3/3/61

Memorandum No. 11 (1961)

Subject: Uniform Rules of Evidence - Rule 63 - Subdivisions (15) and (21)

This memorandum will discuss the necessity for Rule 63(15) of the URE and some of the questions that may arise if it is deleted and C.C.P. §§ 1920 and 1926 are repealed. It will also discuss possible revision of Rule 63(21) of the URE.

Subdivision (15)

In regard to subdivision (15), the staff was asked to present a report on the need for the subdivision in view of the provisions of subdivision (13) pertaining to business records.

Subdivision (13) permits the admission of any record of an act, condition or event if the custodian or some other qualified witness testifies as to its manner of preparation and the judge finds that it was made in the regular course of business and that the sources of information and method of preparation indicate its trustworthiness. It is well settled in California that this language as it now appears in the Uniform Business Records as Evidence Act (C.C.P. §§ 1953e-1935h) applies to records maintained and prepared by the Government. (Nichols v. McCoy, 38 Cal.2d 447 (1952)(record of blood alcohol test from County Coroner's office); Brown v. County of Los Angeles, 77 Cal. App.2d 814 (1947)(record of indegent relief granted by county); Fox v. San Francisco Unified School District, 111 Cal. App.2d 885 (1952)(school personnel performance reports).)

The California cases have held that business records are admissible under the business records exception only to prove facts within the knowledge of the person making the record or facts reported to the recorder by a person with personal knowledge thereof who was under a duty to report them. (Witkin, California Evidence 327). The California cases have excluded business records in which the facts stated are based upon the statements of persons under no duty to give the information to the recorder. The courts state the general proposition that evidence is not admissible, even though contained in a business record, if the recorder or the person within the business who reported to the recorder could not competently testify concerning the same matter. (McGowan v. Los Angeles 100 Cal. App.2d 303 (1951).) Thus in Behr v. County of Santa Cruz, 172 Cal. App.2d 697 (1959) a report on the cause of a fire prepared by a ranger as part of his duties was excluded because the report was based on the statements of others who had no duty to give such information. In Maclean v. San Francisco, 151 Cal. App.2d 133 (1957) the trial court excluded a police accident report because no foundation was laid showing that the statements contained in it were based on the personal observations of the reporting officers. The appellate court said the exclusion was proper if the officers did not observe the events reported, and if they did observe the events, the appellant was not prejudiced by the exclusion of the evidence because the officers were actually called to testify and did testify as to the matters within their personal knowledge.

Subdivision (15) as modified by the Commission in February (see minutes p. 7) provides that statements of fact in reports made within the scope of official duty are admissible if the reporting officer could competently testify thereto if called as a witness and had a duty to (a) perform the act reported, (b) observe the act reported or (c) investigate the facts concerning the act reported.

Paragraphs (a) and (b) of (15) appear to be narrower than the business records exception stated in (13). Under both exceptions, the court must find that the recorder had a duty -- either a business or official duty -- to record the matters in the record, but subdivision (15) requires the officer making the record to perform or observe the reported act. Under the business records exception, it is not necessary for the recorder to observe the acts recorded so long as someone in the business had a duty to report the facts to the recorder and the recorder had the duty to record the matters reported.

The meaning of paragraph (c) is not altogether clear. The preliminary language under subdivision (15) restricts the exception to "statements of fact." This might be construed to mean statements of such facts as are observed by the recorder. But if so, subdivision (c) seems to be merely a repetition of paragraphs (a) and (b). Under this construction, all of subdivision (15) appears to be somewhat narrower than subdivision (13), for under subdivision (15) the recorder must have observed or performed the acts recorded whereas (13) does not impose this requirement.

Paragraph (c), however, might also be construed to apply to statements of fact based upon the investigation of the officer whether

or not he personally observed the facts recorded. Of course, the preliminary language requires the court to find that the officer could competently testify to the facts recorded if called as a witness. But under this construction, (15) might be considered broader than (13) in that opinion evidence might be admissible under (15) although inadmissible under (13). In this connection, two recent criminal cases are significant. These cases indicate that there may be a distinction between the business records exception and the present official records exception (C.C.P. §§ 1920, 1926) insofar as statements of opinion are concerned.

