6/29/62

Memorandum No. 43(1962)

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

The State Bar Committee appointed to work with the Law Revision Commission on the Uniform Rules of Evidence has approved the tentative recommendation contained in the galley proofs previously sent to you. See the letter from the Chairman of the State Bar Committee (Exhibit I - attached blue pages).

The staff requests authority to print the tentative recommendation and study in the form in which it was previously sent to you. We propose that 5,000 copies be printed. (We ordinarily print 3,000 copies of recommendations and studies.) We do not propose that any policy on charging for the report be adopted at this time. We plan to determine the cost of producing an individual copy of the report when the pamphlets are printed. We then will determine whether we can make arrangements for the sale of the pamphlets on a reasonable basis. If we can, we will bring the matter of sale of this pamphlet and other pamphlets back to the Commission for a decision on the policy to be followed. We may, if no unusual demand for the Hearsay Pamphlet develops, continue the present policy of distributing our pamphlet publications free of charge.

We propose to add the following sentence to the letter of transmittal in the Hearsay Pamphlet: "Only the tentative recommendation of the Commission (as distinguished from the research study) is expressive of Commission intent." We would add this sentence after the first sentence

of the second paragraph of the letter of transmittal. (See galley proofs previously sent to you.) A similar statement is contained in the third bound volume. Nevertheless, that statement was not sufficient to prevent Professor Kagel's views from being attributed to the Commission in a recent article on the Arbitration Statute. We also plan to add to the letter of transmittal a brief statement concerning the method of pagination used in the report.

Note that the Northern and Southern Sections propose certain matters for reconsideration by the Commission even though the State Bar Committee as a whole has approved the tentative hearsay recommendation as contained in the galley proofs we recently sent to you:

(1) The Northern Section is opposed to Rule 63(6) as revised by the Commission and requests that the Commission reconsider its position. See Minutes of Northern Section attached as Exhibit II (yellow pages). Compare position of Southern Section of State Bar Committee on this matter (Exhibit III - pink pages). Both the Northern and Southern Sections suggest that Rule 63(6)(b) be deleted as unnecessary.

(2) The Northern Section is opposed to Rule 63(10) as revised by the Commission and requests that the Commission reconsider its position. The Northern Section suggests that the following language added by the Commission to Rule 63(10) be deleted: "except that a statement made while the declarant was in the custody of a public officer or employee of the United States or a state or territory of the United States, is not admissible under this subdivision against the defendant in a criminal action or proceeding."

(3) The Southern Section approves Rule 63(21.1) but suggests that the Commission reconsider whether the requirement that the judgment be "offered by one who was a party to the action or proceeding in which the judgment was rendered" should be retained. See Minutes of Southern Section (Exhibit III - pink pages).

Exhibit IV (white pages) contains the text of Rule 63(6), (10) and (21.1) as revised by the Commission.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

LETTER FROM CHAIRMAN OF STATE BAR COMMITTEE

June 14, 1962

MR. JOHN H. DeMOULLY
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California.

Re: Committee to Consider Uniform Rules of Evidence

Dear Mr. DeMoully:

I have your letter of May 31, 1962 and have received the report of the Southern Section with regard to the hearsay exceptions.

I note that four members of the Southern Section participated in the final determination of that Section's position with regard to the hearsay exceptions. Only three members of the Northern Section so participated. Therefore, as Chairman of the Statewide Committee, and with the approval of the two members of the Northern Section other than myself who so participated, I rule that the Committee as a whole has now approved the final revision proposed by the Law Revision Commission.

However, the Northern Section remains opposed to Sections (6) and (10) of Rule 63, as revised by the Commission, and requests that the Commission reconsider its position. As stated in the report of the Northern Section of its meetings held on May 1st and May 10th the Northern Section cannot see that any purpose is subserved by placing the proposed subparagraph (b) in Section (6). The Constitution, after all, speaks for itself. It does not require reaffirmation by statute. Furthermore, it is not apparent to the Northern Section that any constitutional provisions limit the admission of confessions. Furthermore, the Northern Section feels that if a confession is voluntarily made while a person is illegally detained there is no reason why it should not be admissible. The same reasoning applies to the similar exception found in Section (10).

