

FILE

April 1, 1960

Memorandum No. 39 (1960)

Subject: Uniform Rules of Evidence - Hearsay Division

Attached are the Uniform Rules of Evidence (Hearsay Division) as revised to date by the Commission. You may want to refer to this material in connection with Chadbourn's memo concerning the problem of incorporating the Uniform Rules in the Hearsay Division (Rules 62-66) into the California Codes.

Respectfully submitted,

John H. DeMouly
Executive Secretary

JHD:gl

UNIFORM RULES OF EVIDENCE

HEARSAY DIVISION

Revised March 1, 1960

Revised 12/10/59

10/20/59

(34(L))

Note: This is Uniform Rule 62 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 62. DEFINITIONS.

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

Rules 62 to 66, inclusive:

(1) [~~(2)~~] "Declarant" is a person who makes a statement.

(2) [~~(3)~~] "Perceive" means acquire knowledge through one's own senses.

(3) [~~(4)~~] "Public [~~Official~~]" officer or employee of a state or territory of the United States" includes: [~~an official of a political subdivision of such state or territory and of a municipality.~~]

(a) In this State, an officer or employee of the State or of any county, city, district, authority, agency or other political subdivision of the State.

(b) In other states and in territories of the United States, an officer or employee of any public entity that is substantially equivalent to those included under subparagraph (a) of this paragraph.

(4) [~~(5)~~] "State" includes each of the United States and the District of Columbia.

(5) [~~(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.

(6) [~~(7)~~] Except as otherwise provided in paragraph (7) of this rule, "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. [~~7-ex~~]

(b) Disqualified from testifying to the matter. [~~7-ex~~]

(c) Dead or unable [~~to-be-present~~] to testify at the hearing because of [~~death-or-then-existing~~] physical or mental illness. [~~7-ex~~]

(d) Absent beyond the jurisdiction of the court to compel appearance by its process. [~~7-ex~~]

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

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

(a) If the judge finds that [~~his~~] the exemption, disqualification, death, inability or absence of the witness is due to (i) the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying [~~7~~] or [~~to~~] (ii) the culpable act or neglect of such [~~party~~] proponent; [~~7~~] or

(b) If unavailability is claimed [~~under-clause-(d)-of-the-preceding-paragraph~~] because the witness is absent beyond the jurisdiction of the court to compel appearance by its process and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship [~~7~~] or expense. [~~and-that-the-probable-importance-of-the-testimony-is-such-as-to-justify-the-expense-of-taking-such-deposition.~~]

[(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.]

Note: This is Uniform Rule 63 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 63. HEARSAY EVIDENCE EXCLUDED -- EXCEPTIONS.

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

(1) [~~A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;~~] When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated if the statement would have been admissible if made by him while testifying and the statement:

(a) Is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22; or

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

(c) Concerns a matter as to which the witness has no present recollection and is a writing which was made at a time when the facts

recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory and the writing was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness's statement at the time it was made.

(2) [~~Affidavits to the extent admissible by the statutes of this State;~~] To the extent otherwise admissible under the law of this State:

(a) Affidavits.

(b) Depositions taken in the action or proceeding in which they are offered.

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

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

given under oath or affirmation as a witness in another action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony taken by deposition taken in compliance with law in such an action or proceeding, but only if the judge finds that the declarant is unavailable as a witness at the hearing and that:

(a) Such testimony is offered against a party who offered it in evidence on his own behalf in the other action or proceeding or against the successor in interest of such party; or

(b) In a civil action or proceeding, the issue is such that the adverse party in the other action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action or proceeding in which the testimony is offered; or

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

(4) A statement:

(a) Which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains; [y] or

(b) Which the judge finds [~~was-made-while-the-declarant-was~~

~~under the stress of a nervous excitement caused by such perception, or~~
(i) purports to state what the declarant perceived relating to an
event or condition which the statement narrates, describes or explains
and (ii) was made spontaneously while the declarant was under the stress
of a nervous excitement caused by such perception.

~~{(e)--if the declarant is unavailable as a witness, a statement~~
~~narrating, describing or explaining an event or condition which the judge~~
~~finds was made by the declarant at a time when the matter had been~~
~~recently perceived by him and while his recollection was clear, and was~~
~~made in good faith prior to the commencement of the action;}~~

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

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

~~public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same;~~

In a criminal action or proceeding, as against the defendant, a previous statement by him relative to the offense charged, unless the judge finds pursuant to the procedures set forth in Rule 8 that the statement was made:

(a) Under circumstances likely to cause the defendant to make a false statement; or

(b) Under such circumstances that it is inadmissible under the Constitution of the United States or the Constitution of this State.

(7) Except as provided in paragraph (6) of this rule, as against himself, a statement by a person who is a party to the action or proceeding in his individual or [a] representative capacity. [~~and if the latter, who was acting in such representative capacity in making the statement;~~]

(8) As against a party, a statement:

(a) By a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; [y]
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. [†]

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(9) As against a party, a statement which would be admissible if made by the declarant at the hearing if:

(a) The statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship; [7] or

(b) [~~the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination,~~] The statement is that of a co-conspirator of the party and (i) the statement was made prior to the termination of the conspiracy and in furtherance of the common object thereof and (ii) the statement is offered after proof by independent evidence of the existence of the conspiracy and that the declarant and the party were both parties to the conspiracy at the time the statement was made; or

(c) In a civil action or proceeding, one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability. [7]

(10) [~~Subject to the limitations of exception (6),~~]

If the declarant is not a party to the action or proceeding and is unavailable as a witness, and if the judge finds that the declarant had sufficient knowledge of the subject, a statement which the judge finds was at the time of the [assertion] statement so far contrary to the declarant's pecuniary or proprietary interest or so far

subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true. [†]

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

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

(a) Then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant. [, -or]

(b) Previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition. [†]

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

~~were-such-as-to-indicate-their-trustworthiness;~~ A writing offered as a record of an act, condition or event if the custodian or other qualified witness testifies to its identity and the mode of its preparation and if the judge finds that it was made in the regular course of a business, at or near the time of the act, condition or event, and that the sources of information, method and time of preparation were such as to indicate its trustworthiness. As used in this paragraph, "a business" includes every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(14) Evidence of the absence [~~of-a-memorandum-or-record~~] from the [~~memoranda-or~~] records of a business (as defined in paragraph (13) of this rule) of a record of an asserted act, [~~event-or~~] condition [y] or event, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that:

(a) It was the regular course of that business to make [~~such memoranda~~] records of all such acts, [~~events-or~~] conditions or events, at or near the time [~~thereof-or-within-a-reasonable-time-thereafter~~] of the act, condition or event, and to preserve them; and

(b) The sources of information and method and time of preparation of the records of that business are such as to indicate the trustworthiness of the records.