People v. Terrell, 138 Cal. App.2d 35 (1955), was a prosecution for abortion. A hospital record was introduced which contained the diagnosis of "prob. criminal abortion." The appellate court held that it was error to admit the hospital record under the business records exception for two reasons. The first reason was that the report contained a conclusion to which the doctor who made the notation could not have testified if called as a witness. The second reason was that opinions are not admissible under the business records exception because there is no way to determine whether the person giving the opinion was or was not qualified to express the opinion. The court said that business records may be admitted to prove an action, condition or event and "a conclusion is neither an act, condition or event." However, the court did not reverse the conviction because it found that the error was non-prejudicial in the light of the other testimony. In People v. Williams, 174 Cal. App.2d 364 (1959) the coroner's autopsy record

was introduced in a murder case to show the path of the bullet and the cause of death. On appeal, the admission of this record was objected to on the ground that it contained opinion evidence, and the Terrell case was cited as authority for excluding the evidence. The court distinguished the Terrell case on the ground that the autopsy report was a public record which is admissible as evidence of the facts stated under C.C.P. § 1920, thus implying that opinion evidence is admissible under § 1920 but not under the business records exception. However, the court was also "well satisfied from the reading of the testimony . . . that the [report] did not constitute opinions and conclusions such as those with which the court was concerned in People v. Terrell."

The authority of Terrell may be questioned. Other cases indicate that medical diagnoses made in hospital reports are admissible as business records even though the diagnoses are statements of expert opinion. (McDowd v. Pig'n Whistle Corp., 26 Cal.2d 696 (1945); People v. Gorgol, 122 Cal. App.2d 281 (1953).) Aside from these two cases (Terrell and Williams) the courts have generally excluded evidence offered under the official records exception upon the same grounds that they exclude evidence under the business records exception. (Behr v. County of Santa Cruz, 172 Cal. App.2d 697 (1959) (ranger's report on cause of fire inadmissible as based on hearsay); Pruett v. Burr, 118 Cal. App.2d 188 (1953); Reisman v. Los Angeles School District, 123 Cal. App.2d 493 (1954); McGown v. Los Angeles, 100 Cal. App.2d 386 (1950); Hoel v. Los Angeles, 136 Cal. App.2d 295 (1955).)

In any event, even under the business records exception, a court might admit "findings of fact" or "conclusions" if the court

could find that the sources of information were sufficiently trustworthy. Construing the somewhat similar federal business records statute, the Court of Appeals for the Second Circuit held that the findings of an accident investigation board appointed by an airline were admissible to prove the cause of airplane accidents. (Pekelis v. Transcontinental and Western Air Inc., 187 F.2d 122 (1951), cert. denied, 341 U.S. 951 (1951).) However, the Second Circuit has been imposing a "motive to misrepresent" test in determining the trustworthiness of business records. (See Hoffman v. Palmer, 129 F.2d 976 (1942); 4 Stan. L. Rev. 288 (1952).) This test has not been applied generally elsewhere and no California case has been found sanctioning the application of such a test. In the Pekelis case, the Second Circuit held the investigation board's report admissible against the airline. Presumably it would not have permitted it to be admitted for the airline on the ground that it was made under circumstances that were "dripping with motivations to misrepresent." (Hoffman v. Palmer, 129 F.2d at 991.)

Thus, even if (15)(c) were construed as broadly as it might be, it still might be no broader than the business records exception as applied to governmental records.

From the foregoing, it appears that subdivision (15) as presently worded would admit no evidence that is not admissible under the Uniform Business Records as Evidence Act. It is possible though that opinion evidence based upon personal observation of the recording officer might come in under subdivision (15) and would be excluded under subdivision (13) on the authority of the Terrell and Williams cases.

The Commission apparently intended to forbid the introduction of

opinions and conclusions, for "findings of fact" and "conclusions" were deleted from the original URE version of this subdivision. If this is the intention of the Commission, all of subdivision (15) might well be deleted as unnecessary. If this is done, the staff believes that it would be desirable to amend subdivision (13) so that it clearly states what the cases have held concerning the government's records. A possible revision is as follows:

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

It should be noted that the deletion of subdivisions (15) and (16) may change the law to a certain extent if C.C.P. §§ 1920 and 1926 are also repealed. Sections 1920 and 1926 permit the introduction of entries in public or other official books or records made in the course of duty by a public officer or "another person." As pointed out previously, the cases generally have required the recorder of information received under the business records exception to have personal knowledge of the matters recorded or the person in the business who reported the facts

to the recorder to have personal knowledge thereof. In Orange County Water District v. Riverside, 173 Cal. App.2d 137, (1959) the court considered summaries of reports filed pursuant to a legal duty by water users indicating the amount of water produced by the well they were using. These reports were filed with the District each 6 months. As no objection was made to the summaries on the ground that they did not accurately reflect the original reports, the court held that the summaries were admissible because the original records would have been admissible under § 1920. It may be doubted whether the water users in this case could have been considered persons within the business as the courts have required under the business records act. However, the actual language of the business records act would permit the admission of these records if the court determined that the reports were sufficiently trustworthy.

