#34(L) 5/13/64

Memorandum 64-31

Subject: Study No. 34(L) - URE (Hearsay Evidence)

This memorandum relates to proposed Division 10, Hearsay Evidence, of the Evidence Code. It will discuss certain definitions in Division 2 as they relate to the hearsay division. Many of the matters presented here were presented in Memorandum 64-17. There are some new matters for your consideration also, and we have brought together all the material that you are to consider in regard to the hearsay division in this Memorandum.

DEFINITIONS

Several of the definitions that appear in Rule 62 of our Tentative Hearsay Recommendation have been included in Division 2, entitled "Words and Phrases Defined". We have placed the definitions relating to hearsay among the general definitions relating to the entire code because it is easier to find them there and because the defined terms are useful in other parts of the code.

Section 145.

The definition of "declarant" is the same as that appearing in RURE 62(2).

Section 170.

The definition of "hearsay evidence" is a revised version of the definitional portion of the opening paragraph of RURE 63.

Section 185.

The definition of "perceive" is the same as RURE 62(3).

Sections 210, 215, 235.

The definitions of "public employee", "public entity", and "state" supersede the definitions of "public officer or employee" and "state"

in subdivisions 4 and 5 of RURE 62.

Section 240.

This section is the same as RURE 62(1).

Section 255.

This definition is the same in substance as the definition in subdivisions (6) and (7) of RURE 62 as revised at the February meeting. The following matters should be considered in regard to this section:

(1) We have substituted "his attendance" for "appearance" in subdivision (a)(4) to conform to paragraphs (5) and (6) of subdivision (a). (Code of Civil Procedure Section 2064 provides in part: "A witness, served with a subpena, must attend at the time appointed, . . ." Other existing statutes also use "attend".) Either "attendance" or "appearance" should be used uniformly in the section.

(2) In paragraph (3), note that the New Jersey Committee used the word "disability" instead of "physical or mental illness or infirmity".

(3) In paragraph (5) we suggest that the words "by subpena" be deleted. Attendance can be compelled by means other than subpena. For example, attendance of a county jail prisoner is compelled by an order of court Code Civ. Proc. §§ 1995, 1997. Should a broader phrase be substituted for "by subpena"?

(4) In subdivision (b)(1), the New Jersey Committee used "was brought about by" instead of "is due to".

(5) Subdivision (b)(2) presents two important policy problems. First, there seems no logical reason why it is restricted to the case where the declarant is absent beyond the jurisdiction of the court to compel appearance by its process. The logic of the provision would seem to apply to

any case where the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship or expense, including, for example, cases where the declarant is imprisoned, where the proponent of his statement has exercised reasonable diligence (even though within the jurisdiction) but has been unable to procure his attendance, where he is too ill to attend the hearing, and even when he is dead. New Jersey revised the equivalent of subdivision (b)(2) to meet this problem as follows: "But a witness is not unavailable . . . when his deposition could have been or can be taken by the exercise of reasonable diligence and without undue hardship . . . [or expense]." It is suggested that the New Jersey revision makes good sense.

Second, subdivision (b)(2) makes no sense when a person is offering a deposition on the ground that a person is unavailable as a witness. Subdivision (b)(2) appears to state that a person is not unavailable as a witness if his deposition can be taken. (In the Uniform Rules, a deposition is admissible even if the declarant is available as a witness. When we deleted this provision, we created this problem.) In this connection, see our proposed amendments of Code of Civil Procedure Section 2016 (page 351 of tentative recommendation) and Penal Code Sections 1345 and 1362 (page 353 of tentative recommendation). One method of dealing with the problem would be to insert in each of these three sections the definition of unavailable as a witness from Section 255 (with subdivision (b)(2) omitted). The disadvantage of this is that we then have four code sections that will need to be kept consistent and to make a change in what constitutes unavailability will require amendment of four sections in three different codes.

