#34(L) 2/18/64

First Supplement to Memorandum 64-13

Rule 63(16), (18). Under existing law, a certificate of birth, fetal death, death or marriage, filed within the state is self-authenticating. Health and Safety Code Section 10577 provides:

> Any birth, fetal death, death, or marriage record which was registered within a period of one year from the date of the event under the provisions of this division or any copy of such record or part thereof, properly certified by the State Registrar, local registrar, or county recorder, is prima facie evidence in all courts and places of the facts stated therein.

Subdivision (16) provides a hearsay exception for vital statistics reports from other jurisdictions. However, the judge must find (1) that the maker was required by statute to file the report in a designated public office and (2) that the writing was made and filed as required by the statute. This seems to require some evidence of the identity of the maker so that the judge can determine that he was in fact required to file the writing and that he made and filed the writing in accordance with the statute.

So far as documents executed by public officials are concerned, we made the documents self-authenticating by creating a Thayer presumption as to the validity of official seals and signatures. This is Rule 67.7. We believe that a birth, death, or marriage record filed in a public office is as likely to be authentic as a document signed by a purported notary public and, hence, we recommend that a subdivision be added to Rule 67.7 providing a presumption of authority and the authenticity of the signature of the maker of a birth, death, or marriage record. See Exhibit I (yellow page) for suggested language.

The certificate of marriage referred to in subdivision (18) is not the official record of the marriage referred to in subdivision (16). The certificate referred to in (18) is the kind of certificate that is given to the parties to the marriage. Hence, there is not the same aura of authenticity that there is in regard to official birth, death, and marriage records. Subdivision (18) does not provide that the marriage certificate is self-authenticating. The Commission might wish to make a Thayer presumption of authenticity in regard to this kind of document, too. However, the staff does not recommend such action. We mention it here, however, for your consideration.

Rule 63(20). The Commission disapproved subdivision (20)--which would provide that a final judgment adjudging a person guilty of a felony is admissible to prove any fact essential to sustain the judgment--before the decision of the California Supreme Court in Teitelbaum Furs, Inc. v. Dominion Insur. Co., 58 Cal.2d 601, 25 Cal. Rptr. 559, 375 P.2d 439 (1962). The Teitelbaum case held that the doctrine of collateral estoppel conclusively bars a person convicted of a crime from contesting the matters determined in the criminal action in a later civil action. In the Teitelbaum case, Teitelbaum had previously been convicted of conspiracy to commit grand theft, attempted grand theft, and the filing of a false and fraudulent insurance claim because a purported robbery was a hoax. The corporation of which Teitelbaum was the president then sued the insurance company to recover on its policy protecting it against robbery. The Supreme Court held that the criminal conviction was not merely evidence that there was no robbery, the criminal conviction conclusively established that there was no robbery insofar as Teitelbaum was concerned. The court

distinguished a plea of guilty which is a mere admission and not conclusive. The corporation, then, was barred because it was merely Teitelbaum's alter ego.

In light of the conclusive effect of a criminal judgment against the defendant himself in later litigation, perhaps a conviction of a felony should be given at least an evidentiary effect in later litigation when the doctrine of collateral estoppel does not apply.

The Conference of California Judges Committee (see Exhibit V to Memorandum 64-9) suggests that the Teitelbaum case makes the judgment of conviction admissible in any other action in which it would be material despite the omission of subdivision (20). We do not think this is so, however, for the facts determined by the judgment may be relevant in litigation between other parties. In such a case the doctrine of collateral estoppel would not apply and the Teitelbaum case would have no application.

One member of the judicial committee recommends the retention of subdivision (20) so long as it is made clear that it is not intended to repeal by implication Penal Code Section 1016, subdivision 3, relating to the plea of nolo contendere. Penal Code Section 1016 provides that the plea of nolo contendere may not be used against the defendant as an admission. We cannot tell whether it is intended by this language to overcome the rule of the Teitelbaum case or not. The Teitelbaum case did not use Teitelbaum's plea at all, and distinguished cases using a plea as an admission. And, strictly speaking, the Teitelbaum case did not use the judgment (as distinguished from the plea) as an admission. Teitelbaum was not concerned with the admissibility and effect of a judgment as

evidence, as it would have been if it had treated the judgment as an admission, it was concerned with the effect of a judgment as substantive law. Under our recommendations, the court would obtain knowledge of the judgment by judicial notice, and no evidentiary problem would arise.

We suspect, however, that Section 1016 will have to be construed to mean that a judgment based on a plea of nolo contendere may not be given conclusive effect against the defendant. If this construction is not given, the qualification in Section 1016 does not mean anything. If this is the construction given to Section 1016, it would be desirable, if subdivision (20) is retained, to revise it to indicate that the judgment may not be used as evidence of the underlying facts in any later litigation if the judgment is based on a plea of nolo contendere; for if the judgment cannot be used against the defendant, it would seem inappropriate to make it available against anyone else.