Subdivision (16) would have admitted these records directly. Subdivision (16) also would have admitted vital statistics records from other states. The Commission deleted the subdivision on the ground that the vital statistics statutes in the Health and Safety Code would permit the admission of vital statistic records. However, Health and Safety Code § 10577 pertains only to records of this State. Thus, vital statistics records of other states must be admitted, if at all, under the business records exception contained in (13). It is, of course, possible that the court would find that the sources of information were sufficiently trustworthy to permit the introduction of such records. However, it is also possible that the persons recording the information might be considered persons not within the business and the records might be excluded as based on hearsay.

Subdivision (21)

At the February meeting, the staff was directed to report on the desirability of adding a reference to warranty to the proposed subdivision and to redraft the subdivision.

Civil Code § 2778 sets forth the rules for construing an indemnity contract when a contrary intention does not appear in the agreement. Subdivisions 6 and 7 declare that if a person (an indemnitor) who has agreed to indemnify another (an indemnitee) is notified of any action against the indemnitee and neglects to defend the action, a recovery in the action is conclusive against the indemnitor. If the indemnitor is not given reasonable notice of the action or is not allowed to control its defense, the judgment against the indemnitee is only presumptive evidence against the indemnitor.

If a grantee of real property has received the property by a deed with a title warranty and is sued for the possession of the property, he may give notice of the suit to the warrantor or any previous warrantor in the chain of title and request him to defend the action. If the notice is given, the warrantor is bound by the judgment. (McCormick v. Marcy, 165 Cal. 386 (1913).) There is an early holding, though, that in the absence of notice, the judgment is not admissible in a subsequent action between the warrantor and the warrantee. (Peabody v. Phelps, 9 Cal. 213, 226 (1858): "Of the action the defendant received no legal notice, and the judgment cannot, therefore, be evidence against him of the paramount title in Larkin.")

So far as personal property is concerned, it appears that a judgment obtained for breach of warranty against a seller may be used as evidence in an action against a preceding seller based upon a similar warranty. The following language from Reggio v. Braggiotti, 7 Cush. 166 (Mass. 1855) was cited with approval in Erie City Iron Works v. Tatum, 1 Cal. App. 286, 292 (1905):

> The measure of damages, in an action brought for breach of an implied warranty of the genuineness of an article sold as opium, is the value of an article corresponding to the warranty, deducting the value, if anything, of the article sold; and if the vendor [vendee] has in the meantime sold the article with a like warranty, the sum paid on a judgment obtained against him, in an action brought by his vendee for a breach of that warranty is prima facie evidence of the amount which he can recover of his vendor; and if he gave notice to his vendor of the commencement of that action, he may also recover his taxable costs therein; but he can in no case recover counsel fees paid for the defense thereof."

From the foregoing it appears that judgments are sometimes evidence in warranty cases and sometimes are not. In any event, it would appear to be desirable to make judgments admissible in those warranty cases where they are not now admissible and are not conclusive. A suggested revision is as follows:

(21) To prove any fact essential to the judgment, evidence of a final judgment which under the law of this State is not conclusive against the adverse party when offered by the judgment debtor in an action or proceeding to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment, to enforce a warranty to protect him against the liability determined by the judgment or to recover damages for breach of a warranty identical with a warranty determined by the judgment to have been breached.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

[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 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 California law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference.

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

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 persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation.

Communications should be addressed to the California Law Revision Commission, School of Law, Stanford, California.