Sincerely yours,

s/ Lawrence C. Baker

Lawrence C. Baker
Chairman Committee to Consider
Uniform Rules of Evidence

(Memo. 43)(1962)

EXHIBIT II

MINUTES OF MEETINGS

OF

NORTHERN SECTION OF
COMMITTEE TO CONSIDER
UNIFORM RULES OF EVIDENCE

Two meetings of those members of the Northern Section (for convenience hereinafter called the "Committee") who are concerned with the hearsay rules were held on May 1st and May 10th, 1962.

The Committee agreed with the analysis of the revisions by the Law Revision Commission (hereinafter called the "Commission") heretofore rendered by the Chairman and accordingly proceeded to consider sections (3), (4), (6), (10), (15), (16), (21) and (30) of Rule 63 and also Rule 64.

With respect to section (3) the Committee agreed that the changes made by the Commission were improvements and accordingly approved section (3), as revised by the Commission.

With respect to section (4) the fundamental difference between the Commission and the Committee is that the Committee would confine the admissibility of contemporaneous and spontaneous statements to situations where the declarant is unavailable while no such limitation is imposed by the Commission. Upon further consideration it appears to the Committee that the imposition of the limitation of unavailability springs from a misunderstanding by the whole Committee, both North and South, of the fundamental basis of the hearsay exception for spontaneous statements. This basis is that such statements, being spontaneous, have a probability of trustworthiness greater than might ordinarily be expected

from the declarant while on the stand, and being incapable of recapture except by those who heard the statements, there is an intrinsic necessity for their use totally independent of the declarant's availability. The present California rule does not appear to require unavailability of the declarant, and from the standpoint of general principle Wigmore says:

> "The Necessity Principle; Death, Absence etc., need not be shown. It has already been noticed (ante, § 1421) that through the Exceptions to the Hearsay rule run two general principles, one of which is that some necessity shall exist for resorting to hearsay statements. This Necessity, for the first six Exceptions, consists in the impossibility of obtaining from that person testimony on the stand; for the seventh it consists in the general scantiness of other evidence on the same subject; for the eighth, ninth, tenth, and eleventh, in the practical inconvenience of requiring the person's attendance upon the stand; and, for the thirteenth, in the superior trustworthiness of his extrajudicial statements as creating a necessity or at least a desirability of resorting to them for for unbiased testimony. It is this last reason that suffices equally for the present Exception. The extrajudicial assertion being better than is likely to be obtained from the same person upon the stand, a necessity or expediency arises for resorting to it.
>
> This reason, though rarely noted by the Courts, appears clearly to be the sufficient one."

The Committee therefore approved section (4) as revised by the Commission.

Turning to section (6) the Committee remains unable to agree with the Commission's proposed paragraph (b) which reads:

> "under such circumstances that it is inadmissible under the Constitution of the United States or the Constitution of this State."

The Committee cannot see that any purpose is subserved by placing such a provision in a statute. The Constitution, after all, speaks for itself. It does not require reaffirmation by statute. Furthermore, it is not apparent to the Committee that any constitutional provisions limit the admission of confessions. In this respect in III Wigmore on Evidence, 3rd Ed., Sec. 822, it is said:

"The principle upon which a confession is treated as sometimes inadmissible is that under certain conditions it becomes untrustworthy as testimony.

. . . . . .

The ground of distrust of such confessions made in certain situations is, in a rough and indefinite way, judicial experience."

(Emphasis the author's)

In Sec. 823 the author further says:

"Finally, a confession is not rejected because of any connection with the privilege against self-incrimination."

(Emphasis the author's)

The Committee, however, is aware of the holding in People v. Williams, 20 Cal. (2d) 273, that confessions obtained by physical abuse violates due process of law.

In its most recent revision the Law Revision Commission has added a new subsection (c) which reads as follows:

"during a period while the defendant was illegally detained by a public officer or an employee of the United States or a state or territory of the United States."

The Committee fails to find any relevancy of this subparagraph to the question of admissibility of confessions. If a confession is voluntarily made while a person is illegally detained it appears to the Committee that there is no reason why it should not be admissible.

The Committee therefore disapproved the revision of the Commission and approved the original URE version as heretofore revised by the Committee.

