

for Meeting of

LAW REVISION COMMISSION

San Francisco, September 5-6, 1958

1. Minutes of July, 1958 meeting. (Sent to you July 31, 1958).
2. Report of progress on changes in Commission Staff Organization.
3. 1959 Legislative Program. (See Memorandum No. 3, sent to you on August 27, 1958.)
4. 1959 Report of Commission. (See Memorandum No. 1, sent to you on August 22, 1958).
5. 1959 Agenda Resolution. (See Memorandum No. 2, sent to you on August 22, 1958 and Supplement thereto, sent to you on August 27, 1958.)
6. Study No 58(L) - Codification of Grand Jury Law. (See Memorandum No. 6, sent to you on August 22, 1958).
7. Study No. 1 - Suspension Absolute Power of Alienation. (See Memorandum No. 4, enclosed).
8. Study No. 19 - Penal and Vehicle Code Overlap. (See Memorandum No. 7, enclosed).
9. Study No. 11 - Sale of Corporate Assets. (See Memorandum No. 9 to be sent next week).
10. Study No. 16 - Planning. (See Memorandum No. 8, enclosed.)
11. Study No. 20 - Guardians for Nonresidents. (See Memorandum No. 10, to be sent to you next week.)
12. Study No. 23 - Rescission of Contracts. (See Memorandum No. 1 for the July Meeting and attachments thereto, sent to you prior to that meeting).
13. Study No. 34(L) - Uniform Rules of Evidence. (See Memorandum No. 5, sent to you on August 27, 1958 and Supplement thereto to be sent to you next week).
14. Study No. 38 - Inter Vivos Rights, 201.5 Property. (See Memorandum No. 8 for the June meeting and attachments thereto, sent to you prior to that meeting).
15. Study No. 21 - Confirmation of Judicial Sales of Real Property. (See Memorandum No. 6 for the June meeting and attachment thereto, sent to you prior to that meeting).
16. Study No. 44 - Suit in Common Name. (See Memorandum No. 5 for the June meeting and attachment thereto, sent to you prior to that meeting).
17. Study No. 41 - Small Claims Court. (See Memorandum No. 11 to be sent next week).

MINUTES OF MEETING
of
September 5-6, 1958
SAN FRANCISCO

Pursuant to the call of the Chairman, there was a regular meeting of the Law Revision Commission on September 5 and 6, 1958, at San Francisco.

PRESENT: Mr. Thomas E. Stanton, Jr., Chairman
Mr. John D. Babbage, Vice Chairman
Honorable James A. Cobey (September 6)
Honorable Clark L. Bradley (September 6)
Honorable Roy A. Gustafson
Mr. Bert W. Levit
Mr. Charles H. Matthews
Professor Samuel D. Thurman
Mr. Ralph N. Kleps, ex officio

ABSENT: Mr. Stanford C. Shaw

Mr. John R. McDonough, Jr., the Executive Secretary, and Miss Louisa R. Lindow, Assistant Executive Secretary, were also present.

Professor James H. Chadbourn of the School of Law, University of California at Los Angeles, the research consultant for Study No. 34(L), was present on September 6, 1958.

The minutes of the meeting of July 18 and 19, 1958 were unanimously approved.

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I. ADMINISTRATIVE MATTERS

A. Report of Progress on Changes in Commission Staff

Organization: The Executive Secretary reported Mr. Harry T. Callahan of the State Personnel Board staff has recommended approval by the Board of the Commission's request to upgrade the position of the Assistant Executive Secretary from grade 2 to grade 4. The request must now formally be approved by the State Personnel Board which will consider the matter at its meeting of September 25.

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B. 1959 Legislative Program: The Commission considered Memorandum No. 3 (a copy of which is attached hereto). After the matter was discussed it was agreed that the following studies should be scheduled at this time for presentation to the 1959 Legislative Session:

1. Suspension Absolute Power Alienation.
11. Corporations Code §§ 2201, 3901
(Sale of Assets).
16. Planning Procedure Where No Planning
Commission.
19. Penal and Vehicle Code Overlap.
20. Guardians for Nonresidents.
21. Confirmation Partition Sales.
22. Cut-off Date, Motion New Trial.
24. Mortgages Future Advances.
25. Probate Code § 259 (Right Nonresident
Aliens to Inherit).
31. Doctrine Worthier Title.
32. Arbitration.
- 37(L). Claims Statute.
44. Suit Common Name.
- 56(L). Narcotics Code.
- 58(L). Codification of Grand Jury Law.

It was agreed that studies No. 23 (Rescission of Contracts), No. 26 (Law Governing Escheat), No. 33 (Survival of Tort Actions), No. 38 (Inter Vivos Rights, Probate Code

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§ 201.5 Property) and No. 45 (Rights of Unlicensed Contractor) should be included in the 1959 program if time permits.

It was agreed that the Commission would not introduce a bill in the 1959 Session on the portion of the Uniform Rules of Evidence relating to hearsay. (See Minutes, September 5-6, infra, at E. Uniform Rules of Evidence.)

A motion was made by Mr. Babbage, seconded by Mr. Matthews and unanimously adopted that the staff should give priority to all studies through No. 38 with the exception of studies No. 23 (Rescission of Contracts), No. 26 (Law Governing Escheat), No. 33 (Survival of Tort Actions), No. 34(L) (Uniform Rules of Evidence), No. 38 (Inter Vivos Rights, Probate Code § 201.5 Property) and No. 45 (Rights of Unlicensed Contractor).

C. 1959 Report of Commission: The Commission considered Memorandum No. 1, and a draft of the 1959 Report of the Law Revision Commission and revised pages 18, 18a thereof, relating to the report on statutes repealed by implication or held unconstitutional. (A copy of each of these items is attached hereto.) After the matter was discussed the following matters were agreed upon:

(1) The letter of transmittal should be addressed to His Excellency Goodwin J. Knight.

(2) The paragraph on page 7 in Section II, Personnel of Commission, should be revised to read as follows: "There was no change in the membership of the Commission in 1958. The membership of the Law Revision Commission is as of ..." (with the date to be inserted at the time the page proof is sent to the State Printer).

(3) The paragraph on page 8 relating to meetings of the Commission in 1958 should be revised to eliminate listing the places the Commission has met and to state that the "Commission met on the following dates ... in Southern California ... and on the following dates in Northern California...."