(15) Subject to Rule 64, statements of fact contained in a written report [s-or-findings-of-fact] made by a public [~~official~~] officer or employee of the United States or by a public officer or employee of a state or territory of the United States, if the judge finds

that the making thereof was within the scope of the duty of such ~~[official]~~ officer or employee and that it was his duty to:

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

(16) ~~[Subject-to-Rule-64,]~~ writings made by persons other than public officers or employees as a record, report or finding of fact, if the judge finds that:

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

(b) The writing was made and filed as so required by the statute. []

(17) ~~[Subject-to-rule-64,]~~ (a) If meeting the requirements of authentication under Rule 68, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein. []

(b) If meeting the requirements of authentication under Rule 69, to prove the absence of a record in a specified office, a writing made by

the official custodian of the official records of the office, reciting diligent search and failure to find such record. [;]

(18) [~~Subject to Rule 64,--certificates~~] A certificate that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof, if the judge finds that:

(a) The maker of the certificate was, at the time and place certified as the time and place of the marriage, [was] authorized by law to perform marriage ceremonies; [;] and

(b) The certificate was issued at that time or within a reasonable time thereafter. [;]

(19) [~~Subject to Rule 64~~] The official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that:

(a) The record is in fact a record of an office of a state or nation or of any governmental subdivision thereof; [;] and

(b) An applicable statute authorized such a document to be recorded in that office. [;]

(20) Evidence of a final judgment adjudging a person guilty of a felony, to prove, against such person, any fact essential to sustain the judgment unless such fact is admitted. [;]

(21) To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment if:

(a) Offered by a judgment debtor in an action or proceeding in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment; and [, -provided]

(b) The judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action or proceeding. [†]

(22) To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental subdivision thereof in land, if offered by a party in an action or proceeding in which any such fact or such interest or lack of interest is a material matter. [†]

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

(24) A statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person

other than the declarant if the judge finds that the declarant is unavailable as a witness and finds that:

(a) [~~finds-that~~] The declarant was related to the other by blood or marriage; or

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

(25) [~~A-statement-of-a-declarant-that-a-statement-admissible under-exceptions-(23)-or-(24)-of-this-rule-was-made-by-another-declarant, offered-as-tending-to-prove-the-truth-of-the-matter-declared-by-both-declarants,-if-the-judge-finds-that-both-declarants-are-unavailable-as witnesses;~~]

(26) Evidence of reputation among members of a family, if:

(a) The reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage; and

(b) The evidence consists of (i) a witness testifying to his knowledge of such reputation or (ii) such evidence as entries in family bibles or other family books or charts, engravings on rings, family portraits or engravings on urns, crypts or tombstones.

(27) Evidence of reputation in a community as tending to prove the truth of the matter reputed, if ~~[-(a)-]~~ the reputation concerns:

(a) Boundaries of, or customs affecting, land in the community [,] and the judge finds that the reputation, if any, arose before controversy. [,-er]

(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. [,-er]

(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. [,-er-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;]

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

(29) Subject to Rule 64, evidence of a statement relevant to a material matter, contained in:

(a) A deed of conveyance or a will or other [document] writing purporting to affect an interest in property, offered as tending to prove

the truth of the matter stated, if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property [;] and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement. [†]

(b) A writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter, if the writer could have been properly allowed to make such statement as a witness.

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

(31) 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 on the subject.

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

Any writing admissible under [~~exceptions~~] paragraph (15) [~~(16)~~,
~~(17)~~,~~(18)~~,~~and~~(~~19~~)] or (29) of Rule 63 shall be received only if the party
offering such writing has delivered a copy of it, or so much thereof as
may relate to the controversy, to each adverse party a reasonable time
before trial unless the judge finds that such adverse party has not been
unfairly surprised by the failure to deliver such copy.

(34(L))

10/22/59

Note: This is Uniform Rule 65 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 65. CREDIBILITY OF DECLARANT.

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

(34(L))

10/22/59

Note: This is Uniform Rule 66 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 66. MULTIPLE HEARSAY.

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

MEMORANDUM IN RE INCORPORATING
RULES 62-66 IN THE CALIFORNIA CODES

PART ONE

Introduction

This memo is predicated upon the following assumptions:...

1. That the Commission will recommend that the Legislature enact the Uniform Rules of Evidence, as revised by the Commission.
2. That the recommendation will be to incorporate the Rules in Part IV of the Code of Civil Procedure.

Comment: C.C.P. § 1 provides as follows:

"This act shall be known as The Code of Civil Procedure of California, and is divided into four parts, as follows:

Part I Of Courts of Justice.
II Of Civil Actions.
III Of Special Proceedings of a Civil Nature.
IV Of Evidence."

Penal Code § 1102 provides:

"The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code."

Probate Code § 1230 provides in part as follows:

"All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions."

Thus Part IV of The C.C.P. is the principal source of statutory rules of evidence applicable to civil, criminal and probate proceedings. It seems, therefore, that any large-scale revision of such statutes belongs in Part IV.

3. That the Commission will publish a series of interim, tentative reports on such divisions of the U.R.E. as Hearsay, Privileges, etc.

4. That each such interim report should include suggestions as to adjustments in the C.C.P. and other Codes relevant to the subject matter of the particular report.

On the basis of the above assumptions we propose in this study to explore the problems incident to and to make recommendations concerning the incorporation in The California Codes of Rules 62-66 as revised by the Commission as of December 20, 1959. This study is thus a proposed part of the interim report on the Hearsay Division of the U.R.E.

General comparison of present statutory hearsay law and Rules 62-66

Rules 62-66 purport to provide a complete system governing the admission and exclusion of hearsay evidence. The format of the Rules is (a) Definitional provisions (Rules 62 and 63, introductory paragraph) (b) Statement of general rule that hearsay is inadmissible (Rule 63, introductory paragraph) (c) Statement of thirty-one exceptions to the general rule (Rule 63, subdivisions (1) - (31)).

Although we have today in California numerous code provisions respecting hearsay, these provisions are not organized in any structure comparable to the orderly format of Rules 62-66. Thus, although we have a multiplicity of statutory exceptions to the hearsay rule, we do not have any statutory definition of hearsay evidence, nor any statutory statement of the general rule. Moreover the statutory exceptions are not stated as such, nor are

they collected together in any one place, nor are they inconsiderable in number. In consequence, our present mass of legislative hearsay law can scarcely be called a system. It is in fact so disorganized and so disorderly that, taken as a whole, it is entirely unsystematic.

Nevertheless, we shall now attempt a general description of our present hearsay code provisions and a comparison, in general terms, of such provisions with Rule 63.

Practically all of our hearsay statutes consist of exceptions to the hearsay rule. For descriptive purposes we may call them "general" and "special" exceptions. In this context a general exception means a principle of general application, like the principle of dying declarations, declarations against interest, etc. A special exception means a narrow ad hoc exception in the nature of a rule of thumb directed only to a specially limited situation.

To illustrate:

C.C. P. § 1870 provides in part as follows:

"...evidence may be given upon a trial of ...[t]he act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person ..."

