Meeting

3/1/61

Memorandum No 10 (1961)

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

Description of Attached Material. The attached material (green pages) includes a draft of a letter of transmittal and a draft of a tentative recommendation on Article VIII of the Uniform Rules of Evidence. This material incorporates the changes made by the Commission at its February 1961 meeting.

The text of the revised rules is set out in the form in which the text was approved by the Commission except for a few minor revisions hereinafter specifically noted. Below the text of each rule or subdivision of a rule is a comment. These comments have not been approved by the Commission.

We have made the changes in the text of the rules that were adopted by the Commission at its February 1961 meeting. These changes can be determined by an examination of the minutes of the February meeting already distributed to you. We have revised the comments to conform to these changes. If you noted defects in the earlier version of the tentative recommendation it is suggested that you examine the attached version to determine if the defect still exists. Also, please read the attached version of the tentative recommendation carefully because we have made a number of changes from the earlier version.

Matters Noted for Special Attention. Each comment explaining a rule or subdivision of a rule should, of course, be carefully studied. In addition a number of matters are noted below for special attention in connection with this tentative recommendation.

Rule 63(30)

This subdivision has been revised according to the decision of the Commission at its February 1961 meeting.

The State Bar Committee suggests that the subdivision be revised to read as follows:

(30) Evidence of [~~statements of~~] matters, other than opinions, which are of general interest to persons engaged in an occupation, contained in a tabulation, list, directory, register, [~~periodical~~] or other published compilation [~~to prove the truth of any relevant matter so stated~~] if the judge finds that the [~~compilation is published for use~~] information is generally used and relied upon by persons engaged in that occupation [~~and is generally used and relied upon by them~~] for the same purpose or for purposes for which the information is offered in evidence.

The phrase "to prove the truth of any relevant matter so stated" which the Bar has stricken in its suggestion is probably unnecessary, for under the basic statement of Rule 63 the evidence is not hearsay if it is not introduced for that purpose.

Rule 63(31)

The Bar Committee reports that its northern section approves of the action of the Commission, but the southern section prefers the original proposal contained in the URE with the following modifications:

> (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~~] finds that the treatise, periodical or pamphlet is a reliable authority in the subject.

However, the southern section reports that, in the interest of unanimity, it is willing to accept the action of the Commission and the northern section.

Rule 63(32)

This subdivision has been revised according to the decision of the Commission at its February 1961 meeting.

The northern section of the State Bar Committee has not considered this addition to the Uniform Rules. The sourthern section believes that the language is inexact. It states that "any hearsay evidence

not admissible under subdivisions (1) through (31)" indicates that these subdivisions state rules of inadmissibility. Actually, it is Rule 63 that declares certain evidence is not admissible and subdivisions (1) through (31) merely declare that certain evidence is not inadmissible. The southern section suggests the following revision of subdivision (32):

(32) Any hearsay evidence not admissible under [~~subdivisions (1) through (31) of~~] this Rule 63 but declared by some other law of this State to be admissible.

The revision suggested above is not technically accurate because subdivision (32) will be a part of Rule 63 and will provide that the hearsay rule does not prevent the admission of certain hearsay evidence.

A technically accurate subdivision that will meet the objection of the southern section is set out below:

(32) Any hearsay evidence [~~not admissible under~~] that does not fall within an exception provided by subdivisions (1) through (31) of this rule, but is declared by some other law of this State to be admissible.

The changes shown above are directed to subdivision (32) as approved by the Commission.

However, it is difficult to see why it is necessary to determine that the hearsay sought to be introduced is inadmissible under Rule 63 before reliance may be placed on another law. The same result might be achieved if the subdivision were revised to read:

(32) Hearsay evidence declared to be admissible by any other law of this State.

This suggested revision has been incorporated in the tentative recommendation.

Rule 63A.

Rule 63A was approved by the Commission in substantially the following form:

> 63A. Where hearsay evidence falls within an exception provided by subdivisions (1) through (31) of the Rule 63 and when such evidence is also declared to be admissible by some law of this State other than such subdivision, such subdivision shall not be construed to repeal such other law.

The northern section of the Bar Committee has not considered this rule. The southern section has approved it.

The staff suggests that Rule 63A be revised to save other laws both consistent and inconsistent with subdivisions (1) through (31) of Rule 63. The following language is suggested:

> 63A. Where hearsay evidence is declared to be admissible by any law of this State, nothing in Rule 63 shall be construed to repeal such law.

This suggested revision has been incorporated in the tentative recommendation.

This rule has been revised to insert the words "other than Rule 7" according to the decision of the Commission at its February 1961 meeting. The staff believes this addition is both unnecessary and confusing.

Rule 64.

The Bar Committee has agreed to the inclusion of a reference to Rule 63(29) in this rule. But it reports that it is unable to understand the action of the Commission in deleting the references to subdivisions (16), (17), (18) and (19). As pointed out previously, there does seem to be some inconsistency in this action of the Commission. An original official record must be served under Rule 64, but a copy of the same record is admissible without such service. A record of an action by a public official must be served under Rule 64, but an official report of an action by someone other than a public official is not subject to this requirement. Under Rule 63(15) a report of a marriage performed by a judge is inadmissible unless Rule 64 is complied with, but under Rule 63(16) a report of a marriage performed by a minister is admissible without complying with Rule 64.

Rule 66.

The second paragraph of the proposed Law Revision Commission comment to Rule 66 is not in accordance with Professor Chadbourn's analysis of this Rule. Professor Chadbcurn does not believe that the rule applies to any more than "double hearsay." His study on this rule raises the possibility that the rule may be construed to exclude triple hearsay. The staff, however, believes that multiple hearsay may be reached by repeated applications of Rule 66. For instance, if former testimony (Rule 63(3)) is to an admission (Rule 63(7)) and is sought to be proved by a properly authenticated copy (Rule 63(17)) of the official report (Rule 63(15)) of such testimony, the copy is within an exception and is not inadmissible on the ground that it is offered to prove the official report of the testimony, for the official report is within an exception. The official report is not inadmissible on the ground that it relates prior testimony, for the prior testimony is

within an exception. The former testimony is not inadmissible on the ground that it includes an admission, for the admission is within an exception.

However, if the Commission believes that Rule 66 is not sufficiently clear, the staff believes that it may be clarified by revising it to read as follows:

> Rule 66. A statement within the scope of an exception to Rule 63 is not inadmissible on the ground that [~~it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself~~] the evidence of such statement is hearsay evidence if the hearsay evidence of such statement consists of one or more statements each of which meets the requirements of an exception to Rule 63.

Professor Chadbourn included in his study another suggested revision of Rule 66 in order to solve the problem. However, he did not recommend its approval because he believed the courts would work out the solution to the problem without legislative guidance. His proposed revision is as follows:

> 66. A statement within the scope of an exception to Rule 63 shall not be inadmissible on the ground that it includes [~~a statement made by another declarant~~] one or more statements by an additional declarant or declarants and is offered to prove the truth of the included statement or statements if such included statement [~~itself~~] meets or such included statements meet the requirements of an exception or exceptions.

Adjustments and Repeals of Existing Statutes

The adjustments and repeals set out in the draft of the tentative recommendation are in accord with decisions previously made by the Commission except as noted below.

C.C.P. Section 1951 has been revised to conform it to Rule 63(19). This is in accord with a previous decision by the Commission but the Commission has never considered what changes should be made in Section 1951 to conform it to Rule 63(19).

C.C.P. Section 2047 has been revised to make it consistent with Rule 63(1)(c) and to delete the last sentence which is superseded by Rule 63(1)(c). The Commission has never considered the specific revision suggested in the draft of the tentative recommendation.

Additional adjustments of existing statutes will be recommended in the Supplement to Memorandum No. 7(1961) (to be sent).

Respectfully submitted,

John H. DeMoully
Executive Secretary

mtg

[COVER]

State of California

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

THE UNIFORM RULES OF EVIDENCE

Article VIII. Hearsay Evidence

July 1961

LETTER OF TRANSMITTAL

To HIS EXCELLENCY EDMUND G. BROWN
Governor of California
and to the Members of the Legislature

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

The Commission herewith submits a preliminary report containing its tentative recommendation concerning Article VIII (Hearsay Evidence) of the Uniform Rules of Evidence and the research study relating thereto prepared by its research consultant, Professor James H. Chadbourn of the School of Law, University of California at Los Angeles. This report covers the portion of the Uniform Rules upon which preliminary work has been completed by the Commission. Other portions of the Uniform Rules will be covered in subsequent reports.