With respect to section (10) the Committee cannot find any connection between the following language added by the Commission:

"except that a statement made while the declarant was in the custody of a public officer or employee of the United States or a state or territory of the United States, is not admissible under this subdivision against the defendant in a criminal action or proceeding."

and the exception for declarations against interest. As with the case of confessions it would appear to the Committee that there is no reason why any declaration against interest, voluntarily made, should not be admissible even though the declarant were in the custody of a public officer or employee.

The Committee therefore approved section (10), as revised by the Commission, but with the elimination of the quoted matter above set forth.

Upon consideration of section (15) the Committee concluded that the Commission's revisions substantially satisfied all of the doubts which the Committee harbored with respect to the original URE version and therefore approved section (15) as revised by the Commission.

With respect to section (16) the Northern Section had originally recommended that it be confined to vital statistics. As revised by the Commission it has been so confined and, in addition, the Commission has eliminated certain unintelligible phrases in the URE version.

The Committee therefore approved section (16) as revised by the Commission.

With respect to section (21), after further consideration the Committee agrees with the Commission that, as revised by the Commission, this section would not militate against application of those provisions of law which in certain circumstances attribute conclusiveness to a previous judgment against an indemnitee. It was noted that the Commission's revision eliminates unintelligible language contained in the original

URE version. The section, as revised by the Commission, was therefore approved.

Section (30) next came up for consideration. The Committee believes that the Commission's revision largely removes the doubts of the Committee with regard to the original URE version. The Committee suggests, however, that a greater probability of trustworthiness might be attained if, after the word "opinion", there should be restored the words "which is of general interest to persons engaged in an occupation". This is merely a suggestion and whether or not accepted by the Commission the Committee approves the section in its present form as revised by the Commission.

With respect to Rule 64 the Committee agreed with the Commission that the new discovery rules leave it unnecessary and therefore approved its elimination by the Commission.

The Northern Section therefore approves Rule 62 and 63 as revised by the Commission except that it disagrees with the Commission's revision of sections (6) and (10) of Rule 63. The Northern Section would also suggest, merely as a caveat, that a certain qualification be added to section (30) of Rule 63, as hereinbefore noted.

Statutory changes are approved.

LAWRENCE C. BAKER
Chairman Northern Section Committee
to Consider Uniform Rules of Evidence

Memo. No. 43(1962)

EXHIBIT III

MINUTES OF MEETING OF SOUTHERN SECTION COMMITTEE TO CONSIDER UNIFORM RULES OF EVIDENCE

[May 17, 1962]

The Southern Section of the Committee met on May 17, 1962, at Room 1111, Superior Oil Building, 550 S. Flower Street, Los Angeles.

Members present: Barker, Christopher, Henigson, Kadison

Members absent: Groman, Newell, Schall

The meeting was held for the purpose of reconsidering certain of the hearsay rules in the light of modifications made by the Law Revision Commission (the "Commission"). These modifications are reflected in the Commission's tentative recommendation concerning the Hearsay Article which was distributed to the members of the Committee on October 19, 1961, and later placed in galley proof form. References hereafter made in these minutes to the Commission's revised drafts of the rules in question shall be deemed, unless otherwise stated, to refer to the Commission's draft thereof as shown in the tentative recommendation distributed by the Commission in October, 1961.

Rule 63, subdivisions (3) and (3.1)

These subdivisions relate to the admissibility in a present action of testimony given in a former action. As recast by the Commission, subdivision (3) applies only to situations in which testimony in a former action is offered against a person who was a party to the former

action. Subdivision (3.1), a new subdivision, covers those situations in which testimony given in a former action is offered against a person who was not a party to the former action.

The Committee reviewed the Commission's revised draft of these subdivisions in the light of the draft of subdivision (3) previously agreed upon by the Committee and the Commission. The Committee also reviewed the analysis of these subdivisions made by Lawrence Baker in his report dated January, 1962.

The conclusion reached was that subdivision (3), as revised by the Commission, when read together with the new subdivision (3.1) proposed by the Commission, is a clearer and more precise statement of the former testimony exception to the hearsay rule than the drafts previously approved by the Committee. Accordingly, subdivisions (3) and (3.1) in their presently revised forms were approved.