Under the classification we have in mind this is a "general" exception. On the other hand Agricultural Code § 920 provides in part as follows:

"Any sample taken by an enforcement officer in accordance with rules and regulations promulgated under the provisions

of this article for the taking of official samples shall be prima facie evidence, in any court in this State, of the true condition of the entire lot from which the sample was taken. A written report issued by the State Seed Laboratory showing the analysis of any such sample shall be prima facie evidence, in any court in this State, of the true analysis of the entire lot from which the sample was taken."

This we regard as a "special" exception.

Analogues of the general exceptions are found in the subdivisions of Rule 63. For example, the pedigree exception above quoted is roughly analogous to subdivisions (23) - (26) of Rule 63. On the other hand, since the subdivisions of the Rule for the most part fashion the exceptions in general terms and since the statutory special exceptions deal with minutiae, we find in the subdivisions of the Rule no counterparts of the special exceptions, (except, of course, to the extent that a special exception is a minute application of a general principle stated in a subdivision).

A general program for adjusting the present hearsay code provisions to the adoption of Rules 62-66.

Of course, the proposed adoption of Rules 62-66 must be accompanied by appropriate recommendations concerning adjustments in the present statutes. Ideally and logically, since the Rules are a total system, the appropriate adjustment would be a total repeal of all statutes now dealing with hearsay. It is believed, however, that as the study progresses, this ideal will appear to be impossible of accomplishment.

The program proposed herein is therefore something less

than the ideal which the demands of abstract logic and considerations of symmetry require.

Speaking generally the program is as follows:

1. Repeal specifically all of the present code provisions which are general hearsay exceptions and which are either inconsistent with or substantially coextensive with the Rule 63 counterparts of such provisions.
2. Leave intact the remainder of our present statutory hearsay law.

We now turn to the analysis and discussion of the code provisions which we submit in support of this program.

The Four Groups of Statutes.

The thirty-one subdivisions of Rule 63 are exceptions to the hearsay rule whereby certain evidence is declared to be admissible notwithstanding such evidence is hearsay. Virtually all of our statutory law relating to hearsay likewise declares the admissibility of hearsay evidence and, like the subdivisions of Rule 63, these statutes therefore operate as exceptions to the hearsay rule.

Comparing our statutory exceptions with the exceptions stated in the subdivisions of Rule 63, we find that the statutory exceptions fall into the following four groups:

1. Those which are more restrictive than the Rule 63 exceptions.

Illustration: C.C.P. § 1870 provides in part as follows:

"... evidence may be given upon a trial of the following facts: ... in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death ..."

On the other hand, subdivision (5) of Rule 63 makes dying declarations admissible in civil as well as criminal actions and does not limit the subject matter of the declaration to the cause of the declarant's death.

2. Those which are substantially coextensive with the Rule 62 exceptions.

Illustration: C.C.P. §§ 1953e-1953h (the Uniform Business Records as Evidence Act) is coextensive with subdivision (13) of Rule 63, as revised by the Commission.

3. Those which are more liberal than the Rule 63 exceptions.

Illustration: C.C.P. § 1849 provides in part as follows:

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

Under this the declaration is admissible irrespective of the availability of the declarant. Per contra under subdivision (10) of Rule 63 (as revised by the Commission) such declaration is admissible only if the declarant is unavailable as a witness.

Further illustration: Penal Code § 1107 provides that in a prosecution for forging the note of a corporation, the fact of incorporation may be proved by reputation. Per contra subdivision (28) of Rule 63 permits reputation evidence only to establish a person's character or trait of character.

4. Those which are minute applications of a principle stated in a Rule 63 subdivision.

Illustration: Subdivision (17) of Rule 63 makes admissible a writing purporting to be a copy of an official record or of an entry therein. Business and Professions Code § 8923 provides for admissibility of copies of records and papers in the office of the Yacht and Ship Brokers Commissioner. The latter is, of course, a miniscule application of the principle of the former.

It is believed that practically all of our statutory hearsay law falls within the above classification. There is, however, a small residuum which is not included. Thus, we have a few special statutes which operate in this fashion: they forbid the application of a principle stated in a Rule 63 subdivision to a particular situation.

To illustrate: Under Vehicle Code § 20013 a person's accident report is not admissible against him. This forbids the application

to this particular situation of the admissions principle stated in subdivision (7) of Rule 63.

Such legislation is, so to speak, an exception to an exception stated in a Rule 63 subdivision.

Each of these groups of our present hearsay statutes presents special problems of adjustment in connection with incorporating Rules 62-66 into our Codes. We shall now explore these problems with reference to each group and, then, we shall attempt to formulate appropriate recommendations.

Groups One and Two (General Statutory Exceptions More Restrictive Than or Coextensive With the Subdivisions of Rule 63).

The problems here are not acute. It seems self-evident that, to the extent that our present statutory statements of the traditional hearsay exceptions are more restrictive than their Rule 63 counterparts, such statutes should be repealed. For example, in proposing subdivision (5) of Rule 63 covering the dying declaration exception, we would certainly propose repeal of that portion of C.C.P. § 1870 which states this exception in more restrictive form than subdivision (5).

The only problem we find in this area grows out of a few statutes currently in force which operate to forbid the application of a traditional hearsay exception to a particular situation, as Vehicle Code § 20013 cited above. This, however, does not (we think) require any special adjustment. Presently, this Vehicle Code section operates as an exception to the general admissions principle stated in § 1870(2) ("...evidence may be given ... of ... [the] declaration of a party, as

evidence against such party ..."). The substitution of the Rule 63 admissions principle (i.e. the substitution of subdivision (7)) for C.C.P. § 1870(2) would not (we think) be interpreted as intended to affect the Vehicle Code section.

As to group two: again it seems self-evident that in proposing something coextensive with a present code section or sections we should recommend repeal of the section or sections Group Three (Statutory Exceptions More Liberal Than the Subdivisions of Rule 63)

Above we have partially illustrated this type of statute. We now proceed to develop the illustrations more fully. Penal Code § 315 provides in part:

"... in all prosecutions for keeping or resorting to [a house of ill-fame] common repute may be received as competent evidence of the character of the house, the purpose for which it is kept or used, and the character of the women inhabiting or resorting to it."

As pointed out above Penal Code § 1107 provides in part:

"Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company ... the incorporation of such ... company ... may be proved by general reputation ... "

These, it seems, are two instances of reputation evidence which would now be admissible but which would be inadmissible under Rule 63. Reputation evidence is hearsay under Rule 63 and the exceptions to Rule 63 relating to reputation (subdivisions (26) - (28) do not cover the two kinds of reputation specified in the two sections of the Penal Code.

Probate Code § 372 provides that subject to certain conditions the court may "as evidence of the execution" of a

contested will "admit proof of the handwriting ... of any of the subscribing witnesses." Such proof seems to involve a hearsay statement by the subscribing witness (namely, that he saw the will executed), [See Wigmore § 1505 et seq.]. We find nothing in the subdivisions of Rule 63 which would make such evidence admissible.

Another illustration is the following: C.C.P. § 1870, subdivision 5, which provides in part as follows:

"... evidence may be given ... of the following facts: ... 5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party. ..." [italics added].