The tentative recommendation of the Law Revision Commission concerning Article VIII of the Uniform Rules of Evidence is being released at this time so that interested members of the bench and bar will have an opportunity to study the tentative recommendation carefully and give the Commission the benefit of their detailed comments and criticisms. These comments and criticisms will be considered by the

Commission in formulating its final recommendation which will cover all of the Uniform Rules of Evidence. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford, California.

The Commission wishes to acknowledge the very substantial assistance it has received from its able and tireless research consultant, Professor James H. Chadbourn, and from the Special State Bar Committee appointed to study the Uniform Rules of Evidence: Mr. Joseph A. Ball, Chairman, Mr. Lawrence C. Baker, Vice Chairman, Mr. Stanley A. Barker, Vice Chairman, Southern Section, Mr. John B. Bates, Mr. Bryant M. Bennett, Mr. Warren M. Christopher, Mr. Morse Erskine, Sr., Mr. William J. Hayes, Mr. Stuart L. Kadison, Mr. Otto M. Kaus, Mr. Moses Lasky, Mr. Robert M. Newell, Mr. Jesse E. Nichols, Mr. W. Burleigh Pattee, Mr. William J. Schall, and Mr. J. E. Simpson. [Note: Membership of State Bar Committee will be corrected to reflect membership of Committee as of the date of publication.]

Herman F. Selvin, Chairman

John R. McDonough, Jr., Vice Chairman

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Executive Secretary

July 1961

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A STUDY RELATING TO ARTICLE VIII OF THE UNIFORM RULES OF EVIDENCE ----------

(topical analysis will follow of study)

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

THE UNIFORM RULES OF EVIDENCE

Article VIII. Hearsay Evidence

The Uniform Rules of Evidence (hereinafter sometimes designated as "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.[1] In 1956 the Legislature authorized and directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.

The Law Revision Commission has completed a careful study of Article VIII of the Uniform Rules of Evidence. This article, consisting of Rules 62 through 66, relates to the admissibility of hearsay evidence in proceedings conducted by or under the supervision of a court. The tentative recommendation of the Commission on Article VIII is set forth herein.

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[1] A copy of a printed pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is 60 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

GENERAL SCHEME OF UNIFORM RULES OF EVIDENCE

The Commission's tentative recommendation on URE Rules 62-66 must be read in the context of the general scheme of the Uniform Rules of Evidence, the essence of which lies in Rule 7:

> Rule 7. General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules. Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible.

The explanatory comment of the Commissioners on Uniform State Laws on Rule 7 is as follows:

> This rule is essential to the general policy and plan of this work. It wipes the slate clean of all disqualifications of witnesses, privileges and limitations on the admissibility of relevant evidence. Then harmony and uniformity are achieved by writing back onto the slate the limitations and exceptions desired. All of the other rules, except the very few touching upon related matters or procedure, revolve around and are limitations on and modifications of Rule 7. This is not a new approach. It follows the pattern of the A.L.I. Model Code of Evidence, which in turn was based on the concept of Professor Thayer and others that all things relevant or logically probative are prima facie admissible unless limitations are imposed by another rule.
>
> Thus all relevant hearsay would be admissible under this rule but for Rule 63 which bars hearsay generally, with carefully specified exceptions.
>
> Illegally acquired evidence may be inadmissible on constitutional grounds -- not because it is irrelevant. Any constitutional questions which may arise are inherent and may, of course, be raised independently of this rule. [Emphasis added]

With one important qualification, which is discussed in the comment which follows it, the opening paragraph of URE Rule 63 states the basic

common-law rule of the inadmissibility of extrajudicial declarations offered to prove the truth of the matter stated -- i.e., "hearsay" evidence:

> 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:

Subdivisions (1) through (31) of URE Rule 63 state a series of exceptions to the general rule of the inadmissibility of hearsay evidence stated in the opening paragraph of the Rule. The comment of the Commissioners on Uniform State Laws on the general scheme of Rule 63 is as follows:

> This rule follows Wigmore in defining hearsay as an extrajudicial statement which is offered to prove the truth of the matter stated . . . . The policy of the rule is to make all hearsay, even though relevant, inadmissible except to the extent that hearsay statements are admissible by the exceptions under this rule. In no instance is an exception based solely upon the idea of necessity arising from the fact of the unavailability of the declarant as a witness . . . . The traditional policy is adhered to, namely that the probative value of hearsay is not a mere matter of weight for the trier of fact but that its having any value at all depends primarily upon the circumstances under which the statement was made. The element of unavailability of the declarant or the fact that the statement is the best evidence available is a factor in a very limited number of situations, but for the most part is a relatively minor factor or no factor at all. Most of the following exceptions are the expressions of common law exceptions to the hearsay rule. Where there is lack of uniformity among the states with respect to a particular exception a serious effort has been made to state the rule which seems most sensible or which reflects the weight of authority . . . . The exceptions reflect some broadening of scope as will be noted in the comments under the particular sections. These changes not only have the support of experience in long usage in some areas but have the support of the best legal talent in the field of evidence. Yet they are conservative changes and represent a rational middle ground between the extremes of thought and should be acceptable in any fact-finding tribunal, whether jury, judge or administrative body.

By way of contrast to the systematic and comprehensive approach of the Uniform Rules relating to hearsay evidence, the existing California

law is both unsystematic and incomplete. Although this State has numerous statutory provisions relating to hearsay evidence, there is no statutory definition of hearsay evidence. Nor are the existing exceptions to the general rule that hearsay evidence is inadmissible clearly stated as such. Moreover, the existing statutes relating to hearsay are not systematically compiled to facilitate reference to them.

The Commission approves the general scheme of the Uniform Rules relating to hearsay evidence.

REVISION OF URE RULES 62-66

The Law Revision Commission tentatively recommends that URE Rules 62-66 be revised as hereinafter indicated. It will be seen that the Commission has concluded that many changes should be made in Rules 62-66. In some cases the suggested changes go only to language. In others, however, they reflect a considerably different point of view on matters of substance from that taken by the Commissioners on Uniform State Laws. In virtually all such instances the rule proposed by the Law Revision Commission is less liberal as to the admissibility of hearsay evidence than that proposed by the Commissioners on Uniform State Laws. Nevertheless, the tentative recommendation of the Commission would make a considerably broader range of hearsay evidence admissible in the courts of this State than is presently the case.

In the discussion which follows, the text of the Uniform Rule or a subdivision thereof is set forth as proposed by the Commissioners on Uniform State Laws with the amendments tentatively recommended by the Law Revision Commission shown in strike-out and italics. Each provision is followed by a comment of the Law Revision Commission. Where the

Commission has proposed a modification which relates only to the form of the rule or the purpose of which is obvious upon first reading, no explanation of the Commission's revision is stated. In other cases the reasons for the Law Revision Commission's disagreement with the Commissioners on Uniform State Laws are stated. For a detailed analysis of the various rules, see the research study prepared by the Commission's research consultant.

(34)

RULE 62. DEFINITIONS.

Rule 62. As used in [~~Rule 63 and its exceptions and in the following rules,~~] Rules 62 through 66:

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

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

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

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

(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 paragraph (a) of this subdivision.

(5) "State" includes each of the United States and the District of Columbia.

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

(6) [~~(7)~~] Except as otherwise provided in subdivision (7) of this rule, "unavailable as a witness" includes situations where the [~~witness~~] declarant is:

(a) Exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant. [~~, or~~]

(b) Disqualified from testifying to the matter. [~~, or~~]

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

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

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

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

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

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

COMMENT

This Rule defines terms used in Rules 62 - 66. The Rule as proposed by the Commissioners on Uniform State Laws has been considerably revised in form in the interest of clarity of statement and subdivision (6) thereof has been omitted because "a business" is used only in subdivisions (13) and (14) of Rule 63 and the term is defined there.

RULE 63. HEARSAY EVIDENCE EXCLUDED - EXCEPTIONS.

Opening Paragraph: General Rule Excluding Hearsay Evidence.