(4) The studies listed in Section IV-A, Calendar of Topics of Studies in Progress, page 9, should consist of two lists. One list should designate those studies which the Legislature has directed the Law Revision Commission to make; the second list should

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designate those studies which have been authorized by the Legislature upon the recommendation of the Law Revision Commission.

(5) The Report should contain a statement in Section IV-B, Topics Intended for Future Consideration, page 16, to the effect that because the Commission has a heavy work load which will require the major portion of its energies to complete during the current fiscal year and during the fiscal year 1959-60, the Commission will not introduce at the 1959 Session of the Legislature a concurrent resolution requesting additional topics. (See Minutes, September 5-6, infra at D -- 1959 Agenda Resolution.)

(6) An appendix of Government Code Sections 10300-340 relating to the Law Revision Commission should be included in the 1959 Report.

(7) The recommendations of the Law Revision Commission relating to the desirability of a separate Narcotics Code and the recodification of laws relating to grand juries should be included as separate sections in the 1959 Report.

(8) Other minor changes in the 1959 Report should be made.

The Commission discussed whether the 1959 Report should include the statement made in Section I, Function and Procedure of the Commission, pages 5-6, concerning the policy of sending the research consultant's study and the recommendation of the Commission to the State Bar for its comments. A motion was made

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by Mr. Thurman, seconded by Mr. Gustafson and unanimously adopted to delete this statement.

A motion was made by Mr. Gustafson, seconded by Mr. Babbage and unanimously adopted to approve the 1959 Report of the Commission as revised.

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D. 1959 Agenda Resolution: The Commission discussed whether it should submit an agenda resolution authorizing additional studies for the fiscal year 1959-60 in view of the number of studies still in progress and the possibility that the 1959 Legislature may direct additional studies to the Commission. A motion was made by Mr. Bradley and seconded by Mr. Babbage that the Commission should not submit an agenda resolution authorizing additional studies for the fiscal year 1959-60 unless the Chairman and Executive Secretary conclude at a later date that circumstances have so changed as to warrant the submission of a concurrent resolution at the 1959 Session requesting a limited number of studies. The motion carried:

Aye: Babbage, Bradley, Cobey, Gustafson, Levit,
Matthews, Stanton, Thurman

No : None

Not Present: Shaw

It was agreed that the item in the 1959-60 Budget of \$5,000 for research consultant contracts should be deleted before presenting the 1959-60 Budget to the Legislature.

II. CURRENT STUDIES

A. Study No. 1 - Suspension of the Absolute Power of Alienation: The Commission considered Memorandum No. 4 and a draft prepared by the Executive Secretary of proposed changes to new Section 771 of the Civil Code. (A copy of each of these items is attached hereto.) The Commission first discussed the question raised by Professor Turrentine with respect to the first sentence of the second paragraph of proposed new Section 771 as it appeared in A. B. 249 which Professor Turrentine suggests could be construed to prohibit termination of an inter vivos trust which will not endure longer than the permissible perpetuities period even though the settlor and all of the beneficiaries desired termination. To obviate this possible construction it was agreed to approve the proposed revised draft on page 3 with the following revision of the first part of the second sentence thereof: "A provision ~~prohibiting-termination-of,~~ express or implied, in an instrument creating an inter vivos trust that the trust shall not be terminated shall not never-be-given-effect-to prevent terminations etc."

The Commission then considered whether it should recommend enactment of the statute set forth on page 4 of the Executive Secretary's memorandum. It was agreed that this should not be done because such a provision would unduly limit the duration of

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both deeds of trust and business trusts.

The Commission then discussed the desirability of a provision which would allow a trust to be terminated either (1) upon the request of a majority or more of the beneficiaries (as proposed in the 3d paragraph of the revised draft on page 5 of the memorandum) or (2) by the court upon the petition of the Attorney General or any person who would be affected thereby (the proposed draft of a 3d paragraph on page 6 of the memorandum). A motion was made by Mr. Levit and seconded by Mr. Babbage that the Commission recommend enactment of a statute which will provide that a trust shall be terminated either upon the request of a majority of the beneficiaries or by a court of competent jurisdiction upon the petition of the Attorney General or of any person who would be affected thereby if the court finds that such termination would be in the public interest or in the best interest of a majority of the persons who would be affected thereby. The motion carried:

Aye: Babbage, Gustafson, Levit, Matthews, Thurman

No : Stanton

Not Present: Bradley, Cobey, Shaw

A motion was made and seconded to approve the new Section 771 of the Civil Code as revised to read as follows:

[As in
A.B.
249]

771. A trust is not invalid, either in whole or in part, merely because the duration of the trust may exceed the time within which future interests in property must vest under this title,

if the interest of all the beneficiaries must vest, if at all, within such time.

[As revised
by action of
Commission
supra]

If a trust is not limited in duration to the time within which future interests in property must vest under this title, a provision, express or implied, in the instrument creating the trust that the trust may not be terminated is ineffective insofar as it purports to be applicable beyond such time and the provision is wholly ineffective unless, consistently with the purposes of the trust, it may be given effect for some period not exceeding such time. A provision express or implied in an instrument creating an inter vivos trust that the trust may not be terminated shall not prevent termination by the joint action of the creator of the trust and all of the beneficiaries thereunder if all concerned are competent and if the beneficiaries are all of the age of majority.

[New]

Whenever a trust has existed longer than the time within which future interests in property must vest under this title

(1) it shall be terminated upon the request of a majority of the beneficiaries.

(2) it may be terminated by a court of competent jurisdiction upon the petition of the Attorney General or of any person who would be affected thereby if the court finds that such termination would be in the public interest or in the best interest of a majority of the persons who would be affected thereby.

The motion carried:

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Aye: Babbage, Gustafson, Levit, Matthews, Stanton,
Thurman

No : None

Not Present: Bradley, Cobey, Shaw

It was agreed that a provision relating to jurisdiction or service of process in actions brought to terminate trusts under proposed Section 771 of the Civil Code should not be included since this is a collateral problem.

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B. Study No. 11 - Sale of Corporate Assets: The Commission considered Memorandum No. 9; the revised research study prepared by the staff; a copy of the letter by the Executive Secretary sent to Professor Jennings and Mr. Sterling; the replies received from Professor Jennings and Mr. Sterling; and a draft prepared by the Executive Secretary of (1) a recommendation of the Commission relating to the requirement of notice to shareholders when a sale of corporate assets is approved by written consent, and (2) legislation designed to effectuate the recommendation of the Commission. (A copy of each of these items is attached hereto.)