Another method of dealing with the problem would be to divide subdivision (b) of Section 255 into two subdivisions to read as follows:

> (b) A declarant is not unavailable as a witness if 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 declarant from attending or testifying.
>
> (c) If the evidence offered is not a deposition of the declarant, a declarant is not unavailable as a witness if the deposition of the declarant could have been or can be taken by the proponent of his statement by the exercise of reasonable diligence and without undue hardship or expense.

If this method is used, the introductory clause of subdivision (a) should be revised to read: "Except as otherwise provided in subdivisions (b) and (c)."

A third method of dealing with the problem is to delete the deposition provision from Section 255 and to consider each hearsay exception where unavailability of the witness is required and to determine whether the proponent of the statement should be required by the particular exception to obtain a deposition if possible. For example, if the statement is a declaration against interest, should the proponent be required to take the deposition of the declarant? Suppose the declarant does not give a deposition consistent with his previous declaration against interest. Can the proponent then offer the deposition and also offer his prior declaration against interest (as a prior inconsistent statement) as <u>substantive</u> evidence even though the declarant is not unavailable as a witness? The answer would seem to be no. See Section 1202. We discuss later in this memorandum whether unavailability of the witness should be a requirement under the declaration against interest exception. However, this example does indicate the problem presented by the definition of unavailable as a witness.

If this method is selected by the Commission we will prepare a memorandum that will consider each exception that contains a requirement that the declarant be unavailable as a witness.

Incidentally, it is noted that, in People v. Spriggs (the recent declaration against interest case), a footnote states that a person is not available as a witness if the privilege against self-incrimination is claimed. This dictum, of course, is consistent with Section 255, but is not consistent with some previous California cases.

DIVISION 10. HEARSAY EVIDENCE

Section 1200.

This section is based on the opening paragraph of Rule 63. The opening paragraph of Rule 63 has been split into this section and the definitional section, Section 170.

Section 1201.

This is the same as RURE 66.

Section 1202.

This section is the same as RURE 65. We suggest that the words "tending to impair" that appear in the last sentence of the section be changed to "offered to attack". This change would make the rule consistent with RURE 20 and 21.

Section 1203.

Section 1203 will contain the equivalent of URE Rule 64 if the Commission decides to retain the rule.

At the March 1964 meeting the Commission directed the staff to prepare material on whether a provision similar to Rule 64 should be included in the portion of the new statute relating to hearsay evidence. Rule 64 requires

that a pretrial disclosure be made before certain written hearsay statements may be used at the trial unless the judge finds that the adverse party has not been unfairly surprised by the failure to make pretrial disclosure. The Commission determined that further consideration should be given to the question whether a provision similar to Rule 64 should be included in the Commissions's recommendations, and special consideration should be given to the possible application of such a section in criminal proceedings since the prosecution does not have the benefit of discovery in criminal cases.

Background. The Commission's actions to date on Rule 64 are as follows. In 1959, the Commission revised Rule 64 (in a preliminary draft of the hearsay evidence recommendation) to read:

> Any writing admissible under exception[s] (15), (16), (17), (18), ~~[and]~~ (19), (20), or (29) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it, or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy. Nothing in this section is intended to affect or limit the provisions of Sections 2016-2035, inclusive, of the Code of Civil Procedure, relating to depositions and discovery.

After further consideration, and after reviewing the comments of the northern and southern sections of the State Bar Committee, the Commission decided to delete the last sentence of the revised rule (the underscored sentence). It was concluded that this sentence was unnecessary and confusing.

The southern section of the State Bar Committee concluded that Rule 64 should be applicable to the subdivisions listed in Revised Rule 64 (set out above) and, in addition, to subdivisions (21) and (22). This decision was reconsidered by the State Bar Committee and affirmed at a subsequent meeting of that Committee.

To facilitate understanding of these decisions, we indicate below the subject matter of each of the subdivisions of Rule 63 that were listed in the revised rule and that the State Bar Committee would have added to the revised rule. We also indicate the section of the draft hearsay division in which the particular subdivisions have been compiled.