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

COMMENT

This language, prior to the word "except," states the hearsay rule in its classical form, with one qualification: because the word "statement" as used herein is elsewhere defined (Rule 62(1)) to mean only oral or written expression and assertive nonverbal conduct -- i.e., nonverbal conduct intended by the actor as a substitute for words in expressing a matter -- it excludes from hearsay at least some types of nonassertive conduct which our courts today would probably regard as amounting to extrajudicial declarations and thus hearsay, e.g., the flight of X as evidence that he committed a crime. The Commission agrees with the draftsmen of the URE that evidence of nonassertive conduct should not be regarded as hearsay for two reasons. First, such evidence, being nonassertive, does not involve the veracity of the declarant and one of the principal purposes of the hearsay rule is to subject the veracity of the declarant to cross-examination. Second, there is frequently a guarantee of the trustworthiness of the inference to be drawn from such nonassertive conduct in that the conduct itself evidences the actor's own belief in and hence the truth of the

matter inferred. To put the matter another way, in such cases actions speak louder than words.

The word "except" introduces 31 subdivisions which define various exceptions to the hearsay rule. These and several additional subdivisions added by the Commission are commented upon individually below.

Subdivision (1): Previous Statement of Trial Witness.

(1) [~~A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;~~] 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.

COMMENT

The Commission recommends against adoption of Rule 63(1) of the URE, which would make admissible any extrajudicial statement which was made by a declarant who is present at the hearing and available for cross-examination. URE 63(1) would permit a party to put in his case through written statements carefully prepared in his attorney's office, thus enabling him to present a smoothly coherent story which could often not be duplicated on direct examination of the declarant. Even if the declarant were then called to the stand by the adverse party and cross-examined the net impact of his testimony would often, the Commission believes, be considerably stronger than it would have been had the witness's story been told on the stand in its entirety. Inasmuch as the declarant is, by definition, available to testify in open court the Commission does not believe that so broad an exception to the hearsay rule is warranted.

The Commission recommends, instead, that the present law respecting the admissibility of out-of-court declarations of trial witnesses be codified with some revisions. Accordingly, paragraph (a) restates the present law respecting the admissibility of prior inconsistent statements and paragraph (b) substantially restates the present law regarding the

admissibility of prior consistent statements except that in both instances the extrajudicial declarations are admitted as substantive evidence in the cause rather than, as at the present, solely to impeach the witness in the case of prior inconsistent statements and, in the case of prior consistent statements, to rebut a charge of recent fabrication. The Commission believes that it is not realistic to expect a jury to understand and apply the subtle distinctions taken in the present law as to the purposes for which the extrajudicial statements of a trial witness may and may not be used. Moreover, when a party needs to use a prior inconsistent statement of a witness at the trial as necessary evidence in order to make out his prima facie case or his defense, he should be able to use the statement as substantive evidence. In many cases the prior inconsistent statement is more likely to be true than the testimony of the witness at the trial.

Paragraph (c), which makes admissible what is usually referred to as "past recollection recorded," makes no radical departure from existing law. The language stating the circumstances under which such evidence may be introduced, which the Commission believes provide sufficient safeguards of the trustworthiness of such statements to warrant their admission into evidence, is taken largely from and embodies the substance of the language of C.C.P. § 2047. There are, however, two substantive differences between paragraph (c) and existing California law:

First, our present law requires that a foundation be laid for the admission of such evidence by showing (1) that the writing recording the statement was made by the witness or under his direction, (2) that the writing was made at a time when the facts recorded in the writing actually occurred or at such other time when the facts were fresh in his memory and (3) that the witness knows that the facts are correctly stated in the writing. On the other hand, under paragraph (c) the writing may be made

not only by the witness himself or under his direction but also by some other person for the purpose of recording the witness's statement at the time it was made. In addition, since there is no requirement under paragraph (c) that the witness himself know that the writing is a correct record of his statement, the testimony of the person who recorded the statement may be used to establish that the writing is a correct record of the statement. The foundation requirement of the present law excludes any record of a declarant's statement if the person recording the statement was not acting "under the direction" of the declarant. Yet such a statement is trustworthy if the declarant is available to testify that he made a true statement and the person who recorded the statement is available to testify that he accurately recorded the statement.

Second, under paragraph (c) the document or other writing embodying the statement is admissible while under the present law the declarant reads the writing on the witness stand and it is not otherwise made a part of the record.

Subdivision (2): Affidavits; Depositions Taken in the Action; Testimony at Preliminary Examination or Former Trial in Criminal Action.

(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 at the preliminary examination in the criminal action or proceeding in which it is offered.

(d) Testimony given by a witness at a former trial of the criminal action or proceeding in which it is offered.

COMMENT

Paragraph (a) embodies the substance of subdivision (2) of the URE Rule 63. Both simply preserve the existing law respecting the admissibility of affidavits which, being extrajudicial statements, are hearsay. The Commission is not aware of any defects in or dissatisfaction with the existing law on this subject.

Paragraph (b) preserves the existing law concerning the admissibility of depositions taken in the action or proceeding in which they are offered. The Commission recommends against the adoption of URE 63(3) insofar as it would make admissible as substantive evidence any deposition "taken for use as testimony in the trial of the action in which it is offered " without

special circumstances a the nonavailability of the deponent. In 1957 the Legislature enacted a statute (C.C.P. §§ 2016-2035) dealing comprehensively with discovery, including provisions relating to the taking and admissibility of depositions (C.C.P. § 2016 et seq.). The provisions then enacted respecting admissibility of depositions are narrower than URE Rule 63(3). The Commission believes that it would be unwise to recommend revision of the 1957 legislation at this time, before substantial experience has been had thereunder.

Paragraph (c) preserves the existing law (Penal Code § 686) insofar as it makes admissible in a criminal action testimony taken at the preliminary examination therein. There is no equivalent provision in the URE but there is no indication that the draftsmen expressly intended Rule 63 to make such evidence inadmissible; rather, it would appear that the omission of an exception to the hearsay rule for such evidence was an oversight.

Paragraph (d) preserves the existing law (Penal Code § 686) insofar as it makes admissible testimony given by a witness at a former trial of the criminal action or proceeding in which it is offered. There is no equivalent provision in the URE but, again, this appears to be due to oversight rather than to deliberate omission.

This subdivision is merely a specific application of the principle reflected in Rule 63(32) and Rule 63A that the Uniform Rules should not make inadmissible hearsay evidence that is admissible under existing California statutes.

Subdivision (2a): Testimony in Former Action Between Same Parties.

(2a) In a civil action or proceeding, testimony of a witness given in a former action or proceeding between the same parties or their predecessors in interest, relating to the same matter, if the judge finds that the declarant is unavailable as a witness. As used in this subdivision "former action or proceeding" includes not only another action or proceeding but also a former hearing or trial of the same action or proceeding in which the statement is offered.

COMMENT

There is no equivalent provision in the URE but its absence appears to be due to oversight rather than deliberate ommission.

The proposed provision restates the existing law - C.C.P. § 1870(8) as interpreted by the California courts - except that it will permit such evidence to be introduced in a wider range of cases than does existing law which conditions admissibility of testimony in a former action or prior trial upon the witness's being deceased, out of the jurisdiction or unable to testify. "Unavailable as a witness" is defined in Rule 62 and includes, in addition to these cases, situations in which the witness is exempted from testifying on the ground of privilege or is disqualified from testifying. The Commission perceives no reason why the general definition of unavailability which it has recommended for the purpose of exceptions to the hearsay rule should not be applicable here. There would seem to be no valid distinction between admitting the testimony of a dead witness and admitting that of one who is legally not available.

Subdivision (3): Testimony in Another Action or Proceeding.

(3) [Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;] Subject to the same limitations and objections as though the declarant were testifying in person, 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 examination in the other action or proceeding is not admissible.

COMMENT

This proposed provision is a modification of URE 63(3)(b). The modification narrows the scope of the exception to the hearsay rule which is proposed by the Commissioners on Uniform State Laws. At the same time this provision goes beyond existing California law which admits testimony taken in another legal proceeding only if the other proceeding was a former action between the same parties, relating to the same matter, or was a former trial or a preliminary hearing in the action or proceeding in which the testimony is offered.

There are two substantial preliminary qualifications of admissibility in the proposed rule: (1) the declarant must be unavailable as a witness and (2) the testimony is subject to the same limitations and objections as

though the declarant were testifying in person. In addition, the testimony is made admissible only in the quite limited circumstances described in paragraphs (a), (b) and (c). The Commission believes that with these limitations and safeguards it is better to admit than to exclude the former testimony because it may in particular cases be of critical importance to a just decision of the cause in which it is offered.

The reason for the deletion of URE 63(3)(a) is stated in the comment to URE 63(2).

Subdivision (4): Contemporaneous and Spontaneous Statements.

(4) A statement:

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

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

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

COMMENT

Paragraph (a) appears to go beyond existing law except to the extent that statements of this character would be admitted by trial judges today "as a part of the res gestae." The Commission believes that there is an adequate guarantee of the trustworthiness of such statements in the contemporaneousness of the declarant's perception of the event and his narration of it; in such a situation there is obviously no problem of recollection

and virtually no opportunity for fabrication.

Paragraph (b) is a codification of the existing exception to the hearsay rule which makes excited statements admissible. The rationale of this exception is that the spontaneity of such statements and the declarant's state of mind at the time when they are made provide an adequate guarantee of their trustworthiness.

After very considerable thought and discussion the Commission decided to recommend against the enactment of URE 63(4)(c). Its decision was not an easy one to reach. Rule 63(4)(c) would make the statements with which it is concerned admissible only when the declarant is unavailable as a witness; hence its rejection will doubtless exclude the only available evidence in some cases where, if admitted and believed, such evidence might have resulted in a different decision. The Commission was substantially influenced in reaching its decision by the fact that Rule 63(4)(c) would make routinely taken statements of witnesses in physical injury actions admissible whenever such witnesses were, for any reason, unavailable at the trial. Both the authorship (in the sense of reduction to writing) and the accuracy of such statements are open to considerable doubt. Moreover, as such litigation and preparation therefor is routinely handled it seems likely that defendants would far more often be in possession of statements meeting the specifications of Rule 63(4)(c) than would plaintiffs and it seems undesirable thus to weight the scales in a type of action which is so predominant in our courts.

Subdivision (5): Dying Declarations.

(5) A statement by a person unavailable as a witness because of his death 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. [¶]

COMMENT

This is a broadened form of the well-established exception to the hearsay rule which makes dying declarations admissible. The existing law - C.C.P. § 1870(4) as interpreted by our courts makes such declarations admissible only in criminal homocide actions and only when they relate to the immediate cause of the declarant's death. The Commission believes that the rationale of the present exception--that men are not apt to lie in the shadow of death--is as applicable to any other declaration that a dying man might make as it is to a statement regarding the immediate cause of his death. Moreover, it perceives no rational basis for differentiating, for the purpose of the admissibility of dying declarations, between civil and criminal actions or among various types of criminal actions.

The Commission has rearranged and restated the language relating to the declarant's state of mind regarding the impendency of death, substituting the language of C.C.P. § 1870(4) for that of the draftsmen of the URE. It has also added the requirement that the statement be one made upon the

personal knowledge of the declarant. The Commission's research consultant suggests that the omission of this language from URE 63(5) was probably an oversight; in any event it seems desirable to make it clear that "double hearsay" and the declarant's conjecture as to the matter in question are not admissible.

Subdivision (6): Confessions.

~~(6) [In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged [is] and only if, the judge finds that the accused when making the statement was conscious and was capable of understanding what he said and did, and that he was not induced to make the statement (a) under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (b) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same;]~~ In a criminal action or proceeding, as against the defendant, a previous statement by him relative to the offense charged, 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.

COMMENT

This provision substantially restates the existing law governing the admissibility of defendants' confessions and admissions in criminal actions or proceedings. While the Commission has departed rather widely from the language of URE 63(6), it is believed that paragraph (a) states a principle which is not only broad enough to encompass all the situations covered by URE 63(6) but has the additional virtue of covering as well analogous situations which, though not within the letter of the more detailed language proposed by the draftsmen of the URE, are nevertheless within its spirit.

Paragraph (b) is technically unnecessary since the statute could not admit what the Constitutions of this State and of the United States exclude. It seems desirable to state that proposition here, however, both for the sake of completeness and to make it clear that the Commission has no thought that the Legislature, in enacting this provision, would be asserting that the matter of the admissibility of the confessions and admissions of defendants in criminal actions and proceedings is a matter solely within the competence of the Legislature to determine.

Subdivision (7): Admissions by Parties.

(7) Except as provided in subdivision (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;]~~

COMMENT

In making extrajudicial statements of a party admissible against him this exception merely restates existing law. The first clause was added by the Commission to make explicit what the draftsmen of the URE undoubtedly intended, that admissions of a defendant in a criminal action are governed by subdivision (6).

The Commission has omitted the URE provision that an extrajudicial statement is admissible against a party sued in a representative capacity only if the statement was made by him while acting in such capacity. The basis of the admissions exception to the hearsay rule is that because the statements are the declarant's own he does not need to cross-examine. Moreoever, the party has ample opportunity to deny, explain or qualify the statement in the course of the proceeding. These considerations appear to the Commission to apply to any extrajudicial statement made by one who is a party to a judicial action or proceeding in a representative capacity, whether or not the statement was made in that capacity. Moreover, the Commission believes that more time would be spent in many cases in trying to ascertain in what capacity a particular statement was made than could be justified by whatever validity the distinction made by the draftsmen of the URE might be thought to have.

Subdivision (8): Authorized and Adoptive Admissions.

(8) As against a party, a statement:

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

(b) Of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth. [-;-]

COMMENT

This exception restates in substance the existing law with respect to authorized and adoptive admissions.

Subdivision (9): Vicarious Admissions.

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

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

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

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

COMMENT

URE 63(8)(a) makes authorized extrajudicial statements admissible. Paragraph (9)(a) goes beyond this, making admissible against a party specified unauthorized extrajudicial statements of an agent, partner or

employee. A statement is admitted under paragraph (a), however, only if it would be admissible if made by the declarant at the hearing whereas no such limitation is applicable to authorized admissions. The practical scope of paragraph (a) is quite limited. If the declarant is unavailable at the trial, the self-inculpatory statements which it covers would be admissible under URE 63(10) because they would be against the declarant's interest. Where the declarant is a witness at the trial, many other statements covered by paragraph (a) would be admissible as inconsistent statements under URE 63(1). Thus, paragraph (a) has independent significance only as to self-exculpatory statements of agents, partners and employees who do not testify at the trial as to matters within the scope of the agency, partnership or employment. One justification for this narrow exception is that because of the relationship which existed at the time the statement was made it is unlikely that it would have been made unless it were true. Another is that the existence of the relationship makes it highly likely that the party will be able to make an adequate investigation of the statement without having to resort to cross-examination of the declarant in open court.

Paragraph (a) is more liberal than the existing California law --C.C.P. Section 1870(5)--in two respects. First, under existing law the statement of the agent, partner or employee cannot be used to prove the existence of the agency, partnership or employment; the existence of the relationship must be shown by independent evidence, i.e., testimony of the declarant or another. On the other hand, paragraph (a) does not require independent proof of the agency, partnership or employment, and in some cases the declarant's statement might itself establish the fact that the relationship existed. However, Rule 8 might be interpreted to

require independent proof of the relationship. Rule 8 is ambiguous and has not yet been acted upon by the Commission. Second, paragraph (a) will permit admission of not only statements made in the scope of the agency but also statements which do not themselves fall within the scope of the agency but which concern matters within the scope of the agency. Under existing California law only the former statements are admissible.

Paragraph (b) relates to the admissibility of hearsay statements of co-conspirators against each other. The Commission has substituted for the provision proposed by the Commissioners on Uniform State Laws language which restates existing California law as found in Section 1870(6) of the Code of Civil Procedure. The Commission believes that the more liberal URE rule of admissibility would be unfair to criminal defendants in many cases.

Paragraph (c) restates in substance the existing California law, which is found in Section 1851 of the Code of Civil Procedure, except that paragraph (c) limits this exception to the hearsay rule to civil actions or proceedings. Most cases falling within this exception would also be covered by URE 63(10) which makes admissible declarations against interest. However, to be admissible under URE 63(10) the statement must have been against the declarant's interest when made whereas this requirement is not stated in paragraph (c). Moreover, the statement is admissible under paragraph (c) irrespective of the availability of the declarant whereas under revised Rule 63(10) the statement is admissible only if the declarant is unavailable as a witness.

Subdivision (10): Declarations Against Interest.

(10) [~~Subject to the limitations of exception (9),~~] 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. [~~,~~]

COMMENT

Insofar as this subdivision makes admissible a statement which was against the declarant's pecuniary or proprietary interest when made, it restates in substance the common-law rule relating to declarations against interest except that the common-law rule is applicable only when the declarant is dead. The California rule on declarations against interest, which is embodied in Sections 1853, 1870(4) and 1946 of the Code of Civil Procedure, is perhaps somewhat narrower in scope than the common-law rule.

The justifications for the common-law exception are necessity, the declarant being dead, and trustworthiness in that men do not ordinarily make false statements against their pecuniary or proprietary interest. The Commission believes that these justifications are sound and that they

apply equally to the provisions of subdivision (10) which broaden the common-law exception. Unavailability for other causes than death creates as great a necessity to admit the statement. Men are no more likely to make false statements unreasonably subjecting themselves to civil or criminal liability, rendering their claims invalid, or subjecting themselves to hatred, ridicule or social disapproval than they are to make false statements against their pecuniary or proprietary interest.

The Commission has departed from URE 63(10) by (1) limiting subdivision (10) to nonparty declarants (incidentally making the cross reference to exception (6) unnecessary); (2) writing into it the common-law requirement that the declarant have personal knowledge of the subject and (3) conditioning admissibility on the unavailability of the declarant. With these limitations subdivision (10) states a desirable exception to the hearsay rule.

Subdivision (11): Voter's Statements.

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

COMMENT

The Commission declines to recommend URE 63(11) which would make admissible an extrajudicial statement "by a voter concerning his qualifications to vote or the fact or content of his vote." The Commission is not convinced either that there is any pressing necessity for such an exception or that there is a sufficient guarantee of the trustworthiness of such extrajudicial statements to warrant an exception to the hearsay rule for them.

Subdivision (12): Statements of Physical or Mental Condition of Declarant.

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

(a) The declarant's [~~(a)~~] then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but 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) The declarant's previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition. [~~;~~] or

(c) The declarant that he has or has not made a will, or a will of a particular purport, or has or has not revoked his will.

COMMENT

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

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

The provision that a statement covered by subdivision (12) is not admissible if the judge finds that it was made in bad faith is a desirable safeguard. It is not believed to be more restrictive than the discretion presently given to the trial judge insofar as statements covered by paragraph (a) are concerned.

Subdivision (13): Business Records.

(13) [Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness;] A writing offered as a record of an act, condition or event if the custodian or other qualified witness testifies to its identity and the mode of its preparation and if the judge finds that it was made in the regular course of a business, at or near the time of the act, condition or event, and that the sources of information, method and time of preparation were such as to indicate its trustworthiness. As used in this paragraph, "a business" includes every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

COMMENT

This is the "business records" exception to the hearsay rule as stated in language taken from the Uniform Business Records as Evidence Act which was adopted in California in 1941 (Sections 1953e - 1953h of the Code of Civil Procedure) rather than the slightly different language now proposed by the Commissioners on Uniform State Laws. If there is any difference in

substance between the two provisions, the Commission believes that it is preferable to continue with existing law which appears to have provided an adequate business records exception to the hearsay rule for nearly 20 years. This subdivision does not, however, include the language of Section 1953f.5 of the Code of Civil Procedure because that section inadequately attempts to make explicit the liberal case-law rule that the Uniform Act permits admission of records kept under any kind of bookkeeping system, whether original or copies, and whether in book, card, looseleaf or other form. The Commission has concluded that the case-law rule is satisfactory and that Section 1953f.5 may have the unintended effect of limiting the provisions of the Uniform Act.

Subdivision (14): Absence of Entry in Business Records.

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

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

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

COMMENT

This exception has been recast to make it parallel to subdivision (13). With the safeguards provided the evidence is believed to be both relevant and trustworthy.

Evidence of this nature is probably now admissible in California; but it is not clear whether it is admitted under an exception to the hearsay rule or as direct evidence inasmuch as such evidence does not concern an extrajudicial statement but rather the absence of one and the inferences

to be drawn therefrom.

Under Rule 62, it is likely that such evidence would not be regarded as hearsay. However, the Commissioners on Uniform State Laws suggest and the Commission believes that it is desirable to remove any doubt on the admissibility of such evidence by the enactment of subdivision (14).

Subdivision (15): Reports of Public Officers and Employees.

(15) Subject to Rule 64, 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; [~~,~~]

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

COMMENT

Subdivision (15) states a broader exception to the hearsay rule for reports of public officers and employees than does its existing counterpart, Section 1920 of the Code of Civil Procedure which is limited to "entries in public or other official books or records." The Commission believes that an adequate safeguard of the trustworthiness of the statements made admissible is found in the fact that reports made in the performance of official duty or employment are likely to be carefully and accurately prepared.

Revised subdivision (15) states a narrower rule of admissibility than does URE 63(15) in that it admits only statements of fact contained in official reports and does not extend to the author's findings of fact or conclusions.

Subdivision (16): Reports Required to be Filed in Public Office.

(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. [;]

COMMENT

This exception relates to such official reports filed by private persons as birth, marriage and death certificates filed by doctors, ministers and undertakers, all of which are now admissible in this State under various special statutes. Although these special statutes will continue in effect under Rule 63A, subdivision (16) would apply to these and to any other similarly prepared and filed reports which may be authorized by law. The nature of such reports provides, the Commission believes, a sufficient guarantee of their accuracy and hence trustworthiness to warrant an exception to the hearsay rule to cover them.

The Commission declined to incorporate in subdivision (16) a cross

reference to URE 64, which provides that evidence to which it relates will be received only if the proponent has delivered a copy of it 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. The Commission believes that in light of the availability of modern discovery procedures, which provide the adverse parties adequate opportunity to protect themselves against surprise, there is no justification for requiring the proponent of evidence admissible under subdivision (16) to deliver copies of it to the other parties when no such requirement of pretrial disclosure now exists as to this kind of evidence or, for that matter, to other documentary evidence. Moreover, evidence admissible under subdivision (16) will be useful to impeach a witness only if the witness has no previous notice that the proponent of the impeaching evidence plans to use it at the trial.

Subdivision (17): Content of Official Record.

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

(b) If meeting the requirements of authentication under Rule 69, to prove the absence of a record in a specified office, a writing made by the official custodian of the official records of the office, reciting diligent search and failure to find such record. [;]

COMMENT

Paragraph (a) makes it possible to prove the content of an official record or of an entry therein by hearsay evidence in the form of a writing purporting to be a copy of the record or entry, provided the copy meets the requirements of authentication under Rule 68. It should be noted that paragraph (a) does not make the official record or entry itself admissible; warrant for its admission must be found in some other exception to the hearsay rule.

Paragraph (b) makes it possible to prove the absence of a record in an office by hearsay evidence in the form of a writing from the official custodian thereof stating that no such record has been found after a diligent search, provided the writing meets the requirements of authentication under Rule 69.

Both exceptions are justified by the likelihood that such statements made by custodians of official records are highly likely to be accurate and by the necessity of providing a simple and inexpensive method of proving such facts.

The reason for the omission of the URE cross reference to Rule 64 is the same as that given in the Commission's comment on subdivision (16).

Subdivision (18): Certificate of Marriage.

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

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

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

COMMENT

This exception is broader than existing California law, which is found in Sections 1919a and 1919b of the Code of Civil Procedure. These sections are limited to church records and hence, as respects marriages, to those performed by clergymen. Moreover, they establish an elaborate and detailed authentication procedure whereas certificates made admissible by subdivision (18) need only meet the general authentication requirement of Rule 67 that "Authentication may be by evidence sufficient to sustain a finding of . . . authenticity. . . ."

It seems unlikely that this exception would be utilized in many cases both because it will be easier to prove a marriage by the official record thereof under subdivision (16) or a copy thereof under subdivision (17) and because such evidence is likely to have greater weight with the

jury. The Commission believes, however, that where the celebrant's certificate is offered it should be admissible. The fact that the certificate must be one made by a person authorized by law to perform marriages and that it must meet the authentication requirements of Rule 67 provides sufficient guarantees of its trustworthiness to warrant this exception to the hearsay rule.

The reason for the omission of the URE cross reference to Rule 64 is the same as that given in the Commission's comment on subdivision (16).

Subdivision (19): Records of Documents Affecting an Interest in Property.

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

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

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

COMMENT

This exception largely restates existing California law as found in Section 1951 of the Code of Civil Procedure (documents relating to real property) and Section 2963 of the Civil Code (chattel mortgages).

The reason for the omission of the URE express reference to Rule 64 is the same as that given in the Commission's comment to subdivision (16).