After the matter was discussed a motion was made by Mr. Levit and seconded by Mr. Thurman that the Commission not recommend any change in the substantive law or that Section 3901 be amended to state explicitly that notice to all stockholders is not required when a sale of corporate assets is approved by written consent of a majority. The motion carried:

Aye: Babbage, Gustafson, Levit, Matthews, Stanton,
Thurman

No : None

Not Present: Bradley, Cobey, Shaw

The following matters were agreed upon:

(1) Section 2226 of the Corporations Code set forth in the Staff study should not be enacted.

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(2) The Jeppi decision should be codified in Sections 2201 and 3901 and Section 3904 should be amended, all as proposed in the Staff study.

(3) The draft recommendation should be revised to reflect the action of the Commission.

A motion was made by Mr. Babbage and seconded by Mr. Thurman to approve the revised recommendation of the Commission and the proposed draft as revised.

Aye: Babbage, Gustafson, Levit, Matthews, Stanton,
Thurman

No : None

Not Present: Bradley, Cobey, Shaw

The Executive Secretary was authorized to send this study and recommendation to the State Bar for its views.

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C. Study No. 19 - Penal-Vehicle Code Overlap: The Commission considered Memorandum No. 7; the research study prepared by Mr. Robert Harris as revised by the Staff; the portion of the April 18-19, 1958 minutes relating to this study; a draft prepared by the Executive Secretary of a recommendation of the Commission relating to the Penal-Vehicle Code overlap and of legislation designed to effectuate this recommendation. (A copy of each of these items is attached hereto.) After the matter was discussed it was agreed to approve the recommendation of the Commission and the draft statute as proposed with one modification: that Section 499b of the Penal Code should contain a provision regarding punishment to read as follows: "A person convicted of a felony hereunder shall be subject to punishment as provided in Section 489 of this Code."

The Executive Secretary was authorized to send this study and recommendation to the State Bar for its views.

D. Study No. 23 - Rescission of Contracts: The Commission considered Memorandum No. 1 dated July 1, 1958; the research study prepared by Professor Sullivan; Memorandum A which consists of a summary of the revisions agreed upon by the Commission at the June meeting; Memorandum B prepared by the Executive Secretary relating to the recommendations agreed upon at the June meeting; Memorandum C prepared by Mr. Stanton and distributed at the meeting which comments on the foregoing material and proposes that certain changes be made to the revisions agreed upon at the June meeting. (A copy of each of these items is attached hereto.) In the course of the ensuing discussion Mr. Stanton stated that, in his opinion, it is necessary in view of a recent case to preserve both the right to an out-of-court rescission enforced by the court and the right to bring suit to obtain a rescission.

After Memoranda A, B and C were discussed at length it was agreed that there was still much ground to be covered on this problem and that it was not likely that any agreement could be reached in the near future without further study of the matter by all the members. A motion was made by Mr. Gustafson, seconded by Mr. Levit and unanimously adopted to postpone further consideration of this study until the Commission's 1959 Legislative Program has been completed.

E. Study No. 34(L) - Uniform Rules of Evidence: The Commission considered Memorandum No. 5; the status report of action taken by the Law Revision Commission and the State Bar Committee to Consider Uniform Rules of Evidence dated July 29, 1958; the Summary of Action taken by the Law Revision Commission and the State Bar Committee to Consider Uniform Rules of Evidence dated July 28, 1958; a Memorandum and Supplement thereto submitted by Professor Chadbourn relating to provisions of the Code of Civil Procedure that would require repeal or modification in connection with the enactment of a bill based upon the hearsay provisions in the Uniform Rules of Evidence; a Memorandum prepared by the staff relating to Subdivisions (15) and (16) of Rule 63; and a Memorandum prepared by Professor Chadbourn on Rule 62(7). (A copy of each of these items is attached hereto.)

The Commission first discussed whether a bill on a portion of the Uniform Rules of Evidence, i.e., the Rules relating to hearsay, should be presented in the 1959 Session. A motion was made by Senator Cobey and seconded by Mr. Gustafson that the Commission should not include any proposed legislation relating to the Uniform Rules of Evidence in its 1959 legislative program. The motion carried:

Aye: Babbage, Bradley, Cobey, Gustafson, Levit,
Matthews, Stanton, Thurman

No: None

Not Present: Shaw

The Commission then considered the action taken by the State Bar Committee to Study Uniform Rules of Evidence (hereinafter referred to as State Bar

Committee) on the various rules and subdivisions thereof relating to hearsay.

The following action was taken:

1. Rule 62. The Commission considered the following subdivisions:

Subdivision (4): Professor Chadbourn stated that he believed that the only reference to "public official" in the Uniform Rules of Evidence as drafted in Rules 63, 64, 65 and 66 is in Subdivision (15) of Rule 63. It was agreed that if this is true "public official" as used therein should be defined in Subdivision (15) and Subdivision (4) of Rule 62 should be eliminated. In the course of the discussion a question was raised as to the meaning of the word "municipality" in Subdivision (4) of Rule 62.

Subdivision (5): The question was raised as to whether the definition of "State" should also include "territories of the United States" and "Commonwealth of the United States."

The staff was directed to submit a report with regard to the questions raised concerning Subdivisions (4) and (5) of Rule 62.

Subdivision (6): It was agreed that this Subdivision will be reviewed when the final form of Subdivision (13) of Rule 63 has been agreed upon.

Subdivision (7): Mr. Stanton, noting that under the Uniform Rules of Evidence (Rule 17) a person is disqualified as a witness only if he is incapable of expressing himself so as to be understood or is incapable of understanding the duty of a witness to tell the truth, raised the question whether the phrase "(b) disqualified from testifying to the matter, . . ." is intended to make the hearsay declaration of a person admissible even though at the time he made the statement he would have been disqualified from testifying to the matter and, if so, whether this is desirable. This

raised the question of what the present law on this matter is and a motion was made by Mr. Babbage, seconded by Senator Cobey and unanimously adopted that Professor Chadbourn be requested to submit a report reviewing what the courts have held is the effect on the admissibility of otherwise admissible hearsay of the fact that at the time the extrajudicial statement was made the declarant would not have been competent to testify to the same matter. In the course of the discussion Mr. Gustafson suggested that if it is desired to make hearsay inadmissible under such circumstances this could be accomplished by revising Subdivision (2) of Rule 62 to read: "'Declarant' is a person who makes a statement at a time when he would not have been disqualified as a witness."