Rule 63, subdivision (4)

This subdivision relates to the admissibility of spontaneous declarations.

The only substantive change which the Commission seems to have made from its previous version is the addition of the word "act" to the list of things which the declarant must have perceived, so that the phrase which formerly read "event or condition" now reads "act, event, or condition". This slight change was approved without dissent.

The Committee then reviewed, by reference to its files, the history of what now seems to be the only remaining area of disagreement with the Commission: namely, the need for a requirement that the declarant be unavailable. The requirement of unavailability is not imposed by the

Commission. Previously, the Committee had insisted that spontaneous declarations be admissible only if the declarant were unavailable as a witness or testified that he did not recall the event or condition involved. It may be of some interest to note how this came to be the Committee's view. The notes of the members of the Southern Section who were on the Committee when this problem first was considered in 1958 indicate that the unavailability requirement, although not a requirement under existing California law, was proposed by the Northern Section (at a meeting held April 23, 1958) in an effort to place some restriction on res gestae statements -- the idea being that, in the words of the Northern Section, "trial judges use res gestae as an excuse for letting in almost anything." The Southern Section, on the other hand, never was insistent upon the requirement that the witness be unavailable and, at its June 7, 1958, meeting, voted to the effect that unavailability not be a requirement for admissibility of spontaneous declarations because the very spontaneity of the declaration afforded a sufficient basis for concluding that the declaration was trustworthy. However, in a joint meeting on October 8, 1958, between the Committee as a whole and the Commission, it was agreed, by a slight margin, that the Northern Section's views should prevail. This has represented the view of the Committee as a whole up to the present time.

It was noted that the Northern Section, at its May, 1962, meetings, had reversed its former position and now agreed that unavailability of the declarant should not be a requirement for the admissibility of spontaneous declarations.

Upon further review of the problem of unavailability, the Southern Section again affirmed what initially was its position: namely, that

unavailability of the declarant should not be a requirement for admissibility of spontaneous declarations. Thus, the two Sections now appear to be in agreement with each other and with the Commission.

Subdivision (4), as presently revised by the Commission, thereupon was approved.

Rule 63, subdivision (6).

This subdivision relates to the admissibility of confessions.

The Committee reviewed the history of its past disagreement with the Commission on the matter of admissibility of confessions. The Committee previously has been of the view that the URE version of subdivision (6) should be adopted with the following changes: (i) deletion of the word "reasonably" in subparagraph (b) and, in the same subparagraph, change "public official" to "public officer or employee"; (ii) the addition of a new subparagraph (c) which would read: "or (c) under such other circumstances that the statement was not freely or voluntarily made."

The approach which the Committee as a whole always has taken (and which the Northern Section, judging from the minutes of its May 1962 meetings, still takes) is that the test which should govern the admissibility of confessions is this: Was the confession freely and voluntarily made? If so, it should be admissible. But if it was obtained under circumstances which cast doubt upon its voluntariness, it should be inadmissible as a matter of public policy, irrespective of the question of whether it was likely to have been true or false.

The Commission's previous approach, as we understood it, was that the test of admissibility should turn primarily on the issue of whether the

circumstances were such that the confession was likely to have been false; that the conduct of the authorities in obtaining the confession, although important, is a secondary consideration.

Upon reviewing the Commission's redraft of subdivision (6), it appeared to the members of the Southern Section that the Commission now has come very close to the Committee's thinking on the basic policy question. Under the Commission's present draft, the judge must find that the statement was freely and voluntarily made and, in addition, must find the existence or non-existence of other circumstances. In other words, the free and voluntary nature of the confession is an inherent condition which now must be met in all cases. This represents a substantial and important deviation from some of the Commission's earlier drafts which made the likelihood of truth or falsity the sole or principal test, but which did not require a finding that the confession must have been freely and voluntarily made.

With respect to subparagraph (b) of the Commission's revised draft, the members agreed with the Northern members that reference to the constitutional problem probably is unnecessary. However, they could see no harm in including the language of subparagraph (b).