Subdivision (20): Judgment of Previous Conviction.

(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. [¶]

COMMENT

This exception has no counterpart in our present law. The Commission believes that it is a justifiable innovation, however, inasmuch as the facts established by the judgment were either (1) admitted in the prior proceeding or (2) established beyond a reasonable doubt in the mind of the trier of fact in a proceeding in which the person against whom the evidence is now offered had an opportunity to cross-examine witnesses and otherwise dispute the facts established by the judgment.

Revised subdivision (20) is of more limited scope than URE 63(20). The evidence is admissible only against a person who was adjudged guilty of a felony in the prior proceeding, not against others. Moreover, a party may relieve himself of any prejudice which might arise from the proof of his prior felony conviction by admitting the facts sought to be established by the judgment.

Subdivision (21): Judgment Against Persons Entitled to Indemnity.

(21) To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, 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. [~~.~~]

COMMENT

This exception restates in substance a principle of existing California law as found in Section 2778(6) of the Civil Code. The evidence here made admissible is not, of course, conclusive as between the parties involved but may under Section 1963(17) of the Code of Civil Procedure create a disputable presumption that the judgment correctly determined or set forth the rights of the judgment debtor and judgment creditor, which presumption may be controverted by other evidence.

Subdivision (22): Judgment Determining Public Interest in Land.

(22) To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental 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. [†]

COMMENT

URE 63(22) creates a new exception to the hearsay rule insofar as the law of this State is concerned. However, the exception is supported by the case law of some jurisdictions. It is of very limited scope and is justified because litigation relating to the public domain is likely to be conducted and decided with unusual care.

Subdivision (23): Statement Concerning One's Own Family History.

(23) If the judge finds that the declarant is unavailable as a witness, a statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, [if] unless the judge finds that the declarant [~~is unavailable~~] made the statement at a time when there was an existing controversy over the precise point to which the statement refers and the statement was made under such circumstances that the declarant had motive or reason to exceed or fall short of the truth.

COMMENT

As drafted URE 63(23) restates in substance existing California law as found in Section 1870(4) of the Code of Civil Procedure except that Section 1870(4) requires that the declarant be dead whereas unavailability of the declarant for any of the reasons specified in Rule 62 makes the statement admissible under URE 63(23).

The Commission has amended URE 63(23) to provide that a statement to which it applies is not admissible if the court finds that when the statement was made there was an existing controversy over the precise

point to which the statement refers and the statement was made under such circumstances that the declarant had a motive to exceed or fall short of the truth. In such circumstances, the Commission believes, there is simply not a sufficient guarantee of the trustworthiness of the extrajudicial statement to warrant its introduction into evidence.

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

(24) Unless the judge finds that the declarant made the statement at a time when there was an existing controversy over the precise point to which the statement refers and the statement was made under such circumstances that the declarant had motive or reason to exceed or fall short of the truth, a statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge finds that the declarant is unavailable as a witness and finds that:

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

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

COMMENT

As drafted URE 63(24)(a) restates in substance existing California law as found in Section 1870(4) of the Code of Civil Procedure except that under the latter the statement is admissible only if the declarant is dead whereas under the former unavailability for any of the reasons specified in Rule 62 is sufficient.

URE 63(24)(b) is new to California law but the Commission believes that it is a sound extension of the present law to cover a situation that is within its basic rationale - i.e., to a situation where the declarant was a family housekeeper or doctor or so close a friend as to be "one of the family" for purposes of being included by the family in discussions of its history.

Here again, and for the same reason given in its Comment to subdivision (23), the Commission has added language which will permit the trial judge to refuse to admit a declaration of this kind where it was made under such circumstances that there is not an adequate guarantee of its trustworthiness.

Subdivision (25): Statement Concerning Family History Based on Statement of Another Declarant.

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

COMMENT

The Commission does not recommend the adoption of URE 63(25). This exception would make it possible to prove by the hearsay statement of one declarant that another declarant made a hearsay statement where the first statement made falls under subdivision (23) or (24) of Rule 63 but the second statement does not fall under any of the recognized exceptions to the hearsay rule. The Commission can see no justification for thus forging a two-link chain of hearsay just because the first hearsay declaration would have been admissible if it could have been shown by competent evidence to have been made. There is nothing to guarantee the trustworthiness of the second hearsay statement.

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

(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.

COMMENT

Subdivision (26) restates in substance the existing California law, which is found in subdivision (11) of Section 1870 of the Code of Civil Procedure, except that Section 1870(11) requires that the family reputation in question have existed "previous to the controversy." The Commission does not believe that this qualification need be made a part of subdivision (26) because it is unlikely that a family reputation on a matter of pedigree would be influenced by the existence of a controversy even though the declaration of an individual member of the family, covered in subdivisions (23) and (24), might be.

Paragraph (b) makes explicit the kinds of evidence that are covered by URE 63 (26). In doing so it restates existing law in substance.

Subdivision (27): Community Reputation Concerning Boundaries, General History and Family History.

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

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

(b) [~~the reputation concerns~~] An event of general history of the community or of the state or nation of which the community is a part [,] and the judge finds that the event was of importance to the community. [~~, or~~]

(c) [~~the reputation concerns~~] The date or fact of birth, marriage, divorce [,] or death [~~, legitimacy, relationship by blood or marriage, or race ancestry~~] of a person resident in the community at the time of the reputation. [~~, or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community.~~]

COMMENT

Paragraph (a) restates in substance the existing California law as found in subdivision (11) of Section 1870 of the Code of Civil Procedure.

Paragraph (b) is a wider rule of admissibility than California's present rule, as found in subdivision (11) of Section 1870 which provides in relevant part that proof may be made of "common reputation existing previously to the controversy, respecting facts of a public or general interest more than thirty years old." The 30-year limitation is essentially arbitrary. The important question would seem to be whether a community reputation on the matter involved exists; its age would appear to go more to its venerability than to its truth. Nor does the Commission believe that it is necessary to include in paragraph (b) the qualification that the reputation existed previous to the controversy. It is unlikely that a community reputation respecting an event of general history would be influenced by the existence of a controversy.

Paragraph (c) restates what has been held to be the law of California under Code of Civil Procedure Section 1963(30) insofar as proof of the fact of marriage is concerned. However, this paragraph has no counterpart in California law insofar as proof of other facts relating to pedigree is concerned, proof of such facts by reputation now being limited to reputation in the family. The Commission believes that paragraph (c) as proposed by the Commissioners on Uniform State Laws is too broad in that it might be construed in particular cases to permit proof of what is essentially idle neighborhood gossip relating to such matters as legitimacy and race ancestry. Accordingly, the Commission has limited this paragraph to proof by community reputation of the date or fact of birth, marriage, divorce or death.

Subdivision (28): Reputation as to Character.

(28) If a 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. [¶]

COMMENT

Subdivision (28) restates existing California law in substance.

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

(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 statement would have been admissible if made by the writer while testifying

COMMENT

Paragraph (a) goes beyond existing California law, as found in subdivision (34) of Section 1963 of the Code of Civil Procedure, in that the latter, which applies to ancient documents generally, conditions admissibility on the document's being more than 30 years old. The Commission believes that there is sufficient likelihood that the statements made in a dispositive document will be true to warrant the admissibility of such documents without regard to their age.

Paragraph (b) restates in substance existing California law as found

in subdivision (34) of Section 1963 of the Code of Civil Procedure as it has been interpreted by our courts. This exception to the hearsay rule is based primarily on the sheer necessity of relying on such evidence since the declarant is likely to be dead or to have forgotten the facts stated in the writing. The requirement that the writing has, for at least 30 years, been generally acted upon as true by persons having an interest in the matter is some guarantee of its trustworthiness. Moreover, the Commission is not aware of any dissatisfaction on the part of the bench or bar with Section 1963(34).

Subdivision (29) of Rule 63 is made subject to Rule 64, thus requiring that the party intending to rely on a document or other writing falling within this exception deliver a copy of the document or other writing to the other parties within a reasonable time before trial. Copies of such documents or writings will not in many cases be available from other sources. Moreover, substantial time may be required to investigate their authenticity, particularly as respects writings admissible under paragraph (b).

Subdivision (30): Commercial Lists and the Like.

(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. [;]

COMMENT

Subdivision (30) has no counterpart in the California statutes. However, there has been some indication in judicial decisions that this exception may exist in California.