Subdivision of Revised URE	Section of Statute on Hearsay Evidence	Subject matter of hearsay exception
(15)	1271	Report of public employee
(16)	1272	Report of vital statistic
(17)(a)	1273	Content of writing in custody of public employee
(17)(b)	1274	Proof of absence of public record
(18)	1275	Certificate of marriage
(19)	1280	Official record of document affecting an interest in property
(20) (deleted)	1281	Judgment of previous condition
(21)	1282	Judgment against person entitled to indemnity
(22)	omitted	Judgment determining public interest in land
(29)	1291 1292	Recitals in documents affecting property and in ancient documents. The ancient documents rule was made a separate subdivision by subsequent Commission action.

After further consideration, the Commission determined that Rule 64 should apply only to subdivisions (15) and (29) of Rule 63. The Southern Section reacted to this decision as follows:

It was noted that the Commission, at its December 10, 1959, meeting, apparently had reversed itself and had voted to eliminate reference in Rule 64 to the following subdivisions of Rule 63 which relate to the admissibility of certain writings: namely, (16), (17), (18), and (19). The members were at a loss to understand the reason for such deletions by the Commission. The feeling of the section was, except for business records (which ordinarily are difficult to obtain without a subpena), writings which are made admissible by any appropriate subdivision of Rule 63 should be delivered to the adverse party a reasonable time before trial. The southern section, therefore, approved Rule 64 in the following form:

[Rule 64 revised to apply to subdivisions (15) through (22), inclusive, of Rule 63 and to subdivision (29) of Rule 63.]

The minutes of the meeting where this decision of the Southern Section was reconsidered and reaffirmed state:

Rule 64 was reapproved in the same revised form that the southern section had approved at the January 25, 1960 meeting. It appears to the southern section that the philosophy of Rule 64 is that when a party wants to offer a writing which is a copy and not the original, a copy of the writing that he intends to offer should be submitted to the adversary in advance of trial so that full opportunity is given to compare the copy with the original, that this philosophy is sound, presents no hardship, and is in the interests of full discovery; that, therefore, Rule 64 should make reference to the writings referred to in subdivisions (15) to (22) inclusive, and in subdivision (29) of Rule 63.

The Commission's reconsideration of Rule 64 and the decision to limit the application of the rule to writings admissible only under subdivisions (15) and (29) of Rule 63 was the result of the fear that Rule 64 would operate to prevent impeachment by use of the various types of writings covered by the other subdivisions formerly subject to Rule 64.

At a subsequent meeting, the staff pointed out that there was some inconsistency in the action of the Commission in so limiting Rule 64. As so limited, an original official record was required to be served under Rule 64, but a copy of the same record was admissible without such service. A record of an action by a public official was required to be served under

Rule 64, but an official report of an action by someone other than a public official was not subject to this requirement. A report of a marriage performed by a judge was inadmissible unless Rule 64 was complied with, but a report of a marriage performed by a minister was admissible without complying with Rule 64.

After considering this inconsistency, the Commission determined to delete Rule 64 entirely. This decision was made because it was concluded that the modern discovery procedures provided adequate protection. In addition, the Commission was influenced by the fact that there is no requirement like Rule 64 under existing California law.

The State Bar Committee finally agreed to the deletion of Rule 64.

Discovery in criminal cases. The Commission decided to reconsider its action on Rule 64 after receiving some comments upon the tentative recommendation that pointed out that the reason given in the tentative recommendation--discovery provides adequate protection--does not apply in criminal cases. Some Commissioners indicated that the matter should be reconsidered in regard to civil cases as well. In order that you might consider Rule 64 against the background of the existing law, we summarize here the California law relating to discovery in criminal cases. This summary is based on Louisell, Modern California Discovery 395-404 (1963).

At the trial, the defendant has the right to inspect any statements which he has made to the prosecution. The defendant has the right to inspect any statements made to the prosecution by any of the witnesses against him. The defendant may discover documents and tangible objects such as police reports, a narcotic register, photographs, etc., where he can make at least a prima facie showing that the things sought will be relevant and admissible

as evidence at the trial. The identity of informers can also be discovered by the defendant where such information is pertinent to the defense or to the admissibility of evidence against the defendant.

Prior to the trial, the defendant by motion may inspect any statