after the occurrence, and as soon as he reached the top of the shaft, he asked the brakeman, "How did it happen?" The brakeman said in the presence of Mr. Haskins that "The clutch flew out, the machinery gave way," and that the brake would not hold it. Mr. Haskins replied, "Yes, because I saw him put the clutch in place, throw the clutch in place." ' This was objected to as irrelevant, immaterial, and incompetent, and the objection was sustained. Haskins was the superintendent of the mine, in charge of the works. It is not claimed that this testimony was offered for the purpose of impeaching the witness Haskins, and no foundation was laid for any impeachment. It was explicitly stated that the object was to rebut the testimony of negligence of the fellow-servant. The objections were properly sustained. Any declarations which might have been then made by either Smith or Haskins constituted no part of the *res gestae*. [Citations omitted.] Haskins, the superintendent of the mine, had no more power to bind his employer, the defendant corporation, by admissions as to the cause of the accident than had Smith, the man operating the lever and the brake. He was not the defendant corporation, and did not represent it for the purpose of making admissions as to the cause of the accident that had already occurred. If he made an admission as to such cause, he was not in doing so performing on behalf of the defendant corporation any duty by law imposed upon it, and was not, as to such admission, the representative of his employer. [Citation omitted.] The admissions of an agent are not binding, unless they are made not only during the continuance of the agency, but in regard to a transaction then pending at the very time they are made." Luman v. Golden Ancient Channel Mining Co., 140 Cal. 700, 709-10, 74 Pac. 307, 311 (1903).

The proposition stated in the last sentence is erroneous. Authorized admissions are admissible, though *not* contemporaneous with the transaction to which they relate. See, *e.g.*, authorities cited in notes 7 and 8, pp. 484-85, *supra*.

[18] 46 Cal. App.2d 477, 116 P.2d 121 (1941).

[19] *Id.* at 481, 116 P.2d at 125.

of looks like you [McDougall] are in the wrong?' 'Yes', he says, 'I guess it does.' ''[20] This was held admissible on the following grounds:

> The trial court also properly permitted evidence of declarations and admissions of defendant McDougall. The rule is established in California that after evidence of an agency has been received as in the instant case, declarations or admissions of the agent are admissible against the employer (sec. 1870, subsec. 5, Code Civ. Proc.). Therefore, the trial court properly admitted in the present case evidence of declarations and admissions made by the defendant McDougall at the time of and after the accident.[21]

The case is followed in *Johnson* v. *Bimini Hot Springs*.[22] This was an action for damages for injuries received by plaintiff as a result of slipping and falling in a shower room operated by defendant corporation. Plaintiff was allowed to testify that two weeks after the fall defendant's agent (who was resident assistant manager and assistant secretary and "manager over all the managers at the bathhouse") told the plaintiff that he had found the floor of the shower in a very slippery condition. This was held admissible upon the authority of the *Shields* case.

Accepting the principle of authorized admissions as the governing principle, the results reached in the last two cases are defensible on the basis of that principle and are reconcilable with the previous cases cited which exclude evidence of the agents' statements. The differentiating factor is the high place in the principal's hierarchy occupied by the representatives in the *Shields* and *Johnson* cases. Operating on a purely conceptual level and considering only agency concepts, it is altogether plausible to conclude that whereas a railroad does not authorize a mere locomotive engineer to say in its behalf "It was my fault," the Harbor District does authorize its port director to make a comparable statement in its behalf. If, however, we were to approach the matter from a nonconceptual point of view and to consider only the trustworthiness and reliability of the evidence, we would be hard put to justify our willingness to let the jury hear the director's *mea culpa* but not the engineer's.

To the extent that need and probable reliability are acceptable criteria in fashioning exceptions to the hearsay rule, it seems that the principle of authorized admissions is not an adequate formula for the entire area of agents' statements. This formula is so narrow that it fails to furnish the basis for receipt in evidence of many trustworthy and needed statements made by agents.

This belief led the architects of the Model Code to construct a broader and more comprehensive principle,[23] a principle which the

[20] Reporter's transcript quoted in Johnson v. Bimini Hot Springs, 56 Cal. App.2d 892, 903, 133 P.2d 650, 655 (1943). That the statement was made at some time after the accident is suggested by the fact that the reasoning of the court in admitting it is wholly the agency rationale (nothing is said of *res gestae*). The *Johnson* case supports the inference that the statement postdated the accident, for the *Johnson* case relies on the *Shields* case as authority for admitting an agent's statement made two weeks after the accident.

[21] 46 Cal. App.2d 477, 488, 116 P.2d 121, 129 (1941).

[22] 56 Cal. App.2d 892, 133 P.2d 650 (1943).

[23] MODEL CODE Rule 508(a).

Commissioners on Uniform State Laws accept and propose [24] as Rule 63(9)(a) and which bears the label "Vicarious Admissions."

The new principle is created by erasing the distinction presently drawn between declarations which are within the scope of the agency and declarations which do not themselves fall within the scope of the agency but which do concern *matters* within its scope. Presently only the former are admissible; under the new principle admissibility is extended to cover the latter. To illustrate: D's chauffeur driving D's car on an errand for D runs into pedestrian P. The next day the chauffeur tells P "I saw the light was red and saw you in the crosswalk—I just took an unlucky chance." The evidence cannot be admitted as an authorized admission because the declaration itself is not within the scope of agency. The chauffeur is not a "speaking agent"; he is hired to drive, not speak. On the other hand, the evidence may be admitted under the new principle which does not require that the declaration itself be within the scope of agency. It is sufficient if the declaration concerns a matter which is within the scope of agency. In our case the declaration relates to the chauffeur's driving. Such driving is within the scope of his agency, albeit it was careless driving which D neither authorized nor desired.[25]

What can be said for the trustworthiness of statements which would be admissible under Rule 63(9)(a)? In the first place, the declarant must have knowledge.[26] The declarant's out-of-court statement is admissible only if it would be admissible as an in-court statement. In the second place, the declaration will usually be against the interest of both the employee and that of the employer (*e.g.*, chauffeur says "I was speeding"). In the third place, even as to declarations which are exculpatory so far as the employee is concerned (*e.g.*, chauffeur says "My boss lost his head and grabbed the wheel") such declarations are normally against the interest of the employer and therefore unlikely to be untrue when made—as Rule 63(9)(a) requires them to be made —during the employment. As Professor McCormick puts it:

> The agent is well informed about acts in the course of the business, his statements offered against the employer are normally against the employer's interest, and while the employment continues, the employee is not likely to make such statements unless they are true.[27]

Rule 63(9)(a) overlaps considerably with other Uniform Rules of Evidence provisions. When the agent's declaration is against his interest (as usually it will be) both Rule 63(10) (the Uniform Rules version of the exception for declarations against interest) and Rule 63(9)(a) make it admissible. If the agent is available and testifies, his

[24] See UNIFORM RULE 63(7) Comment:
"This and exceptions (8) and (9) cover the admissibility of admissions by a party or by those by whose statements he is bound. They adopt the policy of Model Code Rules 506, 507 and 508."

[25] RESTATEMENT (SECOND), AGENCY §§ 229, 230, 231 (1958).

[26] In this respect the vicarious admissions of Rule 63(9) are distinguishable from the personal, authorized and adoptive admissions of Uniform Rules 63(7) and 63(8). The latter do not require knowledge. See note 3, p. 484, *supra*.

[27] MCCORMICK, EVIDENCE § 244, p. 519. See Boyce, *Rule 63(9)(a) of Uniform Rules of Evidence—A Vector Analysis*, 5 UTAH L. REV. 311 (1957). See also MODEL CODE Rule 508 Comment *b*:
"[T]he agent or servant in speaking about the transaction which it was within his authority to perform is likely to be telling the truth in most instances . . . ."

pretrial statement is admissible under Rule 63(1) as well as under Rule 63(9)(a). If the case is a respondeat superior case and if the statement inculpates the agent and was made during agency, it is admissible under both Rule 63(9)(a) and Rule 63(9)(c). There is, however, an area in which Rule 63(9)(a) alone is operative—where the statement is exculpatory so far as the agent is concerned (but tends to show liability of the principal)[28] and where the declarant is unavailable. Thus Rule 63(9)(a) alone covers the small but important field of exculpatory statements of unavailable agents as to matters within the scope of agency. If Rule 63(1) and Rule 63(10) were to be rejected wholly or in part, Rule 63(9)(a) could, of course, become of much greater importance.

Rule 63(9)(b)—Co-conspirators' Statements

Section 1870 of the Code of Civil Procedure now provides in part as follows:

> [E]vidence 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 . . . .

By judicial decision the declaration must be made before the termination of the conspiracy.[29] As so construed, Section 1870(6) closely parallels Rule 63(9)(b). Professor McBaine tells us, however, that:

> There are some decisions that state the admission must be "in furtherance of" the conspiracy. Just what is meant by this statement is not clear. The code section (C.C.P. § 1870, subd. 6, ante) makes no such requirement and such statements in decisions are dicta and are confusing.[30]

This element of doubt would be removed by adoption of Rule 63(9)(b). The Commissioners on Uniform State Laws state that Rule 63(9)(b) is based upon the American Law Institute Model Code.[31] The official comment on the American Law Institute Rule states that the rule is specifically intended to *exclude* the in-furtherance-of restriction.[32]

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[28] As where the employee asserts his freedom from fault and this is offered to rebut the defense of injury by fellow servant (see note 17, p. 487, *supra*) or where the employee asserts his freedom from fault and shifts the blame to another employee or to the employer.