Herman F. Selvin, Chairman
John R. McDonough, Jr., Vice Chairman
James A. Cobey, Member of the Senate
Clark L. Bradley, Member of the Assembly
Joseph A. Ball
James R. Edwards
Sho Sato
Vaino H. Spencer
Thomas E. Stanton, Jr.
Ralph N. Kleps, Legislative Counsel, ex officio

John H. DeMoully
Executive Secretary

July 1961

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

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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 URE RULES 62-66

The opening paragraph of Rule 63 provides:

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

With one important qualification, hereafter discussed,[1] this paragraph states the common-law hearsay rule. Subdivisions (1) through (31) of URE Rule 63 state a series of exceptions to the hearsay rule. The comment of the Commissioners on Uniform State Laws on the general scheme of 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

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1. See the Comment of the Law Revision Commission to Rule 63 (opening paragraph), page 9.

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.

REVISION OF URE RULES 62-66

The Law Revision Commission tentatively recommends that URE Rules 62-66 be revised as hereinafter indicated and that the California law be revised to conform thereto. 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 now the case.

In the discussion which follows, the text of the Uniform Rule or a subdivision thereof as proposed by the Commissioners on Uniform State Laws is set forth and the amendments tentatively recommended by the Law Revision Commission are shown in strikeout type 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 and the California law relating to hearsay, see the research study beginning on page _____. This study was prepared by the Commission's research consultant.

RULE 62. DEFINITIONS.

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

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

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

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

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

(a) This State or any county, city, district, authority, agency or other political subdivision of this State.

(b) Any other state or territory of the United States or any public entity in any other state or territory that is substantially equivalent to the public entities included under paragraph (a) of this subdivision.

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

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

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

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

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

(c) Dead or unable [to be present or] 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 and the proponent of his statement could not in the exercise of reasonable diligence have secured the presence of the declarant at the hearing. [, or]

(e) Absent from the [place of] hearing [because] and the proponent of his statement does not know and with reasonable 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 the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the [witness] declarant from attending or testifying; [, or] or [to the culpable neglect of such party, or]

(b) If unavailability is claimed [under clause (d) of the preceding paragraph] because the declarant is absent beyond the

jurisdiction of the court to compel appearance by its process and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship [,] or expense. [~~and that the probable importance of the testimony is such as to justify the expense of taking such deposition.~~]

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.

The significance of the definition of "statement" contained in URE 62(1) is discussed in the comment to the opening paragraph of Rule 63.

URE Rule 62(6) has been omitted because "a business" is used only in subdivisions (13) and (14) of Rule 63 and the term is defined there.

Rule 62 defines the phrase "unavailable as a witness," and this phrase is used in URE Rules 62-66 to state the condition which must be met whenever the admissibility of hearsay evidence is dependent upon the present unavailability of the declarant to testify. The admissibility of evidence under certain hearsay exceptions provided by existing California law is also dependent upon the unavailability of the hearsay declarant to testify. But the conditions consituting unavailability under existing law vary from exception to exception without apparent reason. Under some exceptions the evidence is admissible if the declarant is dead; under others, the evidence is

admissible if the declarant is dead or insane; under others, the evidence is admissible if the declarant is absent from the jurisdiction. For these varying standards of unavailability, Rule 62 substitutes a uniform standard.

The phrase "unavailable as a witness" as defined in Rule 62 includes, in addition to cases where the declarant is physically unavailable (dead, insane, or absent from the jurisdiction), situations in which the declarant is legally unavailable (exempted from testifying on the ground of privilege or disqualification). There would seem to be no valid distinction between admitting the statements of a dead, insane or absent declarant and admitting those of one who is legally not available to testify. Of course, if the out-of-court declaration is itself privileged, the fact that the declarant is unavailable to testify at the hearing on the ground of privilege will not make the declaration admissible. The exceptions to the hearsay rule that are set forth in the subdivisions of Rule 63 do not declare that the evidence described is necessarily admissible. They merely declare that such evidence is not inadmissible under the hearsay rule. If there is some other rule of law -- such as privilege -- which renders the evidence inadmissible, the court is not compelled to admit the evidence merely because it falls within an exception to the hearsay rule. Rule 62, therefore, will permit the introduction of hearsay evidence where the declarant is unavailable because of privilege only if the declaration itself is not privileged or inadmissible for some other reason.

The last clause of URE Rule 62 has been deleted by the Commission for it adds nothing to the preceding language.

RULE 63. HEARSAY EVIDENCE EXCLUDED - EXCEPTIONS.

Opening Paragraph: General Rule Excluding Hearsay Evidence.