It was agreed that "to be present" and "then existing" should be deleted from Subdivision (7) (1st paragraph) as surplusage and that the comma following the word "hardship" should be deleted from the second paragraph of Subdivision (7).

A motion was made by Mr. Babbage, seconded by Mr. Gustafson and unanimously approved to insert "act or" following the word "culpable" in the second paragraph of Subdivision (7).

A motion was made by Mr. Gustafson and seconded by Senator Cobey to approve Subdivisions (1) through (7) of Rule 62 as revised, subject to such further revisions of subdivisions (4), (5), (6) and (7) as may be agreed upon when the reports of the staff and the Research Consultant have been received and Subdivision (13) of Rule 63 has been put in final form. The motion carried:

Aye: Babbage, Bradley, Cobey, Gustafson, Levit, Matthews,
Stanton, Thurman

No: None

Not Present: Shaw

2. Subdivision (6) of Rule 63. After the differences between the prior action of the Commission and the action of the State Bar Committee were dis-

cussed at length a motion was made by Mr. Gustafson and seconded by Mr. Bradley to treat incriminating extrajudicial statements of criminal defendants separately in Subdivision (6) as proposed by the Commissioners on Uniform State Laws and to recommend enactment of the following:

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

The motion carried:

Aye: Babbage, Bradley, Cobey, Gustafson, Matthews, Stanton, Thurman.

No: Levit

Not Present: Shaw

3. Subdivision (7) of Rule 63. A motion was made by Mr. Gustafson and seconded by Senator Cobey to approve Subdivision (7) of Rule 63 in the modified form proposed by the State Bar Committee with the insertion of "in Civil Actions" in the title. The motion carried:

Aye: Babbage, Bradley, Cobey, Gustafson, Levit, Matthews, Stanton, Thurman

No: None

Not Present: Shaw

4. Subdivisions (9) and (9.1) of Rule 63. A motion was made by Mr. Babbage and seconded by Senator Cobey to approve Subdivision (9.1) as proposed

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by the State Bar Committee in principle. The motion carried:

Aye: Babbage, Bradley, Cobey, Gustafson, Levit, Matthews,
Stanton, Thurman

No: None

Not Present: Shaw

It was agreed that if possible Subdivision (9.1) of Rule 63 should be inserted in Subdivision (9) of Rule 63 as clause (b) (with such revision in form as might be necessary to fit it into Subdivision (9)) but if this is not practicable then Subdivision (9.1) should be a separate subdivision of Rule 63 and revised to include the phrase "a statement which would be admissible if made by the declarant at the hearing if"

5. Subdivision (10) of Rule 63. A motion was made by Mr. Babbage and seconded by Mr. Bradley to reaffirm the prior action of the Commission and to disapprove the following portion of Subdivision (10) of Rule 63 as proposed by the State Bar Committee: "Except as against the accused in a criminal proceeding." The motion carried:

Aye: Babbage, Bradley, Cobey, Gustafson, Levit, Matthews,
Stanton, Thurman

No: None

Not Present: Shaw

A motion was made by Senator Cobey and seconded by Mr. Levit to delete the limitation which provides that a declaration against interest is admissible only when a declarant is unavailable. The motion did not carry:

Aye: Babbage, Cobey, Levit

Pass: Gustafson, Matthews

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No: Bradley, Stanton, Thurman

Not Present: Shaw

A motion was made by Mr. Babbage and seconded by Mr. Thurman to reaffirm the prior action of the Commission and to disapprove that portion of Sub-division (10) of Rule 63 as modified by the State Bar Committee which requires a finding of sufficient knowledge of the subject on the part of the declarant. The motion did not carry:

Aye: Babbage, Levit, Matthews

No: Bradley, Cobey, Gustafson, Stanton, Thurman

Not Present: Shaw

A motion was made by Mr. Babbage and seconded by Senator Cobey to approve that portion of Subdivision (10) of Rule 63 as modified by the State Bar Committee which would require a finding of sufficient knowledge of the subject on the part of the declarant. The motion carried:

Aye: Babbage, Bradley, Cobey, Gustafson, Matthews,
Stanton, Thurman

No: Levit

Not Present: Shaw

A motion was made by Mr. Gustafson and seconded by Senator Cobey to reaffirm the prior action of the Commission and to disapprove the proposal of the State Bar Committee to strike out that portion of Subdivision (10) of Rule 63 which relates to a statement which would make the declarant an "object of hatred, ridicule, etc." The motion carried:

Aye: Bradley, Cobey, Gustafson, Levit, Matthews,
Stanton, Thurman

No: Babbage

Not Present: Shaw

The Commission concurred in the State Bar Committee proposal to substitute "statement" for "assertion" in Subdivision (10).

6. Subdivision (15) of Rule 63. The Commission discussed the staff memorandum relating to Subdivision (15). A motion was made by Mr. Levit and seconded by Senator Cobey to approve Subdivision (15) of Rule 63 as revised to read:

(15) Reports of Public Officers and Employees. Subject to Rule 64, statements of facts contained in a written report made by a public officer of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such officer or employee and that 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.

The motion carried:

Aye: Bradley, Cobey, Gustafson, Levit, Matthews,
Stanton, Thurman

No: Babbage

Not Present: Shaw

7. Subdivision (16) of Rule 63. The Commission discussed the staff memorandum relating to Subdivision (16). A motion was made by Mr. Levit and seconded by Mr. Babbage to approve Subdivision (16) of Rule 63 as revised to read:

(16) Filed Reports, Made by Persons Exclusively Authorized. Subject to Rule 64, writings made by persons other than public officers or employees as a record, report of finding of fact, if the judge finds that (a) the maker was authorized by statute

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

The motion carried:

Aye: Babbage, Bradley, Cobey, Gustafson, Levit, Matthews,
Stanton, Thurman

No: None

Not Present: Shaw

8. Subdivision (20) of Rule 63. The Commission discussed whether admission of evidence of a final judgment adjudging a person guilty of a felony should be made subject to the requirements of Rule 64. A motion was made by Mr. Levit and seconded by Mr. Gustafson to make Subdivision (20) of Rule 63 subject to Rule 64 and to provide that evidence of a final judgment adjudging a person guilty of a felony is admissible as an exception to the hearsay rule unless such fact is admitted. The motion carried:

Aye: Babbage, Bradley, Gustafson, Levit, Matthews,
Thurman

No: Cobey, Stanton

Not Present: Shaw

A motion was made by Mr. Levit and seconded by Mr. Gustafson to approve Subdivision (20) of Rule 63 as revised to read:

(20) Judgment of Previous Conviction. Subject to Rule 64, evidence of a final judgment adjudging a person guilty of a felony to prove, against such person, any fact essential to sustain the judgment, unless such fact is admitted.