[29] Del Campo v. Camarillo, 154 Cal. 647, 98 Pac. 1049 (1908).

[30] MCBAINE § 903, p. 300.

[31] UNIFORM RULE 63(9); see note 24, p. 489, *supra*.

[32] MODEL CODE Rule 508 Comment *a*.

The A.L.I. comment gives us the following illustrations of applications of Model Code Rule 508 and, since Uniform Rule 63(9) follows Model Code Rule 508, the comment is applicable also to Uniform Rule 63(9).

"1. (Clause b)—Action by P for a fraud alleged to have been committed upon him by D and E as co-conspirators. O, a police officer called by P, testifies that during the perpetration of the fraud he disguised himself as D and sought and obtained an interview with E. O may testify that during this interview E said: 'I got P's signature on another order by pretending it was a referendum petition. Now you take it to P's warehouse and get the goods.' This testimony is admissible against D as well as against E, if the judge finds that D and E were participants in the plan to defraud P.

"2. (Clause b)—In the action described by Illustration 1, a police lieutenant L is offered to testify in behalf of P that E was arrested and brought to the police station while D was still at large trying to dispose of some of P's goods which had been obtained by fraud, and that E said to L: 'Well, you've got me all right, but you'll never catch D before he gets rid of this last load.' This testi-

Rule 63(9)(c)—Legal Liability of Declarant

Plaintiff employer sues a surety for breach of a fidelity bond covering plaintiff's employee. Plaintiff offers evidence of the employee's statement admitting embezzlement. If plaintiff had sued the employee for conversion or for restitution, the employee's statement (being an admission) would, of course, be admissible against him. Section 1851 of the Code of Civil Procedure [33] and Rule 63(9)(c) both provide that such a statement is also admissible where the surety is the defendant. Applying Rule 63(9)(c): one of the issues between plaintiff and defendant is the legal liability of the employee; the employee's statement tends to establish that liability; the evidence is admissible.

What, however, is the utility of Section 1851 under the present state of the law? What would be the utility of Rule 63(9)(c) if the Uniform Rules scheme were adopted? This depends upon the scope of the applicable exception to the hearsay rule for declarations against interest. Thus to answer these questions we must make brief reference to the current exception for declarations against interest, comparing both Section 1851 and Rule 63(10) (the Uniform Rules version of this exception) to the present exception.

Speaking generally, the present exception covers only the declarations of unavailable declarants which were against interest *when made.*[34] Thus in our action above of plaintiff against surety the employee's statement could be admitted under the against-interest exception only if the employee were unavailable. Under Section 1851, however, the evidence is admissible irrespective of availability. Again, under the against-interest principle the employee's declaration could not be admitted even if he were unavailable if perchance the declaration was not against interest when made. (*E.g.*, employee states "I have a key to the office." Later a theft occurs in the office and the employee is suspected. The declaration is not against interest *when made* although in

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mony would be admissible against D as well as E, if the judge finds as in Illustration 1." MODEL CODE Rule 508.

In California practice, although the judge passes in the first instance upon the foundation facts necessary for receipt of the co-conspirator's declaration against his colleague (existence of conspiracy; declaration within duration of conspiracy), if he admits the evidence, he must charge the jury to disregard it unless and until they find the foundation facts. For this purpose, however, the jury need be only prima facie convinced. People v. Talbot, 65 Cal. App.2d 654, 151 P.2d 317 (1944). Under the Uniform Rules the judge rules with finalty on the question of competency and does not, therefore, submit the question to the jury. For the reasons stated in our discussion on Rule 63(6), we prefer the Uniform Rules.

See generally Levie, *Hearsay and Conspiracy, A Reexamination of the Co-conspirators' Exception to the Hearsay Rule,* 52 MICH. L. REV. 1159 (1954).

[33] CAL. CODE CIV. PROC. § 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."

See Langley v. Zurich Gen. Acc. & Liab. Ins. Co., 219 Cal. 101, 25 P.2d 418 (1933); Nye & Nissen, Inc. v. Central Sur. & Ins. Co., 71 Cal. App.2d 570, 163 P.2d 100 (1945); Piggly Wiggly Yuma Co. v. New York Ind. Co., 116 Cal. App. 541, 3 P.2d 15 (1931).

It will be noted that Section 1851 of the Code of Civil Procedure includes "whatever would be evidence *for* or against" (emphasis added) the third person whereas Rule 63(9)(c) includes only evidence of a statement of the third party. The difference is without practical importance. If A sues T, T may prove A's statements as admissions and may introduce any other relevant and competent evidence. If B sues T, T may prove B's statements and may introduce any other relevant and competent evidence. If A sues B, either may prove the other's statements and may introduce any other relevant and competent evidence. All of this is so without any statutory provision such as the would-be-evidence-for provision of Section 1851. That part of the section does not, therefore, operate to make any evidence admissible that is not already admissible on other principles.

[34] See MCCORMICK, EVIDENCE § 239, p. 504 and § 253.

view of later events and as of the time of these events it is against interest.) Under Section 1851 the evidence is admissible without regard to the against-interest-when-made condition. Thus in cases to which it applies, Section 1851 eliminates two restrictions which would be operative if Section 1851 did not exist and if only the against-interest principle were applicable.[35]

The Uniform Rules version of the against-interest exception—Rule 63(10)—preserves the traditional when-made restriction. It abandons the requirement of unavailability. Thus Rule 63(9)(c) is not as significant in the new scheme as Section 1851 is in the present law. The cases will be few in which the when-made condition is not met and only these few will fall under Rule 63(9)(c) alone.[36] As to these cases, however, Rule 63(9)(c) would merely continue in force the present rule as stated in Code of Civil Procedure Section 1851.

From the foregoing, it is apparent that Section 1851 is superseded in large part by Rule 63(9)(c). However, a review of the cases arising under Section 1851 indicates that another type of evidence is admitted under its provisions that would not be admitted under either Rule 63(9)(c) or Rule 63(10).

One group of cases arising under this section involves *statements* of a person (hereinafter sometimes called "the principal obligor") upon whose obligation or duty the liability of 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*,[37] 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.*,[38] 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

[35] There remains to note this mystery respecting our statute: It possesses a far greater potential than (so far as our reports show) has ever been realized. Logically the statute is capable of application to a respondeat superior situation to make the servant's declaration, though unauthorized, admissible against the master. Thus D's chauffeur on an errand for D runs into P pedestrian. The next day the chauffeur tells P he drove through the red light. Now the "question in dispute between" P and D "is the obligation or duty of" the chauffeur. Therefore, "whatever would be evidence" against the chauffeur is "prima facie evidence against" defendant and, of course, the evidence would be admissible against the chauffeur if he were the defendant. Why has this statute never been invoked as the basis for admitting the evidence in the many cases of this type which have arisen? Why has not some plaintiff injured by defendant's servant who later talked offered the declaration under Section 1851? *Caveat as to criminal cases:* If A is prosecuted for stealing and B is separately prosecuted for receiving, both Section 1851 and Rule 63(9)(c) are capable of being so construed and applied that A's admissions or his confessions are admissible against B. The same is true of Rule 63(10). The evidence would be admissible irrespective of the availability of A. This poses both constitutional and policy questions comparable to those explored in the discussion on Rules 63(2) and 63(3).

[36] The comments to the A.L.I. Code acknowledge this to be so as to the Code analogues of Rules 63(9)(c) and 63(10). See comments to MODEL CODE Rules 508 and 509.

Professor McCormick states that Rule 63(9)(c) "seems relatively unimportant as it appears that the statements described would usually be admissible under the provision for declarations against interest." McCormick, *Hearsay*, 10 RUTGERS L. REV. 620, 625-26 (1956).

[37] 101 Cal. App.2d 480, 225 P.2d 539 (1950).

[38] 190 Cal. App.2d 430, 12 Cal. Rptr. 114 (1961).

surety under Section 1851 as an admission of the principal obligor. Rule 63(9)(c) supersedes Section 1851 insofar as this group of cases is concerned.

Another group of cases arising under Section 1851 involves *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.[39] In 1921, 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,*[40] 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,*[41] 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. As a judgment is not a statement *by* the judgment debtor, it is apparent that the evidence admitted in this group of cases could not be admitted under Rule 63(9)(c).

Section 1851 also provides that "whatever would be the evidence for" the principal obligor "is prima facie evidence between the parties." However, no case has been found in which this "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.*[42] 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 pre-

[39] Ellsworth v. Bradford, 186 Cal. 316, 199 Pac. 335 (1921).
[40] *Ibid.*
[41] 11 Cal. App.2d 98, 52 P.2d 1018 (1936).
[42] 128 Cal. App. 376, 17 P.2d 781 (1932).