We note the following as to the second sentence. Subdivision (10) of Rule 63 as originally drafted would have made admissible against a party the declaration of a person jointly interested with the party provided such declaration was against the interest of the declarant (as usually it would be). Such declaration would be admissible even though the declarant is available. That is, Rule 63 (10) in its original form would have covered most of the ground embraced by C.C.P. § 1870 (5), second sentence. Rule 63 (10) as amended by the Commission to require the unavailability of the declarant would not, however, cover, as § 1870 (5) now does, declarations of an available declarant.

Other instances are as follows: Civil Code § 224m (written statement by person relinquishing child prima facie

evidence of facts recited); § 1263 (declaration of homestead prima facie evidence of facts stated); § 2924 (certain recitals in deed prima facie evidence of facts recited).

The foregoing constitutes a partial collection of present statutory exceptions which are more liberal than the subdivisions of Rule 63. (See infra Part Two of this memo for a full collection.) These exceptions, it seems, admit that which Rule 63 would exclude altogether.

Now we turn to those present exceptions which are more liberal than Rule 63 in that the exceptions admit unconditionally that which the Rule admits only conditionally.

Subdivision (15) of Rule 63 (as revised by the Commission) provides:

"Subject to Rule 64, statements of fact contained in a written report made by a public officer or employee of the United States or by a public officer or employee of a state or territory of the United States [are admissible], if the judge finds that the making thereof was within the scope of the duty of such officer or employee and that it was his duty to:

- (a) Perform the act reported; or
- (b) Observe the act, condition or event reported; or
- (c) Investigate the facts concerning the act, condition or event."

Presently we have an enormous number of code provisions which constitute minute applications of this principle to narrowly confined situations (Example: Government Code §26662 which provides:

"The return of the sheriff upon process or notices is prima facie evidence of

the facts stated in the return.").

However, none of our numerous present code provisions of this character is subject to any condition such as Rule 64 to which subdivision (15) of Rule 63 is subject. It is in this respect that all of these code provisions are more liberal than subdivision (15).

The above review shows that code provisions in the third group are more liberal than Rules 62-66 in either of two respects:

1. The provisions either admit what the Rules exclude altogether, or
2. The provisions admit without condition what the Rules admit only conditionally.

This seems to raise the following questions for decision:

1. Should the code provisions be repealed or continued in operation?
2. If they should be continued, how should this be accomplished?

With reference to the first question, it is recommended that the decision be to continue the provisions in force. We perceive no reason to narrow the present scope of admissible hearsay. Therefore (we think) present law should be preserved to the extent that it makes admissible what the Rules would make altogether inadmissible.

What, however, is the situation as respects the unconditional exceptions vis-a-vis subdivision (15) of Rule 63 which is subject to the condition stated in Rule 64? Logically, if we accept the rationale of this condition, we should change all present

law which is within the scope of the rationale and which does not now impose the condition. Yet, from a practical standpoint, this seems to be entirely infeasible. The code provisions in question are as vast in number as they are minute in scope. To attempt to alter them either by repealing them (so that the general principle of Rule 63(15) would become operative in the areas they now cover) or by amending them (so that each would provide that it is subject to the conditions of Rule 64)--such attempt would be an extraordinarily complex effort. Moreover, in view of the fact that liberal discovery and pretrial procedures reduce the significance of Rule 64, the effort would be out of all proportion to the more or less dubious profit that it would yield.

Turning then to the second question (viz, how to continue present law in force), the answer is (we think) to amend Rule 63 by adding thereto a new subdivision to be numbered (32) and to read as follows:

(32) Any hearsay evidence not admissible under the foregoing provisions of this Rule but declared by other law of this state to be admissible.

Group 4 (Statutory Exceptions Which are Minute Applications of Rule 63 Principles)

The provisions which fall under this head are narrow provisions making admissible certain copies of certain documents and records. Such provisions are simply small applications of the large principle stated in subdivision (17) of Rule 63 (as revised by the Commission, eliminating the subject-to-Rule-64 feature). It may be thought, therefore, that to leave

these statutes in the books would make the codes needlessly prolix and untidy. It is our belief, however, that specific repeal of these provisions would be an intricate operation which would not be worth the man-hours it would require to produce repeal and to make the adjustments incident to such repeal. We advise, therefore, against any attempt to effect specific repeal of the provisions in question.

If such provisions are not to be repealed specifically, what then? Our idea is to incorporate in the U.R.E. an amendment whereby such provisions are identified in terms of general reference and whereby in such terms it is provided for continuing the provisions in force. For this purpose we suggest adding Rule 63A as follows:

When hearsay evidence is declared to be admissible by any of subdivisions (1)-(31) of Rule 63 and when such evidence is also declared to be admissible by some law of this state other than the subdivision, the subdivision shall not be construed to repeal such other law.

In evaluating this proposal it should be remembered that Rule 63A would have no effect on those general code provisions which are coextensive or substantially coextensive with Rule 63 subdivisions, since under our proposed program such provisions would be specifically repealed. The sole purpose and proposed effect of 63A is to clarify the status of the numerous special code provisions which are consistent with Rule 63 subdivisions. As pointed out above, in our opinion these are too numerous

and too much enmeshed with the various acts of which they are a part to make specific repeal a feasible venture. Moreover, it seems (to us) unwise to have the status of all such provisions in doubt. The only course remaining is (we think) to declare the continued vitality of these provisions. The purpose and intent of proposed Rule 63A to make such declaration.

PART TWO

In this Part we propose (a) to indicate all of the California legislation touching hearsay which our research has disclosed, and (b) to indicate how such legislation would be affected by the proposals set forth in Part One of the memo.

All of the Codes have been examined and also Deering's General Laws.

We shall first give the relevant provisions of the C.C.P., next those of the Civil, Penal and Probate Codes, and thereafter those of the other codes in the alphabetical order of such other codes.

CODE OF CIVIL PROCEDURE

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

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

COMMENT: No repeal. Remains in effect under 63(32). Suppose A deeds Blackacre to B. Later B declares that he had agreed with A that the deed should operate as a mortgage. Still later B deeds the property to C. A now sues C to redeem the property. A wishes to prove B's declaration. B is available. Under § 1849 the evidence is admissible. Under Rule 63 (10) as originally drafted the evidence would be admissible. However, under that rule as amended by the Commission to require that declarant be unavailable the evidence would be inadmissible. § 1849 is therefore retained as a provision more liberal than Rule 63 (10) as revised.

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

COMMENT: Repeal. This, it seems, is the 19th Century version of the so-called Res Gestae doctrine. It should be regarded as superseded by URE Rule 63 (4) and should be repealed.

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

COMMENT: Repeal. Superseded by 63 (9) (c).

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

COMMENT: Repeal. Superseded by URE Pedigree Rules - 63 (23) - (27).

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

COMMENT: Repeal. Superseded by 63 (10).