The motion carried:

Aye: Bradley, Gustafson, Levit, Stanton, Thurman

No: Babbage, Cobey, Matthews

Not Present: Shaw

9. Subdivision (27) of Rule 63. A motion was made by Mr. Babbage and seconded by Mr. Thurman to approve Subdivision (27) of Rule 63 as proposed by the State Bar Committee. The motion carried:

Aye: Babbage, Bradley, Levit, Matthews, Stanton, Thurman

No: Cobey, Gustafson

Not Present: Shaw

10. Rule 64. Approved with amendment to refer also to exceptions (20) and (29) of Rule 63 and subject to the intention to further amend Rule 64 to make it clear that it does not limit any right to discovery conferred by the 1957 statute. The staff was requested to propose an appropriate form of amendment for this purpose.

F. Study No. 58(L) - Codification of Grand Jury Law: The Commission considered Memorandum No. 6 and a proposed Title 4, Part 2 of the Penal Code drafted and submitted by the Legislative Counsel. (A copy of each of these items is attached hereto.) Mr. Kleps reported that the proposed draft was not in final form and proposed certain changes to be made therein upon approval of the Commission.

In the course of the ensuing discussion the following changes proposed by Mr. Kleps and others were agreed upon:

(1) The sections of proposed Title 4 should be renumbered using the available section numbers in Title 4, Part 2 of the Penal Code.

(2) The sections in the Code of Civil Procedure relating to petit juries should be revised to conform to the parallel new sections in the Penal Code.

(3) There should be a separate chapter in the Code of Civil Procedure relating to jury commissioners and there should be a cross reference in Title 4 of the Penal Code to this chapter.

(4) The proposed new sections should be reorganized where this will make for a more logical sequence of the provisions relating to grand juries.

The Commission discussed whether Sections 168 and 1324 of the Penal Code should be restated in Title 4, Part 2 of the Penal Code as Sections 920.12 and 923.03 or whether there should be cross references in Title 4, Part 2 of the Penal Code to Sections 168 and 1324 of the Penal Code which are now applicable to grand juries. It was agreed that Section 168 of the Penal Code should be restated in Title 4, Part 2 as proposed Section 920.12. A motion was made by

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Mr. Babbage, seconded and unanimously approved to not restate Section 1324 of the Penal Code as Section 923.03 of Title 4, Part 2, but to have a cross reference to Section 1324 in Title 4, Part 2.

The Commission then discussed to what extent if any it should undertake to clarify the various sections relating to grand jury law. It was agreed that to clarify certain sections would require substantive revisions beyond the scope of the present study. A motion was made by Mr. Gustafson, seconded by Mr. Matthews and unanimously adopted that the Commission confine its study and recommendation to the recodification of the existing grand jury law.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

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Memorandum re Rescission of Contracts (C)
Submitted by Mr. Thomas E. Stanton

Subject: Critique of Critique of Recommendations
Agreed Upon at the June 1958 Meeting.

Following is the long promised memorandum of the Chairman on rescission, which has taken the form suggested by the above subject. My "critical examination" of the points made in Memorandum (B) has led to the following comments:

1. I agree that it is the duty of the Executive Secretary to point out what seem to him to be shortcomings of any of the Commission's recommendations at any time, and personally I do not feel that he should be concerned as to how "respectfully" it is done. The important consideration is that each point be stated as forcefully and as persuasively as may be necessary to compete on equal terms with the points made by others in the course of formulating our recommendations.

2. The term "adjudged" did not originate with Professor Sullivan, but is found in Section 3406 of the Civil Code. This section is in a chapter entitled "Specific Relief", and its purpose seems to have been to provide for and preserve the specific relief afforded by courts of equity in rescission cases. For reasons given later, I feel that the versions presently recommended by the Commission should be fitted into the basic pattern of the Civil Code and that if this is done, some if not all of the problems suggested by the Executive Secretary will be solved.

3. After reading some only of the many California cases dealing with rescission I am more than ever convinced of the wisdom of preserving the concept of the out-of-court rescission. Since at this point the view I favor has prevailed, I will not labor the matter, but I am still concerned that such excellent minds as those of McDonough and Thurman remain unconvinced.

The case of M. F. Kemper Co. v. Los Angeles (1951) 37 Cal. (2d) 696, will furnish a good illustration of my point. There a contractor had submitted a bid to the city for the performance of public work which was in the nature of an irrevocable offer, since the contractor had also furnished a bond in a substantial amount guaranteeing that it would enter into a contract with the city for performance of the work if the contract was awarded to it. The contractor made an error in its bid under circumstances which entitled it to rescind the bid. Immediately upon discovering its error, the contractor gave the city notice of the error and of its election to rescind its bid. The city nevertheless attempted to hold the contractor to its bid, to forfeit its bid bond and to recover damages in the amount of the difference between the contractor's bid and that of the next lowest bidder.

The contractor sued the city for specific equitable relief, namely, the cancellation of its bid and the discharge of its bid bond. The court granted this relief upon the theory that the prompt notice of rescission was effective to rescind the bid and to prevent the happening of the contingency on which the city would have been entitled to forfeit the bid bond.

It seems apparent to me that if the law were changed to provide that a rescission could only be accomplished by mutual consent or by a court decree, the result of the Kemper case would either be changed or the courts would have to adopt a different rationale to reach the same result. In my opinion the Commission should not recommend legislation which would require either of these alternatives.

4. While, for the reasons given above, it is important to preserve the right to an out-of-court rescission, it is likewise important to preserve the right to specific equitable relief in rescission cases.

The proposed repeal of Section 3406 might be construed as abolishing this right.

Section 3274 of the Civil Code provides as follows:

As a general rule, compensation if the relief or remedy provided by the law of this state for the violation of private rights, and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in this part of the Civil Code.