> vent 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 dependent 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.[43]

The rule is stated more succinctly in *Triano* v. *F. E. Booth and Company:* "[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."[44]

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.[45] There is not a great deal of distinction to be drawn between these cases and the principal-guarantor cases[46] where the admissions of the principal are admitted against the guarantor.

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*[47] involved a direct and independent liability of the stockholder. *Ingram* v. *Bob Jaffee Co.*[48] 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

[43] *Id.* at 383, 17 P.2d at 784.
[44] 120 Cal. App. 345, 348, 8 P.2d 174, 175 (1932).
[45] Butte County v. Morgan, 76 Cal. 1, 18 Pac. 115 (1888).
[46] See, *e.g.*, Standard Oil Co. v. Houser, 101 Cal. App.2d 480, 225 P.2d 539 (1950).
[47] 186 Cal. 316, 199 Pac. 335 (1921).
[48] 139 Cal. App.2d 193, 293 P.2d 132 (1956).

case would fall within both the language of Section 1851 and the principle upheld in the *Ingram* and *Ellsworth* cases. 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.[49] Obviously these statements would not be admissions of an employee in an action against him and would be inadmissible hearsay. (Note, however, such statements would be 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.[50] Thus in *Shaver* v. *United Parcel Service*,[51] the driver's statement, "I could have stopped but I thought the trailer was going to stop,"[52] was admitted only as to the driver and not as to the employing corporation.[53] 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 the *Ingram* case. 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 the *Ellsworth* case.

Rule 63(9)(c) embodies the rule set forth in Section 1851 insofar as it applies to admissions of a 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), however, does not cover the cases applying Section 1851 which involved judgments against a principal obligor. Moreover, Rule 63(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 the *Ellsworth* case 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 principal obligor would be admissible against another person under Section 1851. The Uniform Rules do not cover this aspect of Section 1851. Accordingly, it is recommended that another subdivision be added to the Uniform Rules to include the rule of Section 1851 insofar as it pertains to judgments. The subdivision should be numbered (21.1) to

[49] *E.g.*, Luman v. Golden Ancient Channel Mining Co., 140 Cal. 700, 74 Pac. 307 (1903).
[50] *E.g.*, Kimic v. San Jose-Los Gatos Interurban Ry., 156 Cal. 379, 104 Pac. 986 (1909).
[51] 90 Cal. App. 764, 266 Pac. 608 (1928).
[52] *Id.* at 770, 266 Pac. 606 (1928).
[53] 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, 57 P.2d 550 (1936).

place it in the portion of Rule 63 that concerns the admissibility of judgments. It would read as follows:

> (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.

Conclusion

It is recommended that Rule 63(7), Rule 63(8) and Rule 63(9) be approved.[54] Approval of proposed Rule 63(21.1)—set out above—is also recommended.

[54] The N. J. Committee, the N. J. Commission and the Utah Committee all approved subdivisions (7) and (8) without substantial modification. The N. J. Committee also approved subdivision (9). The N. J. Commission, however, disapproved paragraph (a) of subdivision (9) entirely, and substituted the traditional requirement that a co-conspirator's statement must be "in furtherance of the plan" for the requirement of the Uniform Rule 63(9)(b) that the statement must be "relevant to the plan or its subject matter." The Utah Committee approved subdivision (9), but required that the declarant be unavailable as a condition of the admissibility of his statement under paragraph (a). N. J. COMMITTEE REPORT 134-37; N. J. COMMISSION REPORT 57-58; UTAH FINAL DRAFT 36-37.

Rule 63(10)—Declarations Against Interest

Rule 63(10) reads as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> * * *
>
> (10) Subject to the limitations of exceptions (6), a statement which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true;

Rule 63(10) is a modernized version of the ancient exception [1] to the hearsay rule relating to declarations against interest. At common law such declarations were admissible provided that the interest affected was pecuniary or proprietary and that the declarant was dead.[2] In California the common law exception is codified—although imperfectly so [3]—in Sections 1946, 1853 and subdivision (4) of 1870 of the Code of Civil Procedure.[4]

To illustrate the new features embodied in Rule 63(10) and to evaluate its merits, Rule 63(10) will be broken down into several parts.

"A statement . . . contrary to the declarant's pecuniary or proprietary interest"

The coverage here includes any statement, oral or written,[5] of any declarant that "the judge finds was at the time of the assertion so far

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[1] "This exception may be traced back as early as any of the others, namely, to the early 1700s." 5 WIGMORE, EVIDENCE § 1455, p. 259.

[2] MCCORMICK, EVIDENCE §§ 253-257; 5 WIGMORE, EVIDENCE §§ 1455-1477.

[3] Wigmore says of our codification and of similar codifications in other states that:

> "They are . . . for the most part obstructive or confusing rather than helpful; for they either merely restate, in a form too concise to be useful, the established common law rule, or they mingle in inextricable confusion certain fragments of this and other exceptions." 5 WIGMORE, EVIDENCE § 1455 at 260.

[4] Code of Civil Procedure Section 1946 provides in part:

> "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."

Code of Civil Procedure Section 1853 provides:

> "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."

Code of Civil Procedure Section 1870 provides in part:

> "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 . . . ."

[5] UNIFORM RULE 62(1): " 'Statement' means . . . an oral or written expression . . . ."

contrary to the declarant's pecuniary or proprietary interest" that "a reasonable man in his position would not have made the statement unless he believed it to be true." This portion of Rule 63(10) is merely an enactment of the common law exception.[6] Even so, it is broader than Code of Civil Procedure Sections 1946, 1853 and 1870(4). Section 1946 applies only to *written* entries against interest; Section 1853 applies to both oral and written statements, but provides only for admissibility against the *successor in interest* of the declarant; whereas Section 1870(4) applies to both oral and written statements, but only to such statements with respect to the declarant's *real property*.

Thus the California statutes do not cover the entire common law exception. To illustrate—An action against defendant for goods and services. The defense: the goods were supplied to and the services rendered for defendant's brother, he being solely liable therefor. Defendant's offer of proof: witness is to testify to an oral statement by defendant's brother (now deceased) acknowledging his indebtedness to P for the goods and services in question. This evidence does not come in under Section 1946 because the statement was oral. It does not come in under Section 1853 because it is not offered against the successor in interest of the deceased brother. Nor does it come in under Section 1870(4) because it does not relate to real property. Yet it is abundantly clear that the declaration is one against pecuniary interest in the traditional sense and the evidence should be admitted even under the common law exception.[7] Possibly if such a case did occur in California, the court would invoke the common law exception to the extent necessary to fill in the gaps left by our codification. The problem would be eliminated by replacing our present statutes with Rule 63(10), for it clearly comprehends *all* declarations against pecuniary or proprietary interest in *all* cases.

"A statement" subjecting declarant to "civil . . . liability" or rendering "invalid a claim by him against another"

A collision takes place in an intersection, where traffic is governed by a traffic light, between A's car driven by A and B's car driven by B. Later A dies as a result of the injuries received in the collision. While in the hospital A tells a friend visiting him, "The light for me was red. I gambled and lost." This statement tends to invalidate any claim A might otherwise have against B. Furthermore it tends to subject A to civil liability to B. A reasonable man in A's position would scarcely have made the statement unless he believed it to be true. A's statement is as trustworthy as a statement by him that he owed money to B or that B really owned property which A appeared to own. If the latter statements are to be received whenever relevant, even though hearsay, it seems, a fortiori, the former should be. Such, at any rate, is the clear intent and philosophy of this portion of Rule 63(10).

Adoption of this portion of Rule 63(10) would make a definite change in California law in one respect and a more problematical

[6] Except as to the requirements of unavailability and knowledge. See discussion in text at notecalls 21 and 23, pp. 501-02, *infra*.

[7] MCCORMICK, EVIDENCE § 254 at 548: "In respect to declarations against pecuniary interest, the clearest example is the acknowledgment that the declarant is indebted."

change in another respect. The definite change is illustrated in this hypothetical case: Action against B for the wrongful death of A; B offers A's statement; under current law the statement is inadmissible. Since it is an oral statement it cannot be admitted under Section 1946. Since it does not relate to real property it cannot be admitted under Section 1870(4). This leaves only Section 1853 under which "the declaration . . . of a decedent, having sufficient knowledge of the subject" and "against his pecuniary interest" is admissible against "his successor in interest." Plaintiff in the death action is not, however, a "successor in interest" of the decedent. The death action is an independent cause of action arising upon decedent's death, not a derivative cause of action once possessed by decedent and now possessed by plaintiff.[8] The inadmissibility of the evidence which results, although it has been the occasion for at least one expression of judicial regret,[9] is nevertheless clearly established. Clearly this result would be changed by Rule 63(10).