§ 1855a. "When, in any action, it is desired to prove the contents of any public record or document lost or destroyed by conflagration or other public calamity and after proof of such loss or destruction, there is offered in proof of such contents (a) any abstract of title made and issued and certified as correct prior to such loss or destruction, and purporting to have been prepared and made in the ordinary course of business by any person, firm or corporation engaged in the business of preparing and making abstracts of title prior to such loss or destruction; (b) any abstract of title, or of any instrument affecting title, made, issued and certified as correct by any person, firm or corporation engaged in the business of insuring titles or issuing abstracts of title, to real estate whether the same was made, issued or certified before or after such loss or destruction and whether the same was made from the original records or from abstracts and notes, or either, taken from such records in the preparation and upkeep of its, or his, plant in the ordinary course of its business, the same may, without further proof, be admitted in evidence for the purpose aforesaid. No proof of the loss of the original document or instrument shall be required other than the fact that the same is not known to the party desiring to prove its contents to be in existence; provided, nevertheless, that any party so desiring to use said evidence shall give reasonable notice in writing to all other parties to the action who have appeared therein, of his intention to use the same at the trial of said action, and shall give all such parties a reasonable opportunity to inspect the same, and also the abstracts, memoranda, or notes from which it was compiled, and to take copies thereof."

COMMENT: No repeal. Remains in effect under 63 (32) or 63A. The destruction or loss of a document excuses non-production of the document as proof of its terms and lays a foundation for secondary evidence under both C.C.P. § 1855 and URE Rule 70. If, however, such secondary evidence is hearsay e.g., a certificate or an affidavit (cf. viva voce testimony of a witness who testifies from present memory as to the terms of the document,) we must find some exception to the hearsay rule to make it admissible. When the hearsay is in the form of a purported certificate, i.e., a certified copy by the custodian of the public document, the evidence (the hearsay) is admissible under Rule 63 (17) and its C.C.P. counterparts. § 1855a, however, deals with a special and different kind of hearsay, viz, the abstracts therein specified. These abstracts would not be made admissible by 63 (17). Possibly they would be admissible under 63 (13). In any event it seems wise to leave § 1855a intact in order to be sure that the method of proof therein provided for continues in force.

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

2. The act, declaration, or omission of a party, as evidence against such party;
3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto;
4. The act or declaration, verbal or written, of a deceased person in respect to the

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

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

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

7. The act, declaration, or omission forming part of a transaction, as explained in Section 1850;

8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter; ...

11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary; ...

13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family bibles, or other family books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree; ..."

COMMENT:

§ 1870 (2). Repeal. Superseded by 63 (7). Note: 63 (7) refers only to "statement." On the other hand § 1870 (2) refers to "act, declaration or omission." However, under Rule 62 (1) "statement" includes assertive acts or conduct. Under Rule 63

only statements are hearsay. Thus non-assertive acts or omissions are admissible as non-hearsay. Thus Rule 62 (1) plus Rule 63 plus 63 (7) would cover the area of "act, declaration or omission" of a party now embraced by § 1870 (2).

§ 1870 (3). Repeal. Superseded by 63 (8) (b).

§ 1870 (4). Repeal. Clause one superseded by 63 (23); clause two superseded by 63 (10); clause three superseded by 63 (5).

§ 1870 (5), first sentence. Repeal. Superseded by 63 (8) (a) and (9) (a).

§ 1870 (5), second sentence. No repeal. Continues in effect under 63 (32). See text at p. 10 .

§ 1870 (6). Repeal. Superseded by 63 (9) (b).

§ 1870 (7). Repeal. Superseded by 63 (4) (b).

§ 1870 (8). No repeal. Continues in effect under 63 (2) (6).

§ 1870 (11). Repeal. Superseded by 63 (27).

§ 1870 (13). Repeal. Superseded by 63 (26).

§ 1893. "Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing."

COMMENT: Repeal second clause. . . Second clause superseded by 63 (17).

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

COMMENT: Repeal. Superseded by 63 (17).

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

COMMENT: Repeal. Superseded by 63 (15) and (17).

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

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

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

COMMENT: Repeal. Superseded by 63 (15) and (17).

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

1. Acts of the executive of this state, by the records of the state department of the state; and of the United States, by the records of the state department of the United States, certified by the heads of those departments respectively. They may also be proved by public documents printed by order of the legislature or congress, or either house thereof.

2. The proceedings of the legislature of this state, or of congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk or printed by their order.

3. The acts of the executive, or the proceedings of the legislature of a sister state, in the same manner.

4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the executive of the United States.

5. Acts of a county or municipal corporation of this state, or of a board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book published by the

authority of such county or corporation.

6. Documents of any other class in this state, by the original, or by a copy, certified by the legal keeper thereof.

7. Documents of any other class in a sister state, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme, superior, or county court, or mayor of a city of such state, that the copy is duly certified by the officer having the legal custody of the original.

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

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

COMMENT: Repeal. Superseded by 63 (15) and (17) and 68.

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

COMMENT: Repeal. Superseded by 63 (15), (17) and (19).

§§ 1919a--1919b.

COMMENT: No repeal. Continues in effect under 63 (32).

These sections set up an elaborate system for proof by certified copy of the contents of church records. Rule 63 (17) does not seem to apply because church records are not "official" records and 63 (17) applies to proof by certified copy only of official records. 1919a and b gives us a means of proof not supplied by the URE and these sections should be retained.

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

COMMENT: Repeal. Superseded by 63 (15).

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

COMMENT: No repeal. Continues in effect under 63A. A "photographic copy" described in § 1920a would under 63 (17) and 1 (13) be "a writing purporting to be a copy of an official record." Rules 1 (13) and 63 (17) therefore make such photographic copy admissible. However, this is the type of

miniscule provision consistent with Rule 63 which Rule 63A is intended to continue in effect. See text at pp.13-15 .

§ 1920b. "A print, whether enlarged or not, from any photographic film including any photographic plate, microphotographic film, or photostatic negative, of any original record, document, instrument, plan, book or paper may be used in all instances that the original record, document, instrument, plan, book or paper might have been used, and shall have the full force and effect of said original for all purposes; provided, that at the time of the taking of said photographic film, microphotographic, photostatic or similar reproduction, the person or officer under whose direction and control the same was taken, attached thereto, or to the sealed container in which the same was placed and has been kept, or incorporated in said photographic film, microphotographic photostatic or similar reproduction, a certification complying with the provisions of Section 1923 of this code and stating the date on which, and the fact that, the same was so taken under his direction and control.

COMMENT: No repeal. Continues in effect under 63 (32). This is much broader than 63 (17). That does cover certified photographic copies (see above under § 1920a) but only such copies of official records. § 1920b, however, extends to certified photographic copies of any record, document or paper.

§ 1920b is a highly desirable provision, not incorporated in any of the URE provisions. It should be retained intact.

§ 1921. "A transcript from the record or docket of a justice of the peace of a sister state, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the

justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein."

COMMENT: Repeal. Superseded by 63 (17).