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

COMMENT

This 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 defined in Rule 62(1) to mean only oral or written expression and assertive nonverbal conduct -- i.e., nonverbal conduct intended by the actor as a substitute for words in expressing a matter -- it does not define as hearsay at least some types of nonassertive conduct which our 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 drafted by the Commissioners on Uniform State Laws which define various exceptions to the hearsay rule. These and several additional subdivisions added by the Commission are commented upon individually below.

Subdivision (1): Previous Statement of Trial Witness.

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

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

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

(c) Concerns a matter as to which the witness has no present recollection and is contained in a writing which (i) was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness's memory, (ii) was made by the witness himself or under his direction or by some other person for the purpose of recording the witness's statement at the time it was made and (iii) is offered after the witness testifies that the statement he made was a true statement of such fact and after the writing is authenticated as an accurate record of the statement.

COMMENT

The Commission recommends against adoption of Rule 63(1) of the URE, which would make admissible any extrajudicial statement which was made by a declarant who is present at the hearing and available for cross-examination. URE 63(1) would permit a party to put in his case through written statements carefully prepared in his attorney's office, thus enabling him to present a smoothly coherent story which could often not be duplicated on direct examination of the declarant. 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 trial witness in order to make out a prima facie case or defense, he should be able to do so. In many cases the prior inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy which gave rise to the litigation.

Paragraph (c), 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 fact recorded in the writing actually

occurred or at such other time when the fact was fresh in his memory and (3) that the witness "knew that the same was 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 knew 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 unless it is offered by the adverse party.

Subdivision (2): Affidavits.

(2) [~~Affidavits to the extent admissible by the statutes of this state;~~]

COMMENT

The Commission does not recommend the adoption of subdivision (2). Rule 63(32) and Rule 63A will continue in effect the present statutes which set forth the conditions under which affidavits are admissible.

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 in a 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 party against whom the testimony was offered in the other action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the party against whom the testimony is offered has in the action or proceeding in which the testimony is offered; or

(c) In a criminal action or proceeding, the party against whom the testimony is offered 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.

Rule 63(3)(b) as revised by the Commission permits former testimony to be used in a civil action if the party against whom the evidence was offered in the previous action had the right and opportunity to cross-examine the declarant with a motive similar to that of the party against whom the evidence is offered. Thus, the party against whom the evidence is offered may be required to rely on the sufficiency of the cross-examination conducted by another person. However, Rule 63(3)(c) as revised by the Commission permits former testimony to be used in criminal proceedings only if the party against whom the evidence is offered was also the party against whom the evidence was offered in the previous proceeding. This distinction has been made to preserve the right of the person accused of crime to confront and cross-examine the witnesses against him. When a person's life or liberty are at stake -- as they are in a criminal trial -- the Commission does not believe that the accused should be compelled to rely on the sufficiency of prior cross-examination conducted on behalf of some other person.

The Commission recommends against the adoption of URE 63(3)(a). This paragraph would make admissible as substantive evidence any deposition taken "for use as testimony in the trial of the action in which it is

offered" without the necessity of showing the existence of any such special circumstances as the 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). The provisions then enacted respecting admissibility of depositions are narrower than URE 63(3)(a). 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. Rule 63(32) and Rule 63A will continue in effect the existing law relating to use of depositions as evidence at the trial.

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 excitement caused by such perception.

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

COMMENT

Paragraph (a) may go beyond existing law. 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.

The Commission has deleted paragraph (c) of URE 63(4). This paragraph would make the statements with which it is concerned admissible only when the declarant is unavailable as a witness; hence its rejection will doubtless exclude the only available evidence in some cases where, if admitted and believed, such evidence might have resulted in a different decision. The Commission was substantially influenced in reaching its decision by the fact that Rule 63(4)(c) would make routinely taken statements of witnesses in personal injury actions admissible whenever such witnesses are unavailable at the trial. Both the authorship (in the sense of reduction to writing) and the accuracy of such statements are open to considerable doubt. Moreover, as such litigation and preparation therefor is routinely handled, defendants are more often in possession of statements meeting the specifications of Rule 63(4)(c) than are plaintiffs; and it is undesirable thus to weight the scales in a type of action which is so predominant in our courts.

Subdivision (5): Dying Declarations.