The problematical change is illustrated in the following case: B sues A's executor for injuries and property damage allegedly inflicted by A's negligence. B offers A's statement. Now it seems that defendant is A's "successor in interest" within the meaning of Section 1853 since the liability asserted against defendant was possessed by A in his lifetime. The question remains, however, whether A's statement would be regarded as "against his pecuniary interest" within the meaning of Section 1853. The classic English view limits this concept to the area of debt and property (*e.g.*, "I owe"; "I have been paid what was owed me"; "I do not own this property").[10] However, as Professor McCormick points out, some American cases

> have properly extended the field of declarations against interest to include acknowledgement of facts which would give rise to a liability for unliquidated damages for tort or seemingly for breach of contract. A corresponding extension to embrace statements of facts which would constitute a defense to a claim for damages which the declarant would otherwise have, has been recognized in this country.[11]

Query: Would California follow the more conservative English view on this point or the more liberal view of some of the American cases? Assuming that the conservative view would be followed, the evidence would again be inadmissible under current law and again adoption of Rule 63(10) would bring about a change.

"A statement" subjecting declarant to "criminal liability"

D is prosecuted for the murder of X. D offers evidence that C confessed that C (and C alone) committed the murder. Under Rule 63(10) the evidence would be admitted. According to the overwhelming weight of authority the evidence is, however, inadmissible today in California and elsewhere.[12] As the court states in *People* v. *Hall:*

> The rule is settled beyond controversy, that in a prosecution for crime, the declaration of another person that he committed the

[8] Marks v. Reissinger, 35 Cal. App. 44, 169 Pac. 243 (1917).
[9] Carr v. Duncan, 90 Cal. App.2d 282, 202 P.2d 855 (1949).
[10] McCormick, Evidence § 254 at 548.
[11] *Ibid.*
[12] McCormick, Evidence § 255.

> crime is not admissible. Proof of such declaration is mere hearsay evidence, and is always excluded, whether the person making it be dead or not.[13]

If we phrase the result of this rule in terms of what is and what is not "against interest" we produce the formulation that "I owe X" is "against interest" but "I killed X" is not! Manifestly there is no support for the rule in this fatuous formulation. But is there any better reason to abandon (in the instance of declarations against penal interest) the general idea of the exception that what is against interest is trustworthy enough to be heard without the test of cross-examination? Possibly an overriding policy consideration is the special danger of perjury which is here present—a danger assessed as being so great that *all* evidence of this type must be excluded. It cannot be denied that desperate villains on trial for their lives would be ready and willing (and, but for the rule in question, would often be able) to suborn perjury and to fabricate evidence of confessions of others which were never, in fact, made. It cannot be forgotten, however, that (as Wigmore says) although the rule hampers a villain in passing for an innocent it also hampers an honest man in exonerating himself.[14] It must shock one's sense of justice to ponder the possibility of allowing even one innocent man to be doomed under this rule.

The question for decision on this portion of Rule 63(10) is basically this: shall we run the risk, albeit a substantial risk, of perjury in many cases in order to protect the interests of an occasional defendant unjustly charged and possessed of *true* evidence of the confession of another?

We have been considering the fundamentals of the problem from the viewpoint of the defendant relying on the evidence to exonerate himself. However, if in fashioning a new rule to protect defendant we formulate too general a principle, the prosecution may in some cases utilize the new enactment *against* defendant. Rule 63(10) is subject to such use. Under Rule 63(10) the prosecution may prove against defendant relevant declarations of others against their penal interest; this can be done without regard to the restrictions of Rule 63(9)(b) and without regard to the availability of the declarant. To illustrate: D is prosecuted for receiving from X goods stolen by X, or D is prosecuted for receiving a bribe from X. X's declarations (that he stole the goods or offered the bribe) are admissible against D.

The present writer favors extending the new rule this far. The declarations are trustworthy if made. The prosecution is scarcely likely to suborn perjured testimony on the question of whether the declarations were made. Even in cases where X is available, the principle of confrontation need not bar the new rule in this State for the reasons stated in the discussion on Rule 63(2) and Rule 63(3). If, however, this is thought to be too large a step to take at this (or any) time, Rule 63(10) should be amended to provide that declarations against penal interest are admissible only in behalf of defendant and not against him.

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[13] 94 Cal. 595, 599, 30 Pac. 7, 8 (1892).
[14] 5 WIGMORE, EVIDENCE § 1477 at 289; Note, 16 WASH. & LEE L. REV. 126 (1959).

"A statement" making declarant "an object of hatred, ridicule or social disapproval in the community"

A man admits paternity of an illegitimate child;[15] an unmarried woman states that she is pregnant;[16] a man states that he is impotent.[17] Professor McCormick refers to these statements as declarations against "social interests."[18] Currently such declarations are usually excluded.[19] Under the new rule they would be admitted—in our opinion, wisely so. Professor McCormick states that:

> [T]he restriction to material interests, ignoring as it does other motives just as influential upon the minds and hearts of men, should be more widely relaxed. Declarations against social interests, such as acknowledgments of facts which would subject the declarant to ridicule or disgrace, or facts calculated to arouse in the declarant a sense of shame or remorse, seem adequately buttressed in trustworthiness and should be received . . . .[20]

Unavailability

Under Rule 63(10) the evidence is admitted irrespective of the availability of the declarant. This changes the law, but, as Professor McCormick says:

> There is strong argument for dispensing with any requirement that the declarant be unavailable as a witness as a prerequisite for receiving his declarations under this exception to the hearsay rule. The reasoning which admits the admissions of a party and spontaneous declarations (such as excited utterances or declarations of present mental or bodily state), without regard to the availability of the party or the declarant—namely that the admission, or the spontaneous declaration, is just as credible as his present testimony would be—seems equally applicable to the declaration against interest.[21]

Knowledge and Opinion

Traditionally it has been a requirement of the exception for declarations against interest that the declarant be possessed of personal knowledge of the disserving fact of which he speaks.[22] As we read Rule 63(10), the requirement is eliminated in the new principle formulated by that subdivision. Is this wise? In our opinion the answer is "Yes."

When a man speaks against his interest without being possessed of personal knowledge of the facts, we may be almost certain that he has made an adequate investigation and that the data discovered are convincing. Thus, even though we have double (or multiple) hearsay before us (if we consider his statement), it is hearsay possessed of greater reliability than ordinary hearsay.

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[15] Estate of Baird, 193 Cal. 225, 223 Pac. 974 (1924).
[16] Thrasher v. Board of Med. Examiners, 44 Cal. App. 26, 185 Pac. 1006 (1919). *Cf.* People v. Wright, 167 Cal. 1, 138 Pac. 349 (1914).
[17] Estate of James, 124 Cal. 653, 57 Pac. 578 (1899).
[18] McCORMICK, EVIDENCE § 255 at 551.
[19] See notes 15-17, *supra*, and notes 1 and 2, p. 497, *supra*.
[20] McCORMICK, EVIDENCE § 255 at 551.
[21] *Id.* § 257 at 554.
[22] *Id.* § 253 n.6; 5 WIGMORE, EVIDENCE § 1471(a).

The employer of a chauffeur (not present at the time of an accident) is above suspicion of lying when he says, "My man was careless." The declarant who declares his paternity of an illegitimate child has no doubt considered, investigated and rejected alternative hypotheses. Even though his statement is based, in part, on what the woman and others have told him, if this is convincing enough to drive *him* to a conclusion adverse to himself, can we not here safely dispense with the test of cross-examination both as to him and as to his informants?

It should also be noted that under Rule 63(10) there is no requirement that the declaration be in a form appropriate for in-court testimony. A declaration complying with the conditions of Rule 63(10) is not inadmissible because phrased in terms of an opinion or conclusion.[23]

Conclusion

It is recommended that Rule 63(10) be approved.[24]

[23] See MCCORMICK, EVIDENCE § 18, for a good statement of why the opinion rule should not apply to evidence admissible under exceptions to the hearsay rule.

[24] The N. J. Committee recommended the approval of this subdivision. N. J. COMMITTEE REPORT 140. The N. J. Commission, though, recommended the addition of the requirement that the declarant be unavailable as a witness. N. J. COMMISSION REPORT 59. The Utah Committee also required the judge to find the declarant unavailable and further restricted admissibility by permitting the judge to exclude such declarations if he finds that admission will not promote justice. UTAH FINAL DRAFT 37.

Rule 63(11)—Voter's Statements

Rule 63(11) provides:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> * * *
>
> (11) A statement by a voter concerning his qualifications to vote or the fact or content of his vote;

Rule 63(11) deals only with out-of-court statements of the voter. His testimony in court is subject to Rule 31 which provides:

> Rule 31. Every person has a privilege to refuse to disclose the tenor of his vote at a political election unless the judge finds that the vote was cast illegally.

Wigmore disapproves of this exception.[1] California law does not recognize this exception. The arguments against the exception are well stated in the following excerpt from *Lauer* v. *Estes*,[2] the leading California case on the subject:

> One Samuel Cole voted at the election in question . . . . [T]he court found that he was not a qualified voter . . . . [F]or the purpose of showing that Cole voted for the appellant, the respondent was allowed, over the objections of the appellant, to introduce a certain written declaration of Cole that he had voted for the appellant. This declaration was in the form of an affidavit made before a notary public. It was made after the election, and within two days of the filing of the complaint in this action. Of course, the fact that the declaration is in the form of an affidavit is of no significance; there is no provision for such an affidavit, and, if false, it would not subject the party making it to the penalties of perjury. . . . The evidence was improperly admitted, and the court erred in deducting Cole's vote from the votes cast for appellant. Declarations of voters as to their disqualifications were admitted by the English parliament in contests over seats in that body. Their votes were given *viva voce;* the election records showed how an elector voted; the right to vote was a special franchise exercised by a limited class, and was dependent generally upon a freehold interest in land; and the admission of a declaration of a voter that he was disqualified seems to have been founded mainly upon the fact that such declaration was strongly against his interest as the holder of a special franchise, and really endangered his freehold interest which was not always a matter of record. This rule has been followed to some extent by Congress and other American legislative bodies; but even there it has been often

[1] 6 WIGMORE, EVIDENCE §§ 1712-1713.
[2] 120 Cal. 652, 53 Pac. 262 (1898).