Section 3406 is the section of the Civil Code which expressly confers authority upon the courts to "adjudge" the rescission of a contract, and in view of the provisions of Section 3274, it appears important to preserve this express authority.

Accordingly I propose:

a. That Section 3406 be retained and amended to read as follows:

3406. The rescission of a contract may be adjudged, on the application of a party aggrieved, in any of the cases mentioned in Section 1689.

b. That proposed section 1692 be made Section 3407 and proposed Section 1692.5 be made Section 3408.

5. I question the accuracy of Professor Sullivan's statement on page 14 of his report that "it seems now to be settled in this State as it is elsewhere that a pre-action notice of rescission and an offer of restoration is not a condition to an action to obtain a rescission."

Professor Sullivan cites the case of Seeger v. Odell, 18 Cal. (2d) 409, in support of this statement.

In the Kemper case, however, the court said (37 C. (2d) 701-702):

In addition, the party seeking relief must give prompt notice of his election to rescind and must restore or offer to restore to the other party everything of value which he has received under the contract. (Civ. Code #1691; see McCall v. Superior Court, 1 Cal.2d 527, 35-536 [36 P.2d 642, 95 A.L.R. 1019]; Seeger v. Odell, 18 Cal.2d 409, 417-418 [115 P.2d 977, 136 A.L.R. 1291].

See also the statement to the same effect in Carruth v. Fritch (1950) 36 C. (2) 426, 430, which likewise cites the Seeger case, and King v. Mortimer (1951) 37 C. (2d) 430, 435, which does not seem to me to be distinguishable on the basis stated in footnote 41 to Professor Sullivan's report.

I believe that an offer to restore benefits should be required in the usual case, and that such offer should be excused only in cases where it would be inequitable to deny relief for failure to make such an offer.

Accordingly, I propose that the following language from the decision in the Carruth case be inserted after the word

"contract" in the third line of subdivision 2 of proposed
Section 1692:

in any case where the court may by its
judgment fully adjust the equities
between the parties.

6. To meet the point behind the second conclusion
stated in Memorandum (B), I propose the following:

a. That the first sentence of subdivision 3 of Section
337 C.C.P. be changed to read:

3. An action arising out of the rescission of
a contract in writing or to have such rescission
adjudged, whether such action would formerly have
been denominated legal or equitable.

b. That a similar change be made in the proposed re-
visions of Sections 339, 427 and 537 of the C.C.P.

THOMAS E. STANTON, Jr.

July 29, 1958

Memorandum to Members of California Law Revision Commission
and of State Bar Committee to Consider Uniform Rules of Evidence.

Subject: Status Report

1. Prior to the meeting of the California Law Revision Commission on July 19, 1958 the Commission and the State Bar Committee were in agreement with respect to the following of the Uniform Rules of Evidence or parts thereof:

Rule 63 (1st Paragraph)

Rule 63, Subdivisions	(11)	(22)
	(17)	(23)
	(19)	

Rule 66

2. As a result of action taken at the July 19 meeting the Commission and the State Bar Committee are now in agreement on the following additional Rules or parts thereof:

Rule 63, Subdivisions	(3)	(18)
	(5)	(24)*
	(8)	(25)
	(13)	(26)
	(14)	(28)
		(29)*

* Commission has proposed
minor variation in form.

3. As a result of other action taken at the July 19 meeting the Commission and the State Bar Committee are now in disagreement with respect to the following Rules or parts thereof:

Rule 63, Subdivisions (1)
(2)
(4)

4. On the basis of action taken by the Commission and the State Bar Committee prior to July 19, the two bodies were in disagreement on the following Rules or parts thereof and this disagreement was neither positively reaffirmed insofar as the Commission is concerned nor resolved at the July 19 meeting:

Rule 63, Subdivisions (6) (20)
(7) (27)
(9) (30)
(10)

Most or all of these Rules or parts thereof will be further reviewed by the Law Revision Commission at its September meeting.

5. With respect to the following Rules or parts thereof relating to hearsay the Commission and the State Bar Committee are in neither agreement nor disagreement because one or both have not yet taken a position thereon; (Initials in parentheses indicate which group has not taken position.)

Rule 62 (LRC)

Rule 63, Subdivisions (12) (SBC)
(15) (Both)
(16) (Both)
(21) (SBC)
(31) (LRC)

Rule 64 (LRC)

Rule 65 (SBC)

6. What is stated above may be summarized as follows:

<u>Agreement</u>	<u>Disagreement</u>	<u>Status not yet Clarified</u>
63 (1st P)	63 (1)	62
63 (3)	63 (2)	63 (12)
63 (5)	63 (4)	63 (15)
63 (8)	63 (6)	63 (16)
63 (11)	63 (7)	63 (21)
63 (13)	63 (9)	63 (31)
63 (14)	63 (10)	64
63 (17)	63 (20)	65
63 (18)	63 (27)	
63 (19)	63 (30)	
63 (22)		
63 (23)		
63 (24)		
63 (25)		
63 (26)		
63 (28)		
63 (29)		

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

July 28, 1958

MEMORANDUM

Enclosed is a "Summary of Action Taken by the California Law Revision Commission and the California State Bar Committee to Consider the Uniform Rules of Evidence." This Summary, which reflects action taken at a meeting of the State Bar Committee on July 11 and 12 and by the Law Revision Commission on July 18 and 19, should be substituted for the Summary previously sent to you.

July 28, 1958

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

Rule 8

1. As proposed:

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

2. Action of Commission:

Not yet considered.

3. Action of Northern Section:

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

4. Action of Southern Section:

Not yet considered.

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Rule 19 (cont.)

6. Action of Commission 7/19/58:

Withdrew proposed amendment of Rule 19.

Rule 20

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with modification as shown:

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

3. Action Northern Section:

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

4. Action Southern Section:

Not yet considered.

Rule 21

1. As proposed:

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

2. Action of Commission:

Discussed but final action not taken.

3. Action Northern Section:

Proposed following as substitute for first sentence:

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

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

4. Action Southern Section:

Not yet considered.

Rule 22

1. As proposed:

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

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved (a) by divided vote.

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

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

Approved subdivision (d).

4. Action Southern Section:

Not yet considered.

Rule 45

1. As proposed:

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

2. Action of Commission:

Approved insofar as applies to Rules 20 and 22.

3. Action of Northern Section:

Not yet considered.