(5) A statement by a person [~~unavailable as a witness because of his death~~] since deceased if the judge finds that it would be admissible if made by the declarant at the hearing and was made under a sense of impending death, voluntarily and in good faith and [~~while the declarant was conscious of his impending death and believed~~] in the belief that there was no hope of his recovery. [†]

COMMENT

This is a broadened form of the well-established exception to the hearsay rule which makes dying declarations admissible. The existing law - C.C.P. § 1870(4) as interpreted by our courts makes such declarations admissible only in criminal homicide actions and only when they relate to the immediate cause of the declarant's death. The 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 substituted "since deceased" for "unavailable as a witness because of his death" so that the question whether the proponent caused the declarant's death to prevent him from testifying may not be considered in determining the admissibility of the declaration. (See URE

62(7)(a).) If the declaration would tend to exonerate the proponent of the evidence, the Commission does not believe a dying declaration should be withheld from the jury even though there is other evidence from which the judge might infer that the proponent caused the declarant's death to prevent him from giving incriminating testimony.

The Commission has rearranged and restated the language relating to the declarant's state of mind regarding the impendency of death, substituting the language of C.C.P. § 1870(4) for that of the draftsmen of the URE. It has also added the requirement that the statement be one that would be admissible if made by the declarant at the hearing. 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 the declarant's conjecture as to the matter in question is not admissible.

Subdivision (6): Confessions.

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

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

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

(c) During a period while the defendant was illegally detained by a public officer or employee of the United States or a state or territory of the United States.

COMMENT

Paragraphs (a) and (b) and the preliminary language of this subdivision substantially restate the existing law governing the admissibility of defendants' confessions and admissions in criminal actions or proceedings. 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.

Paragraph (c) states a condition of admissibility that now exists in the federal courts but which has not been applied in the California courts. This paragraph will grant an accused person a substantial protection for his statutory right to be brought before a magistrate promptly, for the rule will prevent the State from using the fruits

of the illegal conduct of law enforcement officers. The right of prompt arraignment is granted to assure a person the maximum protection for his constitutional rights. Paragraph (c) will implement this purpose by depriving law enforcement officers of an incentive to violate the accused's right to be brought quickly within the protection of our judicial system.

Subdivision (7): Admissions by Parties.

(7) As against himself in either his individual or representative capacity, a statement by a person who is a party to [~~the~~] a civil action or proceeding whether such statement was made in his individual or [a] representative capacity. [~~and if the latter, who was acting in such representative capacity in making the statement;~~]

COMMENT

In making extrajudicial statements of a party admissible against him this exception merely restates existing law. The Commission has revised the subdivision so that it is applicable only in a civil action or proceeding. This revision makes 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 appearing 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. Moreover, 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 either in a personal or a representative capacity. More time might be spent in many cases in trying to ascertain in what capacity a particular statement was made than could be justified by whatever validity the distinction made by the draftsmen of the URE might be thought to have.

Subdivision (8): Authorized and Adoptive Admissions.

(8) As against a party, a statement:

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

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

COMMENT

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

Subdivision (9): Vicarious Admissions.

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

(a) The statement is that of an agent, partner or employee of the party and (i) the statement [~~concerned a matter within the scope of an agency or employment of the declarant for the party and~~] was made before the termination of such relationship [~~,~~] and concerned a matter within the scope of the agency, partnership or employment and (ii) the statement is offered after, or in the judge's discretion subject to, proof by independent evidence of the existence of the relationship between the declarant and the party; or

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

(c) In a civil action or proceeding, 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 extrajudicial statements of an agent, partner or employee, whether or not authorized. A statement is admitted under paragraph (9)(a), however, only if it would be admissible if made by the declarant at the hearing whereas no such limitation is applicable to authorized admissions. The practical scope of paragraph (a) is quite limited. If the declarant is unavailable at the trial, the self-inculpatory statements which it covers would be admissible under URE 63(10) because they would be against the declarant's interest. Where the declarant is a witness at the trial, many other statements covered by paragraph (a) would be admissible as inconsistent statements under URE 63(1). Thus, paragraph (a) has independent significance only as to self-exculpatory statements of agents, partners and employees who do not testify at the trial as to the matters within the scope of the agency, partnership or employment. For example, the chauffeur's statement following an accident, "It wasn't my fault; the boss lost his head and grabbed the wheel," would be inadmissible as a declaration against interest under subdivision (10), it would be inadmissible as an authorized admission under subdivision (8), but it would be admissible under paragraph (a) of subdivision (9). 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.