> seriously questioned. In a few judicial decisions this rule has been followed although the weight of judicial authority is the other way . . . . In our judgment the declaration of a voter as to how he voted is clearly incompetent, and hearsay of the most dangerous kind. If admissible, it would afford a most easy method of manufacturing sufficient evidence in a closely contested election case to change the result. Under such a rule, an unqualified voter could give one illegal vote to one candidate, and then, by a simple declaration which would not subject him to any loss or danger, could have deducted a legal vote from another candidate. In a close contest between A and B, a friend of A, who had illegally voted for him, would be under a strong temptation to declare that he had voted for B; and it is difficult to imagine another case where the admission of hearsay evidence might be so mischievous. It has been said that in an election contest a voter should be considered as a party, and that therefore his declarations should be admissible. If that be so, then his declarations as to every question involved in the case would be admissible. But in fact he is not a party; he, of course, is not a party of record, and he is not a party in any other sense.[3]

The argument advanced by the Commissioners on Uniform State Laws in behalf of Rule 63(11) is that the out-of-court statement of the voter is probably more trustworthy than his in-court statement.[4] We are inclined to doubt this. In our opinion if the voter is available he should be called to the witness stand. After his disqualification to vote has been established, thus depriving him of his privilege given under Rule 31,[5] he should be required to state under oath how he voted. If he is unavailable, evidence of his extrajudicial statement should, it seems, be admissable. The choice is then between his extrajudicial statement and no statement at all by him. In this situation we are in favor of using the out-of-court statement.

It is recommended that Rule 63(11) be amended by adding at the end thereof the following: "if the judge finds that the declarant is unavailable as a witness." As so amended, Rule 63(11) is recommended for approval.[6]

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[3] *Id.* at 655-57, 53 Pac. at 263-64.
[4] UNIFORM RULE 63(11) Comment.
[5] 8 WIGMORE, EVIDENCE § 2214. See also Note, 46 IOWA L. REV. 441 (1961).
[6] The N. J. Committee and the N. J. Commission both recommended the disapproval of this subdivision. N. J. COMMITTEE REPORT 141-42; N. J. COMMISSION REPORT 59. The Utah Committee approved the subdivision, but conditioned admissibility upon a finding that the vote was cast illegally. UTAH FINAL DRAFT 37.

Rule 63(12)—Statements of Physical or Mental Condition of Declarant

Rule 63(12) reads as follows:

> Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:
>
> * * *
>
> (12) Unless the judge finds it was made in bad faith, a statement of the declarant's (a) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant, or (b) previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition;

Rule 63(12)(a)

Clause (a) of Rule 63(12) makes admissible certain declarations of physical and mental condition. Such declarations are admissible today under a well-established exception to the hearsay rule. We will break down clause (a), into its several parts for the purpose of comment.

"[A] statement of the declarant's . . . then existing . . . physical sensation, including statements of . . . pain and bodily health . . . ." Statements of this kind are today admissible generally [1] and in California.[2] Such statements being "the usual concomitants of existing discomforts, and not narratives of past miseries," [3] they are usually sincere and spontaneous. As such they are regarded as preferable to the in-court testimony of the declarant. Hence there is no requirement that the declarant be unavailable.[4]

"[A] statement of the declarant's . . . then existing state of mind [or] emotion . . . including statements of intent, plan, motive, design, mental feeling, . . . but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is

[1] McCORMICK, EVIDENCE § 265; 6 WIGMORE, EVIDENCE §§ 1714-1715, 1718-1723. The Commissioners on Uniform State Laws state in their official comment that clause (a) "broadly speaking, is accepted in almost all modern decisions." UNIFORM RULE 63(12) Comment.

[2] McBAINE §§ 1041-1056, and McBaine, *Admissibility in California of Declarations of Physical or Mental Condition*, 19 CALIF. L. REV. 231, 367 (1931).
Professor Falknor states that the clause "appears to be in substantial agreement with California case law." Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43, 75 (1954). See also Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224 (1961).

[3] Bloomberg v. Laventhal, 179 Cal. 616, 619, 178 Pac. 496, 497 (1919).

[4] McCORMICK, EVIDENCE § 265.
Query whether a statement of pregnancy would be comprehended by clause (a) of Rule 63(12). The California decisions are conflicting. See McBAINE § 1044.

relevant to prove or explain acts or conduct of the declarant . . . ." Under existing law, statements that indicate the declarant's then existing state of mind are admissible to prove such state of mind when it is in issue. For example, declarations showing an existing belief in the validity of a marriage are admissible to prove that belief when it is material to show that the declarant has been deceived.[5] Declarations showing an existing affection or dislike have been held admissible in the now-abolished action for alienation of affections.[6] Subdivision 12(a) is declarative of the existing law in this regard.

Rule 63(12)(a) also admits declarations which are germane to the declarant's state of mind at a prior time. To illustrate: suppose T's will is contested on the ground of alleged undue influence of X. The will was executed on June 1. On June 15, T said to W "I am afraid of X." Under subdivision 12(a), W may testify to T's statement. The statement relates to T's state of mind as of the time the statement is made (June 15), *i.e.*, T's "then existing state of mind." Such statement is relevant to the state of mind that existed on June 1 because it is reasonable to infer that T's mental state on June 15 was likewise his mental state on June 1. In Professor Chafee's language, "[T]he stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distance up or down the current."[7] Under clause (a) of Rule 63(12), the statements showing "then existing state of mind" are admitted because they are "relevant to . . . explain acts or conduct of the declarant," *i.e.*, to show his mental state when he executed the will.

In this respect Rule 63(12)(a) merely declares common law doctrines. This is made clear by the following explanation which Professor McCormick gives:

> As a later outgrowth of the exception for declarations of bodily pain or feeling, there evolved the present exception to the hearsay rule admitting statements or declarations of a presently existing mental state, attitude, feeling or emotion of the declarant.[8]
>
> * * *
>
> [T]he . . . declaration must describe a then-existing state of mind or feeling, but this doctrine is not as restrictive in its effect as might be supposed. Another principle widens the reach of the evidence. This is the notion of the continuity in time of states of mind. If a declarant on Tuesday tells of his then intention to go on a business trip the next day for his employer, this will be evidence not only of his intention at the time of speaking but of a similar purpose the next day when he is on the road. And so of other states of mind.
>
> Moreover, the theory of continuity looks backward too. Thus, when there is evidence that a will has been mutilated by the maker his subsequent declarations of a purpose inconsistent with the will are received to show his intent to revoke at the time he mutilated it. Accordingly, we find the courts saying that whether a payment

[5] Estate of Carson, 184 Cal. 437, 445, 194 Pac. 5, 9 (1920).
[6] Adkins v. Brett, 184 Cal. 252, 255, 193 Pac. 251, 252 (1920).
[7] Chafee, *Progress of the Law—Evidence, 1919-1922*, 35 HARV. L. REV., 428, 444 (1922).
[8] MCCORMICK, EVIDENCE § 268 at 567.

of money or a conveyance was intended by the donor as a gift may be shown by his declarations made before, at the time of, or after the act of transfer.[9]

Professor McCormick's rationale is followed in California.[10] For example, in *Estate of Anderson,*[11] decedent's will was contested on the ground of undue influence of her aunt. Evidence was offered that after executing the will decedent expressed fear of her aunt. The evidence was held admissible, the court reasoning as follows:

> The only exception to the rule against hearsay within which [the evidence] . . . could come is the exception which admits declarations indicative of the declarant's intention, feeling, or other mental state, including his bodily feelings. But such declarations are competent only when they are indicative of the declarant's mental state at the very time of their utterance, and only for the purpose of showing that mental state . . . . As may be seen from the foregoing statement of the exception, in order that a declaration be within it two things are requisite: (a) the declaration must be indicative of the mental state of the declarant at the very time of utterance, and (b) his or her mental state at that time must be material to an issue in the cause, i.e., have a reasonable evidentiary bearing upon such issue.[12]
>
> * * *
>
> [The evidence] meets both the requirements necessary in order to bring a declaration within the exception. It (a) indicated her then state of mind toward her aunt, and (b) her then state of mind as so indicated was material, since the fact that she then feared her aunt had a reasonably direct bearing on what her mental attitude toward her aunt may have been at a previous and not far distant time, when she executed the will.[13]

Let us now suppose, however, that on June 15 T spoke as follows to W: "I remember that I was afraid of X last June 1." This, it seems, is, in the words of Rule 63(12)(a), "a statement of the declarant's . . . memory or belief to prove the fact remembered or believed." As such, the statement would probably be inadmissible under Rule

[9] *Id.* § 268, at 569-570.