The Commission recommends subdivision (30) because the use of such publications at the trial will greatly simplify and thus expedite the proof of the matters contained in them. The trustworthiness of such publications is adequately guaranteed by the fact that, being prepared for the use of a trade or profession, they must be made with great care and accuracy to induce its members to purchase them.

Subdivision (31): Learned Treatises.

(31) ~~[A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.]~~ Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, to prove facts of general notoriety and interest.

COMMENT

Revised subdivision (31) consists of the language of Section 1936 of the Code of Civil Procedure as modified in form only to conform to the general format of the hearsay statute recommended by the Commission.

The admissibility of published treatises, periodicals, pamphlets and the like has long been a subject of considerable controversy in this State, much of it centered upon the desirability of permitting excerpts from medical treatises to be read into evidence. The State Bar has made at least one special study of this subject. The Commission believes that this matter is both too complicated and too controversial to be resolved in connection with considering the adoption of the Uniform Rules of Evidence. Hence it proposes simply to codify existing law but with the recommendation that the Legislature call for a thorough study of the subject by an appropriate agency in the future.

Subdivision (32): Evidence Admissible Under Other Laws.

(32) Hearsay evidence declared to be admissible by any other law of this State.

COMMENT

There are many statutes in the California codes that provide for the admission of various types of hearsay evidence. Subdivision (32) will make it clear that hearsay evidence which is admissible under any other statute will continue to be admissible.

No comparable exception is included in URE Rule 63 because URE Rules 62-66 purport to provide a complete system governing the admission and exclusion of hearsay evidence.

RULE 63A. SAVINGS CLAUSE.

63A. Where hearsay evidence is declared to be admissible by any law of this State, nothing in Rule 63 shall be construed to repeal such law.

COMMENT

No comparable provision is included in the URE, but the Commission has inserted this provision to make it clear that the Rule 63 exceptions and the existing code provisions authorizing the admission of hearsay evidence are to be treated as cumulative. The proponent of hearsay evidence may justify its introduction upon the basis of a URE exception or an existing code provision or both.

Some of the existing statutes providing for the admission of hearsay evidence will, of course, be repealed when the URE is enacted. The Commission hereinafter recommends the repeal of all present code provisions which are general hearsay exceptions and which are either inconsistent with or substantially coextensive with the Rule 63 counterparts of such provisions. The statutes that will not be repealed when the URE is enacted are, for the most part, narrowly drawn statutes which make a particular type of hearsay evidence admissible under specifically limited circumstances. It is neither desirable nor feasible to repeal these statutes. Rule 63A will make it clear that these statutes are not impliedly repealed by Rule 63.

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

Rule 64. Any writing admissible under [~~exceptions~~] subdivision (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.

COMMENT

This requirement seems reasonable as applied to Rule 63 (15) and (29).

The reason for the Commission's deletion of the reference to exceptions (16), (17), (18) and (19) in Rule 64 as drafted by the Commissioners on Uniform State Laws is stated in the Commission's comment following Rule 63(16). The reason for the addition of a cross reference to Rule 63 (29) is stated in the Commission's comment thereto.

The Commission has tentatively concluded that, when the Uniform Rules are prepared in bill form, a provision should be included in the bill to make it clear that the adoption of Rule 64 is not intended to have any effect on the discovery legislation enacted in California in 1957.

(34)

RULE 65. CREDIBILITY OF DECLARANT

Rule 65. Evidence of a statement or other conduct by a declarant inconsistent with a statement of such declarant received in evidence under an exception to Rule 63 [,] is admissible 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.

COMMENT

This rule deals with the impeachment of one whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. Under existing California law, a witness may be impeached by a prior inconsistent statement only if a proper foundation is laid by calling his attention to the statement and permitting him first to explain it. URE Rule 65 makes it unnecessary to lay such a foundation to impeach a hearsay declarant.

Although generally in accord with California law, Rule 65 would permit the use of some evidence that cannot now be used to impeach a hearsay declarant. Our decisions indicate that when testimony given by a witness at a former trial is read into evidence at a subsequent trial because the witness is not then available, a party who had the opportunity to lay the necessary foundation to impeach the witness at the first trial may impeach the witness at the second trial only if the impeacher can show that he had no knowledge of the impeaching evidence at the time of the first trial. The Commission believes, however, that even where the impeacher had knowledge of the impeaching evidence at the time of the first trial the trier of fact at the second trial should be allowed to consider the impeaching evidence. Accordingly, since the witness is unavailable at the time his former testimony is read in evidence, a foundation cannot be laid and must necessarily be dispensed with.

No California case has been found which deals with the problem of whether a foundation is required when the hearsay declarant is available as a witness at the trial. The Commission believes that no foundation for impeachment should be required in this case. The party electing to use the hearsay of such a declarant should have the burden of calling him to explain or deny any alleged inconsistencies that tend to impeach him.

RULE 66. MULTIPLE HEARSAY.

Rule 66. A statement within the scope of an exception to Rule 63 [~~shall~~] is not [be] inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception.

COMMENT

This rule would make it possible to prove by the hearsay statement of one declarant that another declarant made a hearsay statement where each of the statements falls within an exception to Rule 63. The Commission is not aware of any California case where this limited use of "double hearsay" evidence has been considered. But since each statement must fall within an exception to the hearsay rule there is a sufficient guarantee of the trustworthiness of both statements to justify this modest qualification of the hearsay rule.

This rule may, on occasion, be applied more than once so that "multiple hearsay" may be admitted. For instance, evidence of former testimony is admissible under Rule 63(3). The evidence of such former testimony may be in the form of the reporter's official report, which is admissible under Rule 63(15). A properly authenticated copy of the report would be admissible under Rule 63(17). Even though "triple hearsay" is here involved, the Commission believes that there is a sufficient guarantee of the trustworthiness of each statement, for each statement must fall within an exception to the hearsay rule.

ADJUSTMENTS AND REPEALS OF EXISTING STATUTES

Scattered through the various codes are a number of statutes relating to hearsay evidence. Some of these statutes deal with the problem of hearsay generally, while others deal with the admissibility and proof of certain specific documents and records or with a specific type of hearsay in particular situations. The Commission has carefully studied these statutes in the light of the Commission's tentative recommendation concerning Article VIII (Hearsay Evidence) of the Uniform Rules of Evidence.

The Commission tentatively recommends the repeal of those code provisions that set forth general exceptions to the hearsay rule which are inconsistent with or substantially coextensive with the exceptions provided in subdivision (1) through (31) of Rule 63 as revised by the Commission. The Commission, however, does not recommend the repeal of the numerous provisions dealing with a particular type of hearsay evidence in specific situations. These provisions are too numerous and too enmeshed with the various acts of which they are a part to make specific repeal a desirable or feasible venture. Moreover, many of these provisions were enacted for reasons of public policy germane to the acts of which they are a part and not for considerations relating directly to the law of evidence. For example, the provisions of Section 2924 of the Civil Code, which makes the recitals in deeds executed pursuant to a power of sale prima facie evidence of compliance with certain procedural requirements and conclusive evidence thereof in favor of bona fide purchasers, are to further a policy of protecting titles to property acquired pursuant to such deeds. The Commission has not considered these policies in its

study of the Hearsay Article of the Uniform Rules of Evidence, for these policies are not germane to a study to determine what hearsay is sufficiently trustworthy to have value as evidence. Therefore, the Commission does not recommend any change in these statutes; and, to remove any doubt as to their continued validity, the Commission has hereinbefore recommended the addition of provisions to the Uniform Rules of Evidence to make it clear that other laws authorizing the admission of hearsay evidence which are not repealed will have continued validity.

Set forth below is a list of the statutes which, in the opinion of the Commission, should be revised or repealed. The reason for the suggested revision or repeal is given after each section or group of sections.[1] References in such reasons to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

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[1] A number of the sections listed below refer to the "declaration, act or omission" of a person in defining an exception to the hearsay rule. The superseding provisions of the Uniform Rules of Evidence refer only to a "statement." Rule 62 defines a "statement" as a declaration or assertive conduct, that is, conduct intended by the declarant as a substitute for words. Rule 63 in stating the hearsay rule provides only that "statements" offered to prove the truth of the matter asserted are hearsay and inadmissible. Hence, insofar as these sections of the Code of Civil Procedure refer to nonassertive conduct or to statements which are themselves material whether or not true, these sections are no longer necessary for evidence of such facts is not hearsay evidence under the Uniform Rules.