The Commission has substituted for paragraph (a) of the URE subdivision language which substantially restates existing California law as found in Section 1870(5) of the Code of Civil Procedure. The revised paragraph is, however, somewhat more liberal than the existing California law; it makes admissible not only statements that the principal has authorized the agent to make but also statements that concern matters within the scope of the agency. Under existing California law only the former statements are admissible.

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

Under paragraph (a) as revised by the Commission, the court may in its discretion receive the agent's statement in evidence subject to the later introduction of independent evidence establishing the relationship between the declarant and the party. Under paragraph (b), however, the court is not granted this discretion, for independent evidence of the existence of the conspiracy is required to be introduced before the statements of co-conspirators are introduced against the defendant. The discretion of the court has been limited in this respect to prevent the possibility that the co-conspirators' statements may be

improperly used by the trier-of-fact to establish the fact of the conspiracy and, in cases where the conspiracy is not ultimately established, to prevent the prejudicial effect this evidence may have upon trier-of-fact in resolving the question of guilt on other crimes with which the defendant is charged.

Paragraph (c) restates in substance the existing California law, which is found in Section 1851 of the Code of Civil Procedure, except that paragraph (c) limits this exception to the hearsay rule to civil actions or proceedings. Most cases falling within this exception would also be covered by URE Rule 63(10) which makes admissible declarations against interest. However, to be admissible under URE 63(10) the statement must have been against the declarant's interest when made whereas this requirement is not stated in paragraph (c). Moreover, the statement is admissible under paragraph (c) irrespective of the availability of the declarant whereas under revised Rule 63(10) the statement is admissible only if the declarant is unavailable as a witness. Some of the evidence falling within this exception, would also be admissible under URE Rule 63(21) which makes admissible against indemnitors and persons with similar obligations judgments establishing the liability of their indemnitees.

Subdivision (10): Declarations Against Interest.

(10) [~~Subject to the limitations of exception (6),~~] If the declarant is not a party to the action or proceeding and the judge finds that the declarant is unavailable as a witness and had sufficient knowledge of the subject, a statement which the judge finds was at the time of the [~~assertion~~] statement so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to the risk of civil or criminal liability or so far [~~rendered~~] tended to render invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social [~~disapproval~~] disgrace in the community that a reasonable man in his position would not have made the statement unless he believed it to be true. [~~;~~]

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

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

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 present requirement of C.C.P. § 1853 that the declarant have "sufficient 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 is not convinced that there is any pressing necessity for this exception or that there is a sufficient guarantee of the trustworthiness of the statements that would be admissible under this exception.

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

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

(a) The declarant's [~~(a)~~] then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but except as provided in paragraphs (b), (c) and (d) of this subdivision not including memory or belief to prove the fact remembered or believed, when such [a] mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant. [~~,-or~~]

(b) 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) A declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will.

(d) The declarant's intent, plan, motive or design at a time prior to the statement when the prior intent, plan, motive or design of the declarant is itself an issue in the action or proceeding and the declarant is unavailable as a witness.

COMMENT

Paragraphs (a) and (c) restate existing California law in substance. Paragraph (c) is, of course, subject to the provisions of

Section 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.

Paragraph (d) may broaden the state of mind exception as now declared by the California courts. Decisions now justify the admission of declarations of a previous state of mind upon the theory that there is a sufficient continuity of mental state so that a declaration showing the declarant's then existing belief concerning the previous mental state is relevant to determine what the previous mental state was. Under this rationalization, and under the state of mind exception as stated in paragraph (a), it is possible that a distinction might be drawn between substantially equivalent statements on the basis of the particular words used. For example, if the issue is whether a deed was given to another person with intent to pass title, a statement by the donor that he does not own the property in question or a statement by the donor that the donee does own the property in question would be admissible as evidence of his present state of mind which would be relevant to show the previous intent to pass title. However, it is possible that the statement by the donor, "I gave that property to B,"

might be excluded because the words on the surface do not show present state of mind but show merely memory of past events. To preclude the drawing of any such distinction, paragraph (d) abandons the "continuity of state of mind" rationalization for the admission of declarations which show a previous mental state and provides directly for the admission of such declarations to prove a previous intent, plan, motive or design of the declarant. Under this paragraph, though, declarations of a previous mental state are admissible to prove that mental state only when the mental state itself is an issue in the case. Such statements are not admissible under this paragraph if the relevance of the previous mental state is to prove previous acts or conduct of the declarant. This limitation is necessary to preserve the hearsay rule itself.

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.