[10] Whitlow v. Durst, 20 Cal. 2d 523, 127 P.2d 530 (1942) (Issue: were H and W reconciled on July 16. Evidence: thereafter H said they would never be reconciled. Held admissible because "When intent is a material element of a disputed fact, declarations of a decedent made after[wards] that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule . . . "). *Id.* at 524, 127 P.2d at 531.

Watenpaugh v. State Teachers' Retirement, 51 Cal.2d 675, 336 P.2d 165 (1959) (Issue: intent with which decedent executed designation of beneficiary. Evidence: thereafter decedent told his wife she was beneficiary. Held admissible because "the declarations of a decedent may be admissible under certain circumstances to prove a state of mind at a given time although uttered . . . after that time, on the theory that under these circumstances the 'stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distances up or down the current,'" citing, *inter alia,* Estate of Anderson, 185 Cal. 700, 198 Pac. 407 (1921)). *Id.* at 679, 336 P.2d at 168.

Williams v. Kidd, 170 Cal. 631, 151 Pac. 1 (1915) (Issue: whether decedent delivered a deed to certain property with the intent requisite to pass title. Evidence: later declarations of the decedent showing that at the time of the declarations he regarded himself as the owner of the property).

[11] 185 Cal. 700, 198 Pac. 407 (1921).

[12] *Id.* at 718-19, 198 Pac. at 415 (1921).

[13] *Id.* at 720, 198 Pac. at 415-16 (1921).

63(12)(a). If this is so, Rule 63(12)(a) may modify existing law to a limited extent.

As just noted, Rule 63(12)(a) and the present law provide for admitting evidence of a statement showing an existing state of mind when relevant to explain acts or conduct of the declarant occurring prior to the time of the statement. Rule 63(12)(a) also permits evidence of "then existing state of mind" or "intent" to be admitted when "relevant to prove . . . acts or conduct of the declarant." The subdivision does not require that such "acts or conduct" be contemporaneous with the statement of intent. Hence, under the subdivision, statements indicating a present intent may be used to prove acts or conduct of the declarant occurring after the time of the statements. This is declarative of the existing law.[14]

Rule 63(12)(a) does not, however, permit a declaration showing the "then existing state of mind" to be used to prove past acts or conduct of the declarant. The subdivision provides that the declarant's statement of "memory or belief" is not admissible "to prove the fact remembered or believed." This limitation is necessary to preserve the hearsay rule.[15] If the limitation did not exist, the statement "I went to San Francisco yesterday" would be admissible to show a present belief on the part of the declarant that he went to San Francisco, which, in turn, would be relevant to show that he *did* go to San Francisco. In the language of Rule 63(12)(a), a statement of the declarant's "then existing state of mind" would be used "to prove the fact remembered or believed."

As a general proposition, it may be said that the existing law does not permit a declaration showing the "then existing state of mind," *i.e.*, memory or belief, to be used to prove past acts or conduct of the declarant and that this provision of subdivision (12)(a) declares the existing law. For example, in *Estate of Anderson*,[16] a declaration of a testatrix made after the execution of a will to the effect that the will had been made at an aunt's request was held inadmissible "because it was merely a declaration as to a past event and was not indicative of the condition of mind of the testatrix at the time she made it. It was, therefore, not within the exception to the hearsay rule."[17] However, later cases have developed some exceptions to this general proposition.

One exception to the rule that declarations of memory may not be used to prove past events has developed in the cases dealing with situations where intent, or some other mental state, was a material element of the former act. These cases have held that:

> When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in

[14] Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892); People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627 (1944).

[15] "One limitation upon the present exception to the hearsay rule is necessary if the exception is not to swallow up the rule. This limitation is that the courts will not extend the present exception to admit a declaration that the declarant *remembers* or *believes* a certain matter as evidence that the matter so remembered or believed is true." MCCORMICK, EVIDENCE § 268 at 568.

[16] 185 Cal. 700, 198 Pac. 407 (1921).

[17] *Id.* at 720, 198 Pac. at 415 (1921).

evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving.[18]

As previously indicated, these decisions are rationalized on the ground that "the stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distance up or down the current."[19] Under these cases, it is apparently not important that the declaration sought to be introduced is in form a declaration of a present memory of a past act or event. *People* v. *One 1948 Chevrolet Conv. Coupe*[20] was an action to forfeit an auto for transporting narcotics. The prosecution sought to prove, by a later declaration of the driver of the vehicle, that the narcotics were transported with the knowledge of the driver. The declaration was in the form of a narrative statement of the entire series of events leading up to the acquisition of the narcotics by one of the car's occupants and the ultimate arrest by the police. The declaration was held admissible to show the previous state of mind—knowledge that an occupant of the car possessed narcotics—under the "stream of consciousness" rationale. The court indicated, however, that such evidence was admissible only to show the necessary knowledge, not to prove the existence of the narcotics. Thus, under existing law, where a previous state of mind is itself an issue in the case, a statement of a present memory of the past state of mind appears to be admissible. However, under Rule 63(12)(a) such evidence might be excluded on the ground that it is a statement of "memory or belief" and is introduced "to prove the fact remembered or believed." Therefore, it is suggested that Rule 63(12) be modified so that it will permit the use of present memory or belief to prove a prior state of mind.

Another exception to the rule that declarations of memory may not be used to prove past events has been developed in some recent criminal cases dealing with the state of mind of various murder victims. From the holding in *People* v. *One 1948 Chevrolet Conv. Coupe*,[21] one might conclude that a statement of present memory is admissible to prove a past state of mind but that the state of mind itself is all that may be proved by such evidence. The Supreme Court there held that the declarant's narrative of the past events was admissible to show his mental state—his knowledge that narcotics were in the car—but was not admissible to show the fact that the narcotics were in the car. This clear and easily applied distinction, however, is no longer clearly recognizable. In *People* v. *Merkouris*,[22] the defendant was charged with a double murder. The identity of the killer was disputed. The trial court admitted several statements that had been made by the victims to the effect that the defendant had threatened them. The Supreme Court held that the statements were admissible to show the mental state of the victims, *i.e.*, to show the victims' fear of the defendant. Under the circumstances, though, the fear of the victims was not itself an issue in the case. The victims' fear was relevant only to prove some other

[18] Whitlow v. Durst, 20 Cal.2d 523, 524, 127 P.2d 530, 541 (1942). *Accord*, Watenpaugh v. State Teachers' Retirement, 51 Cal.2d 675, 336 P.2d 165 (1959).
[19] Chafee, *Progress of the Law—Evidence, 1919-1922*, 35 HARV. L. REV. 428, 444 (1922).
[20] 45 Cal.2d 613, 290 P.2d 538 (1955).
[21] *Ibid.*
[22] 52 Cal.2d 672, 344 P.2d 1 (1959).

fact—that the defendant had in fact threatened them; and the fact that the defendant had threatened them was relevant to show the defendant was the killer—that he carried out the threats. The Supreme Court explained its holding as follows:

> The declarations that the defendant had threatened the victims were admissible, not to prove the truth of the fact directly, but to prove the victims' fear.
>
> Where, as here, the identification of defendant as the killer is in issue, the fact that the victims feared defendant is relevant because it is some evidence that they had reason to fear him, that is, that there is a probability that the fear had been aroused by the victims' knowledge of the conduct of defendant indicating his intent to harm them rather than, e.g., that the victims' fear was paranoid.[23]

Thus, the declarations of the victims were admitted, not merely to show their *own* mental state nor even to show their *own* prior conduct, but to show the prior "conduct of *defendant* indicating his intent to harm them." (Emphasis added.) The prior conduct of the defendant indicating such an intent was admissible, of course, to show that he did harm them. The court justified this extension of the state of mind exception by the explanation that the statements were admitted, not to prove the defendant's conduct "directly, but to prove the victims' fear." But this rationale sweeps away all semblance of a hearsay rule. Any statement of a past event shows the declarant's state of mind—his belief that the event occurred and any mental state such belief engenders; if the state of mind—the belief—is in turn admissible to show that the fact believed actually occurred, any statement of a past event is, by a process of circuitous reasoning, evidence of the truth of its contents.

The state of mind exception was again subjected to the scrutiny of the Supreme Court in *People* v. *Hamilton*.[24] The *Hamilton* case again involved a double murder and the principal issue in the case was the intent with which the defendant killed the victims. Identity was not disputed. After the defendant testified that he had been invited to the house of one of the victims on the fatal night, statements of the victim were admitted indicating that the defendant had threatened her. The ostensible purpose of this testimony was to show that the victim feared the defendant, was unfriendly with him and would not have invited him to the house. Hence, unlike the statements in the *Merkouris* case, which were admitted to show past conduct of the *accused*, the victim's statements were admitted on the issue of the declarant's *own* future conduct. Here, however, the Supreme Court held that the statements were admitted erroneously. The court pointed out that the statements included descriptions of past assaults by the defendant upon the victim. The court said the declarations of the decedent were admissible to show her state of mind "only when such testimony refers to threats as to future conduct on the part of the accused, where such declarations are shown to have been made under circumstances indicating that they are reasonably trustworthy, and

[23] *Id.* at 682, 344 P.2d at 6.
[24] 55 Cal.2d 881, 13 Cal. Rptr. 649, 362 P.2d 473 (1961).

when they show primarily the then state of mind of the declarant and not the state of mind of the accused. But . . . such testimony is not admissible if it refers solely to alleged past conduct on the part of the accused." [25]

This explanation is not very satisfactory. For some reason statements of past threats are apparently exempted from the proscription against statements of past conduct, although it is difficult to discover a distinguishing principle. Yet, statements that show primarily the state of mind of the accused are not admissible. Statements of the accused's past threats would seem to fall into the "accused's state of mind" category more than statements of other types of conduct, for threats are declarations of a state of mind, *i.e.*, intent. Moreover, such statements would seem to be as prejudicial as statements of other past acts, for it is not illogical to draw the inference that the threats were consummated in the charged crime. The court did not discuss in any detail the fact that, properly presented, much of the evidence would have been admissible on the issue of the *declarant's* future conduct within the traditional limits of the state of mind exception. Peculiarly, the *Merkouris* [26] case was neither cited nor discussed, yet the evidence of prior threats in that case was apparently used for the specific purpose of showing the accused's state of mind, for the evidence was there admitted to indicate the accused's "intent to harm" the victims.[27]

The same problem was again presented to the Supreme Court in *People* v. *Purvis*.[28] Here again statements of a victim relating threats by the accused were admitted. Again the Supreme Court held the evidence was admitted erroneously. The court distinguished the *Merkouris* case, for there "the victims' statements indicating fear of the defendant were admitted to identify the defendant as the killer." Here, "the identification of defendant as the killer . . . was [not] in issue." Hence, the gap in the hearsay rule created by the *Merkouris* case has apparently been limited to situations where identity is in issue.

[25] *Id.* at 893-94, 13 Cal. Rptr. at 656, 362 P.2d at 480.
[26] People v. Merkouris, 52 Cal.2d 672, 344 P.2d 1 (1959).
[27] The opinion in People v. Hamilton, 55 Cal.2d 881, 13 Cal. Rptr. 649, 362 P.2d 473 (1961), indicates that the trial was conducted in a manner quite prejudicial to the accused. This may have contributed to the court's desire to modify the state-of-mind rules in order to reverse the conviction. The prosecutor in the case stated in his opening statement to the jury that he would prove that the defendant actually performed all of the acts attributed to him in the hearsay statements of the victim. Of course, at the time of the opening statement he did not know that the defendant was going to contend that he had been invited to the victim's house on the fatal night. Therefore, her state of mind towards the defendant could not have been relevant at that stage of the proceeding. The opinion also points out that a great deal of cumulative evidence relating to the declarant's state of mind was admitted. Nine witnesses testified to statements by the victim that the defendant had beaten her and threatened her. It is apparent from the opinion that the prosecutor intended to use this evidence not merely to show the victim's state of mind but to show that the defendant had committed the acts attributed to him in the victim's statements.

Thus, the real relevance of this evidence was obscured by the prejudicial manner in which it was used. After the defendant had taken the stand and testified that he enjoyed friendly relations with the victim and that the victim had invited him to her house on the fatal night, her statements concerning past beatings and threats became very pertinent to the question of whether she would invite him to her house. When the defendant by his testimony placed the state of mind of the victim in issue, the evidence of statements by the victim relating to past beatings and threats became material to a determination of whether the defendant's version of the victim's state of mind was the correct one.

The restrictions placed on state-of-mind evidence in this case seem to permit only the defendant to introduce a great deal of evidence relating to a victim's state of mind and seem to prevent the prosecution from introducing similar evidence even in rebuttal. Query whether the same result will be reached in a case that is properly tried.

[28] 56 Cal.2d 93, 13 Cal. Rptr. 801, 362 P.2d 713 (1961).

Rule 63(12) would wipe out the confusion engendered by this series of cases, for it permits declarations as to a state of mind to be received only when the state of mind is itself an issue or is relevant to explain acts or conduct of the *declarant,* and it does not permit evidence of memory or belief to be used to prove the fact remembered or believed. If this last provision is modified, as previously recommended, to permit memory or belief to be used to prove a prior state of mind, but no fact other than the prior state of mind, the clear standards set forth in *People* v. *One 1948 Chevrolet Conv. Coupe* [29] will be re-established.

The doctrine that declarations may not be used to prove past events has one other major exception. Under existing law, the declaration of a decedent that he has made a will is admissible to show that he actually made a will.[30] Also, the declaration of a decedent that he has a will in existence is admissible to show that he did not revoke his will.[31] Declarations of a decedent that he has made a will leaving property to particular beneficiaries are admissible to prove that a document leaving property to such beneficiaries is in fact the will of the decedent and not a forgery.[32] In all of these cases the evidence is introduced to prove that the decedent did or did not do the act declared. However, under Rule 63(12)(a), a declaration showing a present belief or memory that an act was done is not admissible "to prove the fact remembered or believed."

In this type of case, the necessity for receiving this type of evidence is usually great. The testator is always dead and there is often no other evidence by which the fact in issue may be proved. The evidence is generally trustworthy, for a person would have little or no reason to make false declarations concerning his making or failure to make a will. Therefore, it is suggested that Rule 63(12) be amended to preserve the existing law in regard to the will cases. This could be accomplished by revising the language of Rule 63(12) to include a provision which would permit the court to admit "A statement of the declarant that he has or has not made a will, or a will of a particular purport, or has or has not revoked his will."

Rule 63(12)(b)

Clause (a) of Rule 63(12) deals only with declarations of *then existing* physical, mental, or emotional condition. Declarations of *previous* symptoms, pain or physical sensation are not, therefore, made admissible by this clause. Such declarations are, however, made admissible under certain conditions by clause (b) of Rule 63(12). The conditions are (1) the declaration must be made to a physician, and (2) the physician must be consulted for treatment or for diagnosis with a view to treatment. When these conditions are met the declaration is considered manifestly reliable, even though it deals with past rather than present conditions. There is good reason, therefore, for recognition of this limited exception to the hearsay rule.[33]

[29] 45 Cal.2d 613, 290 P.2d 538 (1955).
[30] Estate of Morrison, 198 Cal. 1, 242 Pac. 939 (1926).
[31] Estate of Thompson, 44 Cal. App.2d 774, 112 P.2d 937 (1941).
[32] Estate of Morrison, 198 Cal. 1, 242 Pac. 939 (1926).
[33] McCormick, Evidence § 266; 6 Wigmore, Evidence § 1722(c).

Is it, however, a new exception? In this jurisdiction and in most other jurisdictions the answer is "Yes!" [34] Current California law on the question is summarized by the following from *Willoughby* v. *Zylstra*:

> Declarations and statements, made to an examining expert by an injured party, of previous condition and past suffering, when declared by the expert to be necessary to enable him to form an opinion as to the nature and extent of disease or injury, and when such statements constitute in part the basis upon which the opinion of the expert is based, are admissible, not for the purpose of establishing the truth of the statements but to serve as a basis for the medical opinion the expert is about to give.[35]

Under this rationale, although the patient's statements are repeated by the doctor-witness, the jury cannot consider the patient's statements as substantive evidence.[36] It follows, too, that as nonsubstantive evidence the statements are not hearsay.[37] However, under clause (b) of Rule 63(12), the statements would be admissible as substantive evidence, although, as such, they constitute hearsay.[38] The new exception gives this reliable evidence the full value it possesses logically. There is additional merit in the elimination of the jury-confusing charge required by the current view.

The new exception is limited, however, to the situation of a doctor consulted for treatment or for diagnosis with a view to treatment.[39] As to consultation for the purpose of enabling the doctor to form and give an opinion as an expert witness,[40] the presently prevailing nonsubstantive evidence view would continue to be operative.

Discretion: "Unless the judge finds it was made in bad faith . . . ."