With respect to subparagraph (c) of the Commission's revised draft, a majority of the members present agreed with the Commission that, as a matter of public policy, illegal detention should deprive the authorities of the right to use a confession obtained during the period of illegal detention. Mr. Henigson, however, was in favor of deleting subparagraph (c) on the ground that the advantages which result from the use of confessions which are actually freely and voluntarily made (although they happen to have been made during a period of illegal detention) outweigh the public policy

that is served by excluding such confessions. Thus, Mr. Henigson would agree with the Northern Section that the question of illegal detention should not be a factor.

By a majority vote [Henigson dissenting only with respect to subparagraph (c), which he would delete], the members voted to approve subdivision (6) in the form presently revised by the Commission.

Rule 63, subdivision (10)

This subdivision deals with the admissability of declarations against interest.

The Commission's presently revised draft of subdivision (6) appears to be substantially the same as that previously approved by the Committee, except that:

(i) the Southern Section of the Committee previously has insisted upon inserting, at the outset, the words "except as against the accused in a criminal proceeding";

(ii) the Commission now proposes to add, at the end of subdivision (10), language reading as follows: "except that a statement made while the declarant was in the custody of a public officer or employee of the United States or a state or territory of the United States is not admissible under this subdivision against a defendant in a criminal action or proceeding."

The Southern Section previously has insisted upon some restriction upon the use of third-party declarations against interest as against an

accused in a criminal proceeding because of its fear that, in the absence of such a restriction, the prosecution could, for example, put the squeeze on a co-consipirator (not the accused) to make a declaration which implicates both the declarant and the accused and then use that declaration against the accused without having to comply with the requirements of subdivision (9) [relating to admissibility of declarations of co-conspirators].

After reviewing the new language which the Commission proposes to add to subdivision (10), the Southern Section concluded that the inclusion of that new language would serve a very material and salutary purpose and would go a long way towards reducing the previous fears of the members of the Southern Section that subdivision (10) would serve as a vehicle for getting around subdivision (9). Although the Northern Section apparently saw no useful purpose in the new language, the members of the Southern Section thought otherwise. It seemed to them that the new language makes a logical distinction between declarations which are likely to be trustworthy and those which are not; that an extra-judicial declaration against interest which is made by a third party (not the accused) against the accused is inherently more credible if made while the declarant is not in custody of the authorities than it is if made while the declarant is in custody. The conclusion finally arrived at was that the new language which the Commission proposes to add to subdivision (10) represents an acceptable compromise which meets to a substantial degree our previous objections to making third-party declarations against penal interest admissible

as against an accused in a criminal proceeding. The Southern Section members believe that it is not likely that a third person, particularly a co-conspirator, will make a declaration against interest which implicates himself and the accused unless the declarant is in custody when he makes the declaration, and that if the declarant makes the declaration while not in custody the statement is likely to be true.

Accordingly, the Commission's revised draft of subdivision (10) was approved.

Rule 63, subdivision (15)

This subdivision relates to the admissibility of written reports made by public officials in the performance of their duties.

It was noted that the Commission now has revised subdivision (15) to eliminate subparagraph (c) of the URE version of this subdivision. Subparagraph (c) would have made admissible written reports made by an official whose duty was merely to "investigate" the facts (i.e., a police officer who did not observe the accident but merely investigated it afterwards). Also, the Commission's revised draft would substitute a general provision stating that the admissibility of official reports is dependent upon a finding by the judge that the sources of information for, and the method of preparation of, the report are such as to indicate the trustworthiness of the report. This is basically the same approach that is used in determining the admissibility of business records.

The Committee concluded that applying the same approach to the problem of admissibility of official records as is used in connection

with business records is a practical solution to the problem. The Committee also decided to withdraw its former insistence that there be restrictions imposed upon the admissibility of official reports when the reporting official is employed by a governmental agency which is a party to or has a direct interest in the litigation. The Committee is willing to accept the argument that if the agency whose employee prepared the report has an interest in the litigation, this fact can be handled by treating it as something which goes to weight, bias, etc., and that a rule of complete exclusion may be unnecessarily harsh and may serve to keep out vital information which otherwise may not be obtainable.

Rule 63, subdivision (16)

This subdivision relates to the admissibility of reports made by persons who are not public officers but who nevertheless have a statutory duty to make reports.

