Meeting - 7

RULE 62

Rule 62 supplies definitions of some of the terms which are used throughout Rule 63 and its 31 subdivisions.

The definition of "Statement" (Rule 62 (1)) is of crucial importance. As we shall see, this definition operates to impose important restrictions upon the concept of hearsay evidence.

No comment seems to be needed at this point on the definitions set forth in subdivisions (2) - (6) of Rule 62.

However, preliminary comment on subdivision (7) of the Rule does seem to be in order.

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

Thus a person may be unavailable if he is:

(1) Dead, or

(2) Too ill to testify, or

(3) Beyond the reach of the court's subpoena power, or

(4) Absent and his whereabouts are unascertainable, or

(5) Disqualified or privileged.

Traditionally death has of course been recognized as constituting unavailability. There has been doubt, however, as to the extent to which the other causes enumerated should

be regarded as constituting unavailability. (See Wigmore, §§ 1456 and 1481 (3) (4).)

There is, however, no doubt under subdivision (7) of Rule 62. The philosophy of this subdivision is that if it is proper to receive the hearsay declarations of a declarant who is unavailable because dead, it must be equally proper to receive such declarations when he is unavailable for any of the reasons stated in the subdivision.

In some respects the present California view of what is unavailability is more restrictive than the Rule 62 (7) view. To illustrate:

> Presently certain pedigree declarations are admissible only if declarant is dead or "out of the jurisdiction" (C.C.P. §§ 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 or because he refuses to testify on the ground of privilege. Moreover, adoption of the Uniform Rules of Evidence provisions indicated would qualify the out-of-the-jurisdiction condition presently stated in C.C.P. § 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.

It is believed, however, that these would be wise changes, because the rationale supporting 62 (7) is believed to be sound.

It is worth emphasizing that paragraph two of 62 (7) sets up safeguards against sharp practices and, in the words of the Commissioners, assures "that unavailability is honest and not planned in order to gain an advantage."

December 5, 1959

RULE 64

The theory of this Rule is that, as to writings offered under Rule 63, subdivisions (15), (16), (17), (18) and (19), the opponent should be guarded against surprise at the trial by receiving pre-trial notice and opportunity to investigate the validity and accuracy of the writings.

As was said in the Comment on Model Code Rule 519, from which Rule 64 is derived: "The Rule accords with the spirit of modern legislation governing discovery."

Our previous recommendation that subdivisions (15) - (19) of Rule 63 be approved is, of course, by necessary implication a recommendation that Rule 64 be also approved. (For references to Rule 64, see Memo on 63, subdivision (15) and (16), pp. 3 - 4 and Memo on 63, subdivision (18) and (19), footnotes 1 and 2.