Any statement of the kind described in Rule 63(12)(a) or (12)(b) is to be excluded if the judge finds that the statement was made in bad faith. This gives the trial judge considerable leeway of discretion.[41] However, is this a broader discretion than the judge now possesses under the current exception for statements of a mental or physical condition? Wigmore emphasizes the requirement of the present exception that the statement be made "without any obvious motive to misrepresent" [42] and must "appear to have been made in a natural manner and not under circumstances of suspicion." [43] This requirement is stated in at least one California case [44] and is no doubt implicit

[34] 6 WIGMORE, EVIDENCE § 1722(c).
[35] 5 Cal. App.2d 297, 300-01, 42 P.2d 685, 686 (1935).
[36] See MCCORMICK, EVIDENCE § 266 n.4 and § 265, p. 565; 6 WIGMORE, EVIDENCE § 1720(1).
[37] *Ibid.*
[38] "While the California cases permit a physician, in giving expert testimony, to base it, in part, on the case history as related to him by the patient, including statements descriptive of past pain, and to testify to such declarations, the local rule appears to be that such declarations are not entitled to assertive use, *i.e.*, are not to be taken as evidence of 'past pain.' The proposed rule [clause (a)] would abrogate any such limitation." Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43, 75 (1954). See also Comment, 43 MINN. L. REV. 149 (1958).
[39] *E.g.*, People v. Wilson, 25 Cal.2d 341, 153 P.2d 720 (1944).
[40] *E.g.*, Willoughby v. Zylstra, 5 Cal. App.2d 297, 42 P.2d 685 (1935).
[41] See discussion in text on Uniform Rule 63(4), pp. 462-65, *supra* for an analysis of the good faith concept.
[42] 6 WIGMORE, EVIDENCE § 1714 at 58.
[43] *Id.* § 1725 at 80.
[44] People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627 (1944).

in others.[45] Professor McCormick is of the opinion that in practical operation this element of the exception probably amounts to this:

> [T]he trial judge has the duty to consider the circumstances under which the declarations were made and to determine (largely in his discretion) whether they were uttered spontaneously or designedly with a view to making evidence.[46]

If this is a fair summary of current law, and we believe it is, then the good faith condition in Rule 63(12) is merely a formula for vesting in the court substantially the same discretion which exists today.

Conclusion

It is recommended that Rule 63(12) be amended as suggested so that it will not alter the existing law and that it be approved as so amended.[47]

[45] See cases, such as Cripe v. Cripe, 170 Cal. 91, 148 Pac. 520 (1915), that state the terms of the exception without including the element of "naturalness and freedom from suspicion." These cases should not, however, be read as rejecting this element. This is especially so when, as in the *Cripe* case, Wigmore is cited as authority for the exception.

[46] MCCORMICK, EVIDENCE § 265 at 562.

[47] The N. J. Committee, the N. J. Commission, and the Utah Committee all approve this subdivision without substantial modification. N. J. COMMITTEE REPORT 143; N. J. COMMISSION REPORT 59; UTAH FINAL DRAFT 37.

Rule 63(13)—Business Entries and the Like

Rule 63(13) provides as follows:

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

The Commissioners on Uniform State Laws state that Rule 63(13) "embodies the substance" of the Uniform Business Records as Evidence Act. California adopted this Act in 1941 as Sections 1953e-1953h of the Code of Civil Procedure. A brief comparison of these sections and the Uniform Rules counterparts follows.

Section 1953e defines the term "business" as follows:

> 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.

Rule 62(6) contains an identical definition.

Section 1953f prescribes as follows the conditions respecting admissibility:

> 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.

Comparison of the above with Rule 63(13) reveals verbal differences but no differences of substance. It is true that Section 1953f includes the condition "if the custodian or other qualified witness testifies to its identity and the mode of its preparation" whereas Rule 63(13) omits this condition. Nevertheless, this difference is not important. The other conditions of Rule 63(13) require the proponent to make a foundation consisting of identity-and-mode-of-preparation evidence. Under Rule 63(13) the judge must find not only that the record was "made in the regular course of a business," but also that "the sources of information from which made" and the "method and circumstances" of preparation indicate "trustworthiness." If proponent is to convince

the judge on these foundational matters he must come forward with evidence (apart from the record itself) both authenticating (identifying) the record and validating it as a trustworthy document. Probably the Commissioners on Uniform State Laws omit any explicit requirement of identity evidence in Rule 63(13) because of their inclusion in Rule 67 of the general principle that "authentication of a writing is required before it may be received in evidence."

Both Section 1953f and Rule 63(13) vest a large amount of discretion in the judge. In this respect the only differences between the two provisions appear to be verbal rather than substantive.

In 1959, California's version of the Uniform Business Records as Evidence Act was revised by the addition thereto of Section 1953f.5 of the Code of Civil Procedure.[1] This section reads as follows:

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

This section was enacted along with a companion measure which added Section 337a to the Code of Civil Procedure.[2] The latter section defines "book account" to mean a detailed record of transactions between a debtor and creditor entered in the regular course of business and kept in a reasonably permanent form such as a bound book, sheets fastened in a book or cards of a permanent character.

This legislation was apparently adopted to overcome decisions such as that in *Tabata* v. *Murane*.[3] There, the plaintiff sought to recover on an open book account consisting of 12 separate sheets of paper which had never been bound together, but which were stapled together for purposes of trial. The court held that the sheets did not constitute an account book and that the staple did not cure the defect. "Notations made upon loose sheets of paper are not accorded the presumption of accuracy and reliability which they have when entered in book form, and are therefore inadmissible as books of account."[4] If strictly applied, this decision might have precluded reliance upon card files used in business machines as a "book account." The enactment of Sections 337a and 1953f.5 make clear that such card files are also "book accounts."[5]

The problem with which this legislation deals, however, is not an evidence problem so much as it is a statute of limitations problem. Section 337 of the Code of Civil Procedure provides that an action must be brought upon a "book account" within four years. The term "book account," though, is not used in the Uniform Business Records as Evidence Act, and the cases construing that act have made it clear that business records evidence is not restricted to evidence contained in "book accounts." The cases have admitted as business records such evidence as a loose memorandum by an ambulance driver indicating the purpose of a trip,[6] a tally sheet used to note the number of produce

[1] Cal. Stat. 1959, c. 1009, § 1, p. 3033.
[2] Cal. Stat. 1959, c. 1010, § 1, p. 3034.
[3] 76 Cal. App.2d 887, 174 P.2d 684 (1946).
[4] *Id.* at 890, 174 P.2d at 686.
[5] In Thompson v. Machado, 78 Cal. App.2d 870, 178 P.2d 838 (1947) (hearing denied), the court concluded that loose ledger sheets made up by business machine did constitute a "book account."
[6] Gallup v. Sparks-Mundo Engineering Co., 43 Cal.2d 1, 271 P.2d 34 (1954).

boxes stacked behind a grocery store,[7] completed appraisal forms from a bank's loan file,[8] tags prepared by a linen supply company for delivery to customers showing the amount of linen delivered and returned,[9] and crude oil invoices showing the amount of oil delivered to the issuing company.[10] *Tabata* v. *Murane* [11] did not construe the Uniform Act and expressly declined to decide whether the documents involved in that case were admissible as business records under the Uniform Act.

Section 337a of the Code of Civil Procedure appears to solve the problem raised by *Tabata* v. *Murane*.[12] At most, Section 1953f.5 merely makes explicit the liberal case-law rule. However, the section may have the effect of limiting the provisions of the Uniform Act as it was construed by prior cases. The section could be construed to limit evidence of accounts to "open book accounts in ledgers, whether bound or unbound." Such a limitation would be undesirable and was probably not intended by the authors of Section 1953f.5. The omission of the language of Section 1953f.5 from Rule 63(13) would preclude the possibility of the exclusion of competent evidence by an unduly restrictive construction of that language.

We cannot perceive any changes (except formal ones) that would result from the substitution of Rule 62(6) and Rule 63(13) for Code of Civil Procedure Sections 1953e-h [13] and, therefore, these sections are recommended as drafted by the Commissioners on Uniform State Laws.[14]

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[7] People v. Woods, 157 Cal. App.2d 617, 321 P.2d 477 (1958).
[8] Cole v. Ames, 155 Cal. App.2d 8, 317 P.2d 662 (1957).
[9] Oakland California Towel Co. v. Zanes, 81 Cal. App.2d 343, 345, 184 P.2d 21, 22 (1947); the court, in distinguishing Tabata v. Murane, 76 Cal. App.2d 887, 174 P.2d 684 (1946), stated: "That case involved the question of the admissibility of similar evidence to prove a book account. But this case is not a suit on a book account and the cited case has no bearing."
[10] Doyle v. Chief Oil Co., 64 Cal. App.2d 284, 148 P.2d 915 (1944).
[11] 76 Cal. App.2d 887, 891-92, 174 P.2d 684, 687 (1946).
[12] 76 Cal. App.2d 887, 174 P.2d 684 (1946).
[13] Section 1953g of the Code of Civil Procedure provides: "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." Section 1953h states how the article may be cited.

Possibly some such provision as Section 1953g should be enacted and made applicable to *all* the Uniform Rules that are adopted. There is, however, no reason to make such a provision specially applicable to Uniform Rules 63(13) and 63(14).

See generally Emerson, *Business Entries: Their Status Under the Uniform Rules and Present Law*, 26 U. CINC. L. REV. 591 (1957); Green, *The Model and Uniform Statutes Relating to Business Entries as Evidence*, 31 TUL. L. REV. 49 (1956); Laughlin, *Business Entries and the Like*, 46 IOWA L. REV. 276 (1961); Polasky and Paulson, *Business Entries*, 4 UTAH L. REV. 327 (1955); Rogers, *Hospital Records as Evidence*, 35 CALIF. ST. B. J. 552 (1960); Comment, 1957 U. ILL. L. F. 484.
[14] The N. J. Committee, the N. J. Commission, and the Utah Committee all approve this subdivision without significant modification. N. J. COMMITTEE REPORT 145; N. J. COMMISSION REPORT 60; UTAH FINAL DRAFT 38.

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