4. Action of Southern Section:

Not yet considered.

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Rule 62

1. As proposed:

See "Action of Northern Section."

2. Action of Commission:

Not yet considered except that has approved subdivision (1).

3. Action of State Bar Committee:

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

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

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

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

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

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

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

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

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

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Rule 62 (cont.)

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

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

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

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July 15, 1958

Rule 63

1. As proposed:

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

2. Action of Commission:

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

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

3. Action of State Bar Committee:

Approved.

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

- 1) Extrajudicial statements not offered to prove the truth of the matter stated.
- 2) Non-verbal conduct not intended by the actor as a substitute for words - i.e., as a communication.

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Subdivision (1), Rule 63

1. As proposed:

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

2. Original Action of Commission:

Disapproved; proposed substitute, to read:

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

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

3. Action of State Bar Committee:

Approved Commission substitute with modifications as shown:

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

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Subdivision (1), Rule 63 (cont.)

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

- (a) The statement is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22, or
- (b) The statement is offered following an attempt to impair his testimony as being recently fabricated or when his testimony has been impeached by evidence of a prior inconsistent statement and the statement is one made prior to the alleged fabrication or prior inconsistent statement and is consistent with his testimony at the hearing, or
- (c) The statement concerns a matter as to which the witness has no present recollection and is a writing which (i) was made by the witness himself or under his direction, (ii) was made at a time when the facts recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory, and (iii) is verified by the witness as having been true and correct when made.

4. Action of Commission 7/19/58:

1. Proposed new subsection (b) to read:

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

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

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Subdivision (2), Rule 63

1. As proposed:

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

2. Original Action of Commission:

Proposed following substitute:

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

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

3. Action of State Bar Committee:

(a) Approved as proposed; disapproved Commission substitute.

(b) Proposed following new subdivision 2.1:

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

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

4. Action of Commission 7/19/58:

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

- 1. Substituted "under the law" for "by the statutes."
- 2. Added "taken in the action in which they are offered" after "depositions."

Subdivision (3), Rule 63

1. As proposed:

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

2. Original Action of Commission:

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

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

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

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

3. Action of State Bar Committee:

Approved Commission substitute with modifications as shown:

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

- (a) (i) The Such testimony is offered against a party who offered it in evidence on his own behalf on the former occasion in the other proceeding or against the successor in interest of such party, or
- (b) (ii) In a civil action, the issue is such that the adverse party on the former occasion in the other proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action proceeding in which the testimony is offered, or
- (c) (iii) In a criminal action proceeding the present defendant was a party to the prior action other proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the action proceeding in which the testimony is offered; provided, however, that the testimony given at a preliminary hearing in the prior action other proceeding is not admissible.

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Subdivision (3), Rule 63 (cont.)

4. Action of Commission 7/19/58:

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

Subdivision (4), Rule 63

1. As proposed:

See "Action of Commission".

2. Original Action of Commission:

Approved as proposed with modifications as shown:

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

3. Action of State Bar Committee:

Proposed following as substitute:

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

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Subdivision (4), Rule 63 (cont.)

4. Action of Commission 7/19/58:

1. Did not accept State Bar Committee proposal to add "If the declarant is unavailable as a witness or testifies that he does not recall the event or condition involved" to Subdivision (4).
2. Discussed but did not take final action on clause (a) of State Bar Committee substitute for Uniform Rules of Evidence Subdivision (4).
3. Accepted clause (b) of State Bar Committee substitute for Subdivision (4).
4. Concurred with State Bar Committee view that subsection (c) of Uniform Rules of Evidence Subdivision (4) should not be adopted in this State.

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Subdivision (5), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with modification as shown:

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

3. Action of State Bar Committee:

Approved as modified by Commission with further modification as shown:

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

4. Action of Commission 7/19/58:

Approved in form proposed by State Bar Committee.

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Subdivision (6) , Rule 63

1. As proposed:

See "Action of State Bar Committee."

2. Action of Commission:

Disapproved; substituted amendment of
subdivision (7).

3. Action of State Bar Committee:

Approved as proposed with modification as shown:

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

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

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Subdivision (7), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with modification as shown:

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

3. Action of State Bar Committee:

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

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

4. Action of Commission 7/19/58:

1. Deleted "and if the latter, who was acting in such representative capacity in making the statement"
2. Discussed but did not take final action on other differences between the Commission and State Bar Committee views re form of Subdivision (7).

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Subdivision (8), Rule 63

1. As proposed:

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

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

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

4. Action of Commission 7/19/58:

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

Subdivision (9), Rule 63

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

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

3. Action of State Bar Committee:

Approved (a) and (c).

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

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

(Revised 7/28/58)

Subdivision (10), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with modification as shown:

(10) Declarations against Interest. Subject to the limitations of exception (5), a statement made by a declarant who is unavailable as a witness which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true;

3. Action of State Bar Committee:

Approved as modified by Commission with further modification as shown:

(10) Declarations Against Interest. Subject to the limitations of Exception (5) a statement made by a Except as against the accused in a criminal proceeding, if the declarant who is unavailable as a witness which and if the judge finds that the declarant had sufficient knowledge of the subject, a statement which the judge finds was at the time of the assertion statement so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true.

Revised
July 28, 1958

Subdivision (10), Rule 63 (cont.)

4. Action of Commission 7/19/58:

1. Approved substitution of "statement" for "assertion."
2. Disapproved deletion of clause re making object of hatred, ridicule etc.
3. Discussed but did not take final action on other amendments proposed by State Bar Committee.

Revised
July 15, 1958

Subdivision (11), Rule 63

1. As proposed:

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

2. Action of Commission:

Disapproved.

3. Action of State Bar Committee:

Disapproved.

Revised
July 15, 1958

Subdivision (12), Rule 63

1. As proposed:

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

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

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

Revised
July 28, 1958

Subdivision (13), Rule 63

1. As proposed:

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

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

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

4. Action of Commission 7/19/58:

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

Revised
July 28, 1958

Subdivision (14), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with modification as shown:

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

3. Action of State Bar Committee:

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

4. Action of Commission 7/19/58:

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

Revised
July 15, 1958

Subdivision (15), Rule 63

1. As proposed:

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

2. Action of Commission:

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

3. Action of State Bar Committee:

Disapproved; will consider Commission redraft.