§ 1925. "A certificate of purchase, or of location, of any lands in this state, issued or made in pursuance of any law of the United States, or of this state, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a preemption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes."

COMMENT: No repeal. Continues in effect under 63 (32).

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

COMMENT: Repeal. Superseded by 63 (15).

§ 1927. "Whenever any patent for mineral lands within the State of California, issued or granted by the United States of America, shall contain a statement of the date of the location of a claim or claims, upon which the granting or issuance of such patent is based, such statement shall be prima facie evidence of the date of such location."

COMMENT: No repeal. Continues in effect under 63 (32).

§ 1927.5. "Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this State, derived from the Spanish or Mexican Governments, prepared under the supervision of the Keeper of the Archives, authenticated by the Surveyor-General or his successor and by the Keeper of the Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-6, are receivable as prima facie evidence in all the courts of this State with like force and effect as the originals and without proving the executing of such originals."

COMMENT: No repeal. Continues in effect under 63 (32).

§ 1928. "A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed."

COMMENT: No repeal. Continues in effect under 63 (32).

§§ 1928.1 - 1928.4. (These sections make admissible certain federal records or certified copies thereof respecting the status of certain persons as dead, alive, prisoner of war, interned, etc.)

COMMENT: No repeal. Continues in effect under 63 (32) and 63A.

§ 1935. "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest."

COMMENT: Query. What adjustment, if any, is required here depends on what finally becomes of 63 (30) and (31).

§ 1946. "The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:

1. When the entry was made against the interest of the person making it.
2. When it was made in a professional capacity and in the ordinary course of professional conduct.
3. When it was made in the performance of a duty specially enjoined by law."

COMMENT: Repeal. § 1946 (1) is superseded by 63 (10).

§ 1946 (2) is superseded by 63 (13). § 1946 (3) is superseded by 63 (16).

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

COMMENT: Repeal. Superseded by 63 (13).

§ 1948. "Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of such acknowledgement or proof is

prima facie evidence of the execution of the writing, in the same manner as if it were a conveyance of real property."

COMMENT: No repeal. Continues in force under 63 (32).

§ 1951. "Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may, together with the certificate of acknowledgement or proof, be read in evidence in an action or proceeding, without further proof; also, the original record of such conveyance or instrument thus acknowledged or proved, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof.

COMMENT: No repeal. Continues in effect under 63 (32) and 63A.

§§ 1953e - 1953h. (Uniform Business Records as Evidence Act.)

COMMENT: Repeal. Superseded by 63 (13).

§§ 2009 - 2015. (Use of Affidavits.)

COMMENT: No repeal. Continues in effect under 63 (2) (a).

§ 2047. "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced,

and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution."

COMMENT: Repeal second sentence, which is superseded by 63 (1) (c).

CIVIL CODE

(See below for comment on all the hearsay provisions of this Code.)

- § 166 (inventory prima facie evidence)
- § 224m (written statement relinquishing child reciting maker entitled to sole custody prima facie evidence of sole custody)
- § 1263 (declaration of homestead prima facie evidence of facts stated)
- § 2924 (certain recitals in deed prima facie evidence of facts recited)

COMMENT: No repeal of any of above provisions of the Civil Code. All continue in effect under 63 (32).

PENAL CODE

- § 315 (in prosecution for keeping house of ill-fame, character of house and inmates provable by reputation)

COMMENT: No repeal. Continues in effect under 63 (32).

- § 476a. (notice of protest admissible as proof of presentation, nonpayment and protest)

COMMENT: No repeal. Continues in effect under 63 (32).

§ 686 (former testimony)

COMMENT: No repeal. Continues in effect under 63 (2) (c).

§ 969(b) (judicial and penitentiary records
to establish prior conviction)

COMMENT: No repeal. Continues in effect under 63 (32) and 63A.

§ 1107 (in prosecution for forging note of
corporation, incorporation provable by
reputation)

COMMENT: No repeal. Continues in effect under 63 (32).

§§ 1334.2 - 1334.3 (certificate prima facie
evidence under Uniform Act to secure
the attendance of witnesses from with-
out the state in criminal cases)

COMMENT: No repeal. Continues in effect under 63 (32).

§ 4852.1 (records admissible in application
for restoration of rights)

COMMENT: No repeal. Continues in effect under 63 (32) and 63 A.

PROBATE CODE

§§ 329 and 372 (proof of execution of will
by establishing signature of sub-
scribing witness)

COMMENT: No repeal. Continue in force under 63 (32). See
discussion in text at p. 9-10.

§§ 351 and 374 (certain former testimony
admissible)

COMMENT: No repeal. Continued in force by 63 (2) (c).

§ 712. (Claim presented by notary,
certificate prima facie evidence
of presentation and date)

COMMENT: No repeal. Continues in force under 63 (32).

§ 853 (decree directing executor or
administrator to execute conveyance
prima facie evidence of correctness
of proceedings and authority to
make conveyance)

COMMENT: No repeal. Continues in force under 63 (32).

§ 1192 (decree determining identity of
heir prima facie evidence of fact
determined)

COMMENT: No repeal. Continues in force under 63 (32).

§ 1233 (affidavits admissible in uncontested
probate proceedings)

COMMENT: No repeal. Continues in force under 63 (2) (a).

AGRICULTURAL CODE

(See below for comment on all hearsay sections of this
Code.)

§ 160.97 (proof of failure to file report
creates presumption of no damage)

§ 438 (certain records, reports, audits,
certificates, findings, prima facie
evidence)

§ 746.4 (certain certificates prima facie
evidence)

§ 751 (like § 746.4 supra)

§ 768 (like § 746.4 supra)

§ 772 (like § 746.4 supra)

- § 782 (like § 746.4 supra)
- § 892.5 (certificates as to grade, quality and condition of barley prima facie evidence of truth)
- § 893 (like § 746.4 supra)
- § 920 (written analysis of state Seed Laboratory prima facie evidence of true analysis)
- § 1040 (like § 746.4 supra)
- § 1272 (like 746.4 supra)

COMMENT: No repeal of any of foregoing sections of Agricultural Code. All continue in force by virtue of 63 (32) or 63A or both.

BUSINESS AND PROFESSIONS CODE

(See below for comment on all hearsay provisions of this Code.)

- § 162 (certificate of custodian of records of Department of Professional and Vocational Standards prima facie evidence of certain facts)
- § 1001 (like § 4809 infra)
- § 2376 (clerk's record of suspension or revocation of certificate to practice medicine prima facie evidence)
- § 4809 (register of Board of Examiners in Veterinary Medicine prima facie evidence of matters contained therein)
- § 4881 (like § 2376 supra)
- § 6766 (certificate of registration presumptive evidence of fact)
- § 8532 (like § 8929 infra)

- § 8923 (certified copies of records in office of Yacht and Ship Brokers Commission)
- § 10078 (like § 8923 supra)
- § 14271 (trade-mark registration prima facie evidence of ownership)
- § 20768 (motor fuel pump license tag evidence of payment of license fee)

COMMENT: No repeal of any of foregoing sections of Business and Professions Code. All continue in force by virtue of 63 (32) or 63A or both.