Code of Civil Procedure

Section 1848. This section should be repealed. It deals with the extent to which out-of-court declarations, acts or omissions may be used to the prejudice of a party, and this is covered by the opening paragraph of Rule 63 and the numerous exceptions thereto.

Section 1849. This section will be superseded and should be repealed. If a predecessor in interest of a party is unavailable as a witness, his declarations against interest in regard to his title are admissible under Rule 63(10). If the declarant is available as a witness, he may be called and asked about the subject matter of the declaration; and if he testifies inconsistently, the prior statement may then be shown under Rule 63(1)(a) to prove the truth of the matter stated.

Section 1850. This section should be repealed. It is superseded by Rule 63(4) providing an exception to the hearsay rule for contemporaneous and spontaneous declarations.

Section 1851. This section should be repealed. It is superseded by the exception stated in Rule 63(9)(c).

Section 1852. This section should be repealed. It is superseded by the pedigree exceptions contained in subdivisions (23), (24), (26) and (27) of Rule 63.

Section 1853. This section should be repealed. It is an imperfect statement of the declaration against interest exception and is superseded by Rule 63(10).

Section 1870.

Subdivision 2 should be deleted. It is superseded by the admissions exception contained in Rule 63(7).

Subdivision 3 should be deleted. It is superseded by the admissions exception stated in Rule 63(8)(b).

Subdivision 4 should be deleted. The first clause is superseded by the pedigree exception contained in Rule 63(23). The second clause is superseded by the exception relating to declarations against interest contained in Rule 63(10). The third clause is superseded by the dying declaration exception contained in Rule 63(5).

Subdivision 5 should be deleted. The first sentence, relating to vicarious admissions of partners and agents, is superseded by the exceptions contained in Rule 63(8)(a) and 63(9)(a). The second sentence, relating to vicarious admissions of joint owners or joint debtors or other persons with joint interests, is superseded by Rule 63(10) inasmuch as the statements involved are declarations against interest and the declarant is unavailable. If the declarant is available as a witness, he may be called and asked about the subject matter of the statement, and if he testifies inconsistently, the prior statement may be shown under Rule 63(1)(a) as evidence of the truth of the matter stated. If the declarant is unavailable and the statement cannot be classified as a declaration against interest, the Commission does not believe that the statement is sufficiently trustworthy to be introduced as evidence.

Subdivision 6 should be deleted. It is superseded by the exception relating to admissions of co-conspirators contained in Rule 63(9)(b).

Subdivision 7 should be deleted. It is superseded by Rule 63(4) relating to contemporaneous and spontaneous declarations.

Subdivision 8 should be deleted. It is superseded by subdivisions (2), (2a) and (3) of Rule 63 which relate to former testimony.

Subdivision 11 should be deleted. It is superseded by the community reputation exception contained in Rule 63(27).

Subdivision 13 should be deleted. It is superseded by the reputation exceptions contained in Rule 63(26) and Rule 63(27).

Section 1893. This section should be revised to read:

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

The language deleted is superseded by the exception pertaining to copies of official records contained in Rule 63(17).

Section 1901. This section should be repealed. It is superseded by the exception pertaining to copies of official records contained in Rule 63(17).

Sections 1905, 1906, 1907, 1918 and 1919. These sections should be repealed. They are superseded by subdivisions (15), (17) and (19) of Rule 63 pertaining to the admissibility of official records and copies thereof.

Section 1920. This section should be repealed. It is superseded by Rule 63(15) and (16) pertaining to statements in official records.

Section 1920a. This section should be repealed. It is superseded by the exception pertaining to copies of official records contained in Rule 63(17).

Section 1921. This section should be repealed. It is superseded by the exception pertaining to copies of official records contained in Rule 63(17).

Section 1926. This section should be repealed. It is superseded by the official written report exception contained in Rule 63(15).

Section 1936. This section should be repealed. It has been incorporated in the Uniform Rules as Rule 63(31).

Section 1946. This section should be repealed. The first subdivision is superseded by the declaration against interest exception of Rule 63(10); the second subdivision is superseded by the business records exception contained in Rule 63(13); and the third subdivision is superseded by the official reports exception contained in Rule 63(14).

Section 1947. This section should be repealed. It is superseded by the business records exception contained in Rule 63(13).

Section 1951. The last clause of this section is superseded by Rule 63(19) pertaining to the proof of official records of documents affecting interests in real property and should be deleted. The revised section would read as follows:

> 1951. Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in any action or proceeding, without further proof [~~; also, the original record~~

a-witness-may-testify-from-such-a-writing,-though-he-ret.in no-recollection-of-the-particular-facts,-but-such-evidence must-be-received-with-caution.]

TEXT OF REVISED ARTICLE VIII OF UNIFORM RULES OF EVIDENCE

The following is the text of Article VIII of the Uniform Rules of Evidence as tentatively revised by the Law Revision Commission.

VIII. Hearsay Evidence

RULE 62. Definitions. As used in Rules 62 through 66:

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

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

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

(4) "Public officer or employee of a state or territory of the United States" includes:

(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 paragraph (a) of this subdivision.

(5) "State" includes each of the United States and the District of Columbia.

(6) Except as otherwise provided in subdivision (7) of this rule, "unavailable as a witness" includes situations where the declarant is:

(a) Exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant.

(b) Disqualified from testifying to the matter.

(c) Dead or unable to testify at the hearing because of physical or mental illness.

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

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

(7) For the purposes of subdivision (6) of this rule, a declarant is not unavailable as a witness:

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

(b) If unavailability is claimed because the declarant is absent beyond the jurisdiction of the court to compel appearance by its process and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship or expense.

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) 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) 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 at the preliminary examination in the criminal action or proceeding in which it is offered.

(d) Testimony given by a witness at a former trial of the criminal action or proceeding in which it is offered.

(2a) In a civil action or proceeding, testimony of a witness given in a former action or proceeding between the same parties or their predecessors in interest, relating to the same matter, if the judge finds that the declarant is unavailable as a witness. As used in this subdivision,"former action or proceeding" includes not only another action or proceeding but also a former hearing or trial of the same action or proceeding in which the statement is offered.

(3) 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 supevision 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 examination 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; or

(b) Which the judge finds (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.

(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 in the belief that there was no hope of his recovery.

(6) 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 subdivision (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 representative capacity.

(8) As against a party, a statement:

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

(b) Of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth.

(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 partnership or employment of the declarant for the party and was made before the termination of such relationship; or

(b) 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.

(10) 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 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) [Deleted]

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

(a) The declarant's 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.

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

(c) The declarant that he has or has not made a will, or a will of a particular purport, or has or has not revoked his will.

(13) 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 from the records of a business (as defined in subdivision (13) of this rule) of a record of an asserted act, condition or event, to prove the non-occurrence of the act or event, or the

non-existence of the condition, if the judge finds that:

(a) It was the regular course of that business to make records of all such acts, conditions or events, at or near the time 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 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, 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.

(16) 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) (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) A certificate that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof, if the judge finds that:

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

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

(19) 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

(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) If the judge finds that the declarant is unavailable as a witness, a statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, unless the judge finds that the declarant made the statement at a time when there was an existing controversy over the precise point to which the statement refers and the statement was made under such circumstances that the declarant had motive or reason to exceed or fall short of the truth.

(24) Unless the judge finds that the declarant made the statement at a time when there was an existing controversy over the precise point to which the statement refers and the statement was made under such circumstances that the declarant had motive or reason to exceed or fall short of the truth, a statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant, if the judge finds that the declarant is unavailable as a witness and finds that:

(a) The declarant was related to the other by blood or marriage; or

(b) 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.

(25) [Deleted]

(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 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.

(b) 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.

(c) The date or fact of birth, marriage, divorce or death of a person resident in the community at the time of the reputation.

(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 material matter, contained in:

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

(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 statement would have been admissible if made by the writer while testifying.

(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) Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, to prove facts of general notoriety and interest.

(32) Hearsay evidence declared to be admissible by any other law of this State.

RULE 63A. Savings Clause. Where hearsay evidence is declared to be admissible by any law of this State, nothing in Rule 63 shall be construed to repeal such law.

RULE 64. Discretion of Judge under Exceptions to Exclude Evidence. Any writing admissible under subdivision (15) 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.

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.

RULE 66. Multiple Hearsay. A statement with the scope of an exception to Rule 63 is not 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.