Revised
July 15, 1958

Subdivision (16), Rule 63

1. As proposed:

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

2. Action of Commission:

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

3. Action of State Bar Committee:

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

Revised
July 15, 1958

Subdivision (17), Rule 63

1. As proposed:

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

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

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

Revised
July 28, 1958

Subdivision (18), Rule 63

1. As proposed:

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

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved in substance; suggests form be changed as follows:

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

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

4. Action of Commission 7/19/58:

Approved as redrafted by State Bar Committee.

Revised
July 15, 1958

Subdivision (19), Rule 63

1. As proposed:

(19) Records of Documents Affecting an Interest in Property. Subject to Rule 64 the official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that (a) the record is in fact a record of an office of a state or nation or of any governmental subdivision thereof, and (b) an applicable statute authorized such a document to be recorded in that office;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved.

Revised
July 28, 1958

Subdivision (20), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with modification as shown:

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

3. Action of State Bar Committee:

Disapproved.

4. Action of Commission 7/19/58:

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

Revised
July 15, 1958

Subdivision (21), Rule 63

1. As proposed:

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

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

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

(Revised 7/15/58)

Subdivision (22), Rule 63

1. As proposed:

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

2. Action of Commission:

Approved

3. Action of State Bar Committee:

Approved.

(Revised 7/15/58)

Subdivision (23), Rule 63

1. As proposed:

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

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved

(Revised 7/28/58)

Subdivision (24), Rule 63

1. As proposed:

(24) Statement Concerning Family History of Another.

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

2. Original Action of Commission:

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

3. Action of State Bar Committee:

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

4. Action of Commission 7/19/58:

Approved with changes in form as follows:

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

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

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

Revised
July 28, 1958

Subdivision (25), Rule 63

1. As proposed:

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

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Disapproved.

4. Action of Commission 7/19/58:

Disapproved.

Revised
July 28, 1958

Subdivision (26), Rule 63

1. As proposed:

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

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved with modification as shown:

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

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

4. Action of Commission 7/19/58:

Approved as proposed to be modified by State Bar Committee.

Subdivision (27), Rule 63

1. As proposed:

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

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved with modification as shown:

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

Revised
July 28, 1958

Subdivision (27), Rule 63 (cont.)

4. Action of Commission 7/19/58:

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

Revised
July 28, 1958

Subdivision (28), Rule 63

1. As proposed:

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

2. Original Action of Commission:

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

3. Action of State Bar Committee:

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

4. Action of Commission 7/19/58:

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

Subdivision (29), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with amendment as shown:

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

3. Action of State Bar Committee:

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

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

Revised
July 28, 1958

Subdivision (29), Rule 53 (cont.)

4. Action of Commission 7/19/58:

1. Concurred in State Bar Committee proposals for amendment of Subdivision (29).
2. Redrafted to read:

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

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

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

Revised
July 28, 1958

Subdivision (30), Rule 63

1. As proposed:

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

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

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

Subdivision (31), Rule 63

1. As proposed:

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

2. Action of Commission:

Discussed but did not take final action.

3. Action of State Bar Committee:

See report on subdivision (30)

1. As proposed:

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

2. Action of Commission:

Not yet considered.

3. Action of State Bar Committee:

Approved with amendment to refer to subdivision (29).

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with modification as shown:

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

3. Action of state Bar Committee:

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

(Revised 7/15/58)

Rule 66

1. As proposed:

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

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved.

Rule 68

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

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

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

3. Action Northern Section:

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

4. Action Southern Section:

Not yet considered.

SUPPLEMENT TO MEMORANDUM SUBMITTED BY
Professor James H. Chadbourn

Summary of Sections of Part IV
of the Code of Civil Procedure to be Repealed
or Amended

REPEALED

1850
1851
1852
1853
1870(2)
1870(3)
1870(4)
1870(5) first sentence
1870(6)
1870(7)
1870(11)
1870(13)
1878
1893 last clause
1901
1905
1906
1907
1918
1919
1920(?)
1920a
1921
1922
1923
1924
1926(?)
1946(1)
1946(2)
1946(3)(?)
1947
1953e-1953h
2047 second sentence

AMENDED

1854(?)
1870(8)(?)
1936(?)
1948
1951
2016(d)(?)
2049
2052

NOTES ON UNIFORM RULES OF EVIDENCE RULE 62(7)

62(7) defines "unavailable as a witness."

The following exceptions to Rule 63 require that the declarant be "unavailable" in the sense of 62(7):

63(3) (as amended by Commission)

63(5)

63(10) (as amended by Commission)

63(23)

63(24)

63(25)

If we were to adopt 62(7) and the foregoing subdivisions of 63 we would change present law as follows:

1. Presently declarations against interest seem to be admissible only if the declarant is dead (CCP §§ 1853, 1870(4), 1946). Adoption of 63(10) (as amended by Commission) and 62(7) would make such declarations admissible not only when declarant is dead but also when declarant is unavailable in any of the other senses stated in 62(7).

Illustration: Defendant calls W and asks re a matter adverse to W's interest. W refuses to answer on ground of self-incrimination. Defendant may now prove W's out-of-court statement respecting the matter. W is "unavailable" because of his claim of privilege.

2. Presently certain pedigree declarations are admissible only if declarant is dead or "out of the jurisdiction" (CCP §§ 1852, 1870(4), first clause). Adoption of 63(23) (24) and (25) plus 62(7) would make such declarations admissible not only when declarant is dead or out of the jurisdiction but also (for example) when declarant is unable to testify because of physical or mental

illness. However, adoption of the Uniform Rules of Evidence provisions indicated would qualify the out-of-the-jurisdiction condition presently stated in CCP § 1852. Under 62(7) out-of-the-jurisdiction is "unavailable" only if the judge excuses the failure to take declarant's deposition on the basis stated in 62(7) second paragraph.

3. 63(3) as amended by Commission plus 62(7) would create a new hearsay exception. Unavailability is a feature of the exception. But since the whole exception is new we have nothing in our present law respecting the unavailability feature.

Evaluation:

If we are willing to accept certain hearsay declarations of a hearsay declarant when he is unavailable because dead, it would seem we should be willing to accept these same declarations when declarant is unavailable for any of the reasons stated in 62(7). I recommend approval of 62(7) as revised by State Bar Committee. (This revision makes no substantive changes but does improve the form.)

Respectfully submitted,

James H. Chadbourn