It was noted that the Commission's revised draft apparently accepts the Northern Section's view that the only reports which should be made admissible by subdivision (16) are those of the vital statistics variety (birth, death, marriage). The Southern Section, although of the view that the URE version of subdivision (16) is far too broad, previously has been reluctant to limit the application of subdivision (16) to reports of birth, death, and marriage, pointing out that there are many other types of reports that generally are reliable and contain information that it would be difficult to obtain from other sources [examples are ships' logs, shipping registers, timber reports, surveyors'

reports, etc.]. However, the Southern Section has been unable to come up with any workable formula which would distinguish between those types of reports concerning which there would be little controversy and those whose reliability might be subject to serious question.

Upon reconsideration, the Southern Section decided to accept the views of the Northern Section and the Commission, and to approve subdivision (16) in the form approved by the Commission. Many reliable types of reports of the non-vital-statistics variety probably could come into evidence under some other hearsay exception, particularly the business records exception.

Attention was directed to the fact that in the Commission's galley proof of subdivision (16) the word "fetal" is misspelled "fatal".

Rule 23, subdivisions (21) and 21.1

These subdivisions relate to the admissibility of a prior judgment obtained against X when X thereafter brings an action against Y, based on the former judgment, to recover on an indemnity agreement with Y or to enforce a warranty given by Y to X.

The members of the Section concluded that the Commission's revised subdivision (21) sufficiently clarifies the ambiguities which the Committee had objected to in former drafts. Therefore, the Commission's redraft of subdivision (21) was approved.

With respect to the Commission's new subdivision (21.1), the Committee agreed to approve the Commission's draft subject to receiving an explanation from the Commission as to why subdivision (21.1) should be limited only to situations in which the judgment is offered by a

person who was a party to the action in which the judgment was rendered. The Southern Section members cannot readily see why it should make any difference whether the judgment is offered by a party or by a non-party.

Rule 63, subdivision (30)

This subdivision relates to the admissibility of matters contained in commercial lists, etc. which are generally relied upon as accurate by persons in the trade.

After some discussion, it was decided to approve the Commission's draft of subdivision (30).

Rule 64.

The Committee agreed with the Commission's view that the new discovery rules probably make Rule 64 unnecessary, and, therefore, the Commission's action in deleting Rule 64 was approved.

Statutory changes

The statutory changes recommended by the Commission were approved.

Summary

As a result of the action taken at this meeting and at previous meetings, it now appears that the Southern Section is in full agreement with the Commission with respect to the entire Hearsay Article [Rule 62 though 66.1, inclusive[.

Stanley A. Barker
Vice-Chairman

EXHIBIT IV

TEXT OF RULE 63(6), (10) AND (21.1) AS REVISED

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;~~ As against the defendant in a criminal action or proceeding, 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

As revised by the Commission, 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.

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. For the sake of completeness, however, it is desirable to give express recognition to the fact that any rule of admissibility established by the Legislature is subject to the requirements of the Federal and State constitutions.

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 an accused 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 (10): Declarations Against Interest

(10) ~~Subject to the limitations of exceptions (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, except that a statement made while the declarant was in the custody of a public officer or employee of the United States or a state or territory of the United States is not admissible under this subdivision against the defendant in a criminal action or proceeding.~~;~~

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.

URE 63(10) has been revised (1) to limit its scope to nonparty declarants (incidentally making the cross reference to exception (6) unnecessary); (2) to write into it the present requirement of Code of Civil Procedure Section 1853 that the declarant have "sufficient knowledge of the subject"; (3) to condition admissibility on the unavailability of the declarant; and (4) to prohibit the use of such a declaration against the defendant in a criminal case if the declarant was in custody when the statement was made.

Subdivision (21.1): Judgment Determining Liability, Obligation or Duty

(21.1) When the liability, obligation or duty of a third person is in issue in a civil action or proceeding, evidence of a final judgment against that person to prove such liability, obligation or duty, if offered by one who was a party to the action or proceeding in which the judgment was rendered.

COMMENT

This subdivision supplements the rule stated in subdivision (9)(c). Together, they codify the holdings of the cases applying Section 1851 of the Code of Civil Procedure.