CORPORATIONS CODE

See below for comment on all hearsay provisions of this Code.)

- § 832 (original or copy of by-laws or minutes prima facie evidence of adoption of by-laws, holding of meetings and action taken)
- § 833 (corporate seals as prima facie evidence of execution)
- § 3904 (certificate annexed to corporate conveyance prima facie evidence of facts authorizing conveyance)
- § 6500 (copy of designation of process agent sufficient evidence of appointment)
- § 6503 (certificate of Secretary of State of receipt of process prima facie evidence of such receipt)
- § 6600 (copy of articles of foreign corporation prima facie evidence of incorporation)

COMMENT: No repeal of any of foregoing sections of Corporation Code. All continue in force by virtue of 63 (32) or 63A or both.

EDUCATION CODE

(See below for comment on all hearsay provisions of this Code.)

- § 12913 (record of conviction admissible)
- §§ 23258 and 23260 (deed to Regents of University prima facie evidence of certain facts)
- § 16958 (copy of resolution declaring need for student transportation district admissible)

COMMENT: No repeal of any of foregoing provisions of Education Code. All continue in force by virtue of 63 (32) or 63A or both.

FINANCIAL CODE

(See below for comment on all hearsay provisions of this Code.)

- § 252 (papers executed by Superintendent admissible)
- § 255 (reports by Superintendent prima facie evidence of facts stated in such reports)
- § 3010 (certificate by Superintendent of Banks prima facie evidence of certain facts)
- § 9303 (verified copies of minutes presumptive evidence of holding and action of meeting)
- § 9616 (Commissioner's written statement of his determination of assets prima facie evidence of correctness of determination)

COMMENT: No repeal of any of foregoing sections of Financial Code. All continue in force by virtue of 63 (32) or 63A or both.

GOVERNMENT CODE

(See below for comment on all hearsay provisions of
this Code)

- § 23211 (verified petition prima facie evidence
of facts stated)
- § 23326 (like § 23211 supra)
- § 25172 (sheriff's return upon subpoena
prima facie evidence)
- § 26662 (return of sheriff on process or notices
prima facie evidence of facts stated
in return)
- § 27335 (certified copy of record prima facie
evidence of original stamp)
- § 38009 (certain affidavit prima facie evidence
of facts stated)

- § 39341 (deed of street superintendent prima facie evidence of facts recited)
- § 40807 (record with certificate prima facie evidence of contents, passage and publication of ordinance)
- § 50113 (certain certified copies admissible)
- § 50433 (proof of publication of notice by affidavit)
- § 50443 (resolution prima facie evidence of facts stated)
- § 53874 (deed prima facie evidence)

COMMENT: No repeal of any of foregoing sections of Government Code. All continue in force by virtue of 63 (2) (a) or 63 (32) or 63A.

HEALTH AND SAFETY CODE

(See below for comment on all hearsay provisions of this Code.)

- § 10577 (birth, death, marriage record prima facie evidence of facts stated)
- § 14840 (certificate prima facie evidence of facts stated)
- § 24207 (copy of resolution declaring need for air pollution control district, admissible)
- § 26339 (certificate of Chief of Division of Laboratories and Chief of Bureau of Food and Drug Inspections prima facie evidence of facts therein stated)
- § 26563 (like § 26339 supra)

COMMENT: No repeal of any of foregoing sections of Health and Safety Code. All continue in force by virtue of 63 (32) or 63A or both.

INSURANCE CODE

(See below for comment on all hearsay provisions of this Code.)

- § 38 (like § 11022 infra)
- § 772 (certain written statement prima facie evidence of certain facts)
- § 1740 (certificate of Commissioner certifying facts found after hearing prima facie evidence of facts)
- § 1819 (like § 1740 supra)
- § 11014 (Commissioner's certificate prima facie evidence of existence of society)
- § 11022 (affidavit of mailing admissible to show mailing)
- § 11028 (like § 11022 supra)
- § 11030 (printed copies of constitution of society prima facie evidence of legal adoption thereof)
- § 11139 (Commissioner's report prima facie evidence of facts stated)

COMMENT: No repeal of any of foregoing sections of Insurance Code. All continue in force by virtue of 63 (2) (a) or 63 (32) or 63A.

LABOR CODE

(See below for comment on all hearsay provisions of this Code.)

- § 1304 (failure to produce permit or certificate prima facie evidence of illegal employment)
- § 1813 (failure to file report prima facie evidence of no emergency)

- § 1851 (like § 1813 supra)
§ 6507 (admissibility of safety orders)

COMMENT: No repeal of any of foregoing provisions of Labor Code. All continue in force by virtue of 63 (32) or 63A or both.

PUBLIC RESOURCES CODE

(See below for comment on all hearsay provisions of this Code.)

- § 2311 (certificate of surveyor prima facie evidence)
§ 2318 (notice and affidavit prima facie evidence of certain facts)
§ 2320 (like § 2318 supra)
§ 2322 (record of location of mining claim admissible)
§ 2323 (copy of record admissible)
§ 2606 (grubstake contracts and prospecting agreements prima facie evidence)
§ 3234 (classified records)
§ 3428 (record of assessment prima facie evidence)
§ 5559 (like § 2318 supra)

COMMENT: No repeal of any of foregoing sections of Public Resources Code. All (save § 3234) continue in force by virtue of 63 (32) or 63A or both. § 3234 would continue effective in same way as Vehicle Code § 20013. See text at p. 8-9.

PUBLIC UTILITIES CODE

(See below for comment on all hearsay provisions of this Code.)

- § 1901 (copies of documents and orders evidence in like manner as originals)
- § 14358 (copy of order of exclusion prima facie evidence of exclusion)
- § 15531 (great register sufficient evidence)
- § 17510 (like § 14358 supra)
- § 27258 (like § 14358 supra)

COMMENT: No repeal of any of foregoing provisions of Public Utilities Code. All continue in force by virtue of 63 (32) or 63A or both.

REVENUE AND TAXATION CODE

(See below for comment on all hearsay provisions of this Code.)

- § 1842 (statement of secretary of board prima facie evidence of certain facts)
- § 1870 (copy of order prima facie evidence of regularity of proceedings)
- § 2634 (like § 2862 infra)
- § 2862 (roll showing unpaid taxes prima facie evidence of assessment, etc.)
- § 3004 (like § 2862 supra)
- § 3517 (deed prima facie evidence of certain facts)
- § 3520 (deed prima facie evidence)
- § 4376 (abstract list showing unpaid taxes prima facie evidence of certain facts)
- § 6714 (like § 10075 infra)
- § 7981 (copy of return prima facie evidence of certain facts)
- § 10075 (board's certificate prima facie evidence of certain facts)

- § 11473 (like § 10075 supra)
- § 12682 (controller's certificate prima facie evidence of certain facts)
- § 12834 (controller's lists prima facie evidence of certain facts contained therein)
- § 15576 (appraiser's report prima facie evidence of value of gift)
- § 16122 (controller's certificate prima facie evidence of imposition of tax)
- § 18600 (certificate of Franchise Tax Board prima facie evidence of assessment)
- § 18647 (certificate of Franchise Tax Board prima facie evidence of certain facts)
- § 18834 (like § 18647 supra)
- § 19403 (like § 18647 supra)
- § 23302 (certificate of Secretary of State prima facie evidence of suspension or forfeiture)
- § 25669 (certificate of Franchise Tax Board prima facie evidence of certain facts)
- § 25761b (findings of Franchise Tax Board prima facie evidence of certain facts)
- § 26252 (like § 25669 supra)
- § 30303 (certificate of board prima facie evidence of certain facts)

COMMENT: No repeal of any of foregoing sections of Revenue and Taxation Code. All continue in force by virtue of 63 (32) or 63A.