If the Commission believes that subdivision (20) should be restored, we recommend the following language:

> (20) Unless the judgment was based on a plea of nolo contendere, evidence of a final judgment adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment.

Rule 63(22), (27). Both of these exceptions to the hearsay rule permit evidence concerning land to be introduced. Subdivision (22) permits a judgment determining the interest of a public entity in land to be used as evidence of the interest or lack of interest of the public entity, and subdivision (27) permits common reputation in a community to be used to prove boundaries of, or customs affecting, land in the community.

The rules are somewhat related from this standpoint: the English cases tended to regard the hearsay rule at times as merely a rule requiring the

court to use the best evidence that was available on the particular issue. The English courts regarded a judgment between adverse parties as a superior form of evidence--that is, a more reliable form of evidence--than common reputation. Hence, because they accepted reputation evidence on the interest of the public in land, they would permit evidence of a judgment determining the interest of the public in land to be used to prove that interest.

First, considering subdivision (27), we have discovered that it does not permit introduction of all of the hearsay on the subject that is now admissible. In Simons v. Inyo Cerro Gordo Co., 48 Cal. App. 524 (1920), the court pointed out that there is a common law exception to the hearsay rule permitting common reputation evidence to be used to show the interest or lack of interest of the public in property; but the reputation must be ancient, that is, of a fact more than 30 years old.

Nothing in Rule 63(27) permits evidence of reputation concerning the interest or lack of interest of the public in property to be shown. We think that the proposed rules of evidence should not let in less hearsay than is now admissible. We believe, therefore, that subdivision (27) should be revised to make reputation evidence as to the public interest in property admissible. We do not believe that the revision should include the 30 year limitation that is in the existing law. The Commission has previously rejected the 30 year limitation so far as events of general history are concerned. The reason for the deletion is given in the comment to subdivision (27). We think the comment is equally applicable to the 30 year requirement in regard to reputation as to interest in property.

Subdivision (22) also needs revision. The proposed revision of subdivision (27) would make reputation evidence admissible to prove the interest

or lack of interest of the public at large in property, even though no particular public entity were interested in the property. Correspondingly, we think subdivision (22) should permit a judgment determining the interest or lack of interest of the public at large in property to be used as evidence of such interest or lack of interest whether or not any particular public entity was a party to the lawsuit.

It seems to us that where no public entity's interest is involved, the exception in subdivision (22) is most needed. The interest of a particular entity can usually be traced to appropriate documents. Judgments affecting the interest are probably constitutive documents affecting the public interest rather than evidence of what the public interest may be. Moreover, where an entity is concerned, there are officials and records that can be looked to for information. But, when no entity is involved, these alternative sources of proof do not exist. Thus, if the rationale for Rule 63(22) is sound (and we think it is), and a judgment determining the public interest should be received when reputation concerning that interest would be received because it is a superior and more reliable form of evidence, subdivision (22) should be revised to permit evidence of a judgment to be introduced as hearsay evidence when the judgment determines the interest or lack of interest of the public at large in property whether or not the interest of a public entity was decided in the judgment and whether or not a public entity was a party to the lawsuit.

Is the reference in subdivisions (22) and (27) to "land" broad enough? Simons v. Inyo Cerro Gordo Co., 48 Cal. App. 524 (1920) and Vernon Irrigation Co. v. Los Angeles, 106 Cal. 237 (1895) held that common reputation evidence is admissible to prove the public interest or lack of public interest in

water. Should the reference be changed to "property" or should an additional reference to "water" be added?

We recommend that the subdivisions be revised as follows:

(22) To prove any fact which was essential to the judgment[~~,~~] :

(a) Evidence of a final judgment determining the interest or lack of interest of the public in property.

(b) Evidence of a final judgment determining the interest or lack of interest of a public entity in [~~land~~] property, if the judgment was entered in an action or proceeding to which the public entity whose interest or lack of interest was determined was a party. As used in this [~~subdivision~~] paragraph, "public entity" means the United States or a state or territory of the United States or a governmental subdivision of the United States or of a state or territory of the United States.

(27) To prove the truth of the matter reputed, evidence of reputation in a community if the reputation concerns:

* * * * *

(d) The interest or lack of interest of the public or of a public entity in property in the community and the judge finds that the reputation, if any, arose before controversy.

Respectfully submitted,

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Assistant Executive Secretary

First Supplement
to Memo 64-13

EXHIBIT I

Either of the following subdivisions should be added to Rule 67.7:

A writing purporting to be a record or report of a birth, fetal death, death, or marriage is presumed to be genuine if:

(a) A statute required writings made as a record or report of a birth, fetal death, death, or marriage to be filed in a designated public office; and

(b) The writing was filed in that office.

A signature is presumed to be genuine and authorized if it is affixed to a writing purporting to be a record or report of a birth, fetal death, death, or marriage and:

(a) A statute required writings made as a record or report of a birth, fetal death, death, or marriage to be filed in a designated public office; and

(b) The writing was filed in that office.