UNEMPLOYMENT INSURANCE CODE

- § 1854 (certificate prima facie evidence of certain facts)

COMMENT: No repeal. Continues in force under 63 (32).

VEHICLE CODE

§ 20013 (accident report not admissible)

COMMENT: No repeal. See text at pp. 8-9.

§ 40806 (on plea of guilty court may consider police report, giving defendant notice and opportunity to be heard)

COMMENT: No repeal. Continues in force under 63A.

§ 40832 (revocation or suspension of license by department not admissible in any civil action)

COMMENT: No repeal. See text at pp. 8-9.

§§ 40833 and 16005 (departmental action not evidence on issue of negligence)

COMMENT: No repeal. See text at pp. 8-9.

§ 41103 (proof of notice by certificate or affidavit)

COMMENT: No repeal. Continues in force by virtue of 63 (2) (a) and 63 (32).

WELFARE AND INSTITUTIONS CODE

(See below for comment)

§ 5355 (evidence of bad repute in proceedings to commit drug addict)

§ 6738 (certificate prima facie evidence of sanity)

COMMENT: No repeal. These sections continue in force by virtue of 63 (32).

Respectfully submitted,

James H. Chadbourn

mtg.

SUPPLEMENTAL MEMORANDUM IN RE INCORPORATING
RULES 62-66 IN THE CALIFORNIA CODES

This supplemental memo discusses several code provisions which are germane to the subject of the original memo but which had not been discovered when that memo was written.

References herein to 63(32) and 63(A) mean subdivision (32) of Rule 63 proposed in the original memo as a new subdivision (See p. 13 of the original memo) and Rule 63(A) proposed in the original memo as a new Rule (See p. 14 of the original memo).

CODE OF CIVIL PROCEDURE

§ 17. "... The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context: ... 7. The word 'state,' when applied to the different parts of the United States, includes the District of Columbia and the territories ..."

COMMENT: Rule 62(5) provides "'State' includes the District of Columbia." Rule 63(15) refers to "state or territory of the United States" Rule 63(19) refers to "state or nation".

Recommendation: omit subdivision (5) of Rule 62, as not needed in view of the provisions of C.C.P. § 17(7). Although the latter defines "state" to include both D.C. and the territories, this would not change the scope of 63(15) which expressly includes territories. Nor would it change what we suspect to be the intent of 63(19), namely that it is intended to apply to territorial records.

§ 273. "The report of the official reporter, or official reporter pro tempore, of any court, duly appointed and sworn, when transcribed and certified as being a correct transcript of testimony and proceedings in the case, is prima facie evidence of such testimony and proceedings."

COMMENT: NO repeal. Continues in force under proposed Rule 63A.

§ 1846. "A witness can be heard only upon oath or affirmation, and upon a trial he can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine."

COMMENT: NO repeal. Possibly a witness's statements made at a hearing upon private or ex parte examination of the witness would not fall within the Rule 63 definition of hearsay. Therefore, § 1846 had better remain as a protection against such private or ex parte examination.

§ 1854. "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence."

COMMENT: NO repeal. To the extent that this section makes hearsay admissible, we may regard the section as a special exception to the hearsay rule.

Under proposed new exception 63(32), § 1854 would be continued in operation.

CIVIL CODE

§ 226 (statement of person in connection with adoption proceedings that person is entitled to custody of child prima facie evidence of fact)

- § 1183.5 (certain recitals in military certificate or jurat prima facie evidence of truth thereof)
- § 1189 (out-of-state certificate of acknowledgment prima facie evidence of facts stated in certificate)
- § 1190.1 (certificate of acknowledgment by corporation prima facie evidence instrument act of corporation pursuant to by-laws)
- § 1207 (certified copy of record of defectively executed instrument admissible)
- § 1810.2 (certain record notation of mailing and date prima facie evidence of such mailing)
- § 2471 (certain certified copies of entries by clerk and certain affidavits by printer presumptive evidence of facts stated)

COMMENT: NO repeal of any of foregoing. All continue in operation by virtue of 63(32) or 63A or both.

PENAL CODE

- § 269b (recorded certificate of marriage or certified copy "proves the marriage" for purposes of prosecution for adultery)
- § 939.6 (grand jury shall receive "none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.")
- § 1192.4 (withdrawn plea of guilty may not be received in evidence)

COMMENT: NO repeal of § 269b. That is continued in operation by 63(A).

PENAL CODE

§ 939.6. In the investigation of a charge, the grand jury shall receive no other evidence than such as is given by witnesses produced and sworn before the grand jury, furnished by legal documentary evidence, or the deposition of a witness in the cases mentioned in subdivision 3 of Section 686. The grand jury shall receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

Repeal § 939.6. Under Rule 2, the Uniform Rules seem to apply to grand jury investigations. Since this seems to be so and since § 939.6 may be more restrictive than the Uniform Rules on the question of what is "legal evidence", it seems desirable to repeal the section.

No repeal of § 1192.4. This qualifies the admissions principle as stated in subdivision (7) of Rule 63. However, no adjustment of the Rule seems necessary. (See original memo at pp. 8-9.)

PROBATE CODE

- § 545 (certain entries in register of actions prima facie evidence)
- § 1174 (judgment establishing death prima facie evidence of death)
- § 1435.7 (certain medical certificate prima facie evidence of facts stated therein)
- § 1461 (certain affidavits prima facie evidence of facts stated therein)
- §§ 1653-1654, (certain certificates prima facie evidence)
1662.5,
and
1664

COMMENT: NO repeal of any of foregoing. All continue in operation by virtue of 63(32) or 63A or both.

CORPORATIONS CODE

- § 15011 ("An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this act is evidence against the partnership.")

COMMENT: NO repeal. Continues in force under 63(A).

STREETS AND HIGHWAYS CODE

- § 6614 (bond prima facie evidence)
§§ 6768 and (certificate prima facie
6790 evidence)
§ 10423 (deed of tax collector prima
facie evidence of matters it
recites)
§ 22178 (like § 10423)

COMMENT: NO repeal of any of foregoing. All continue in
operation by virtue of 63(32) or 63(A) or both.

Respectfully submitted,

James H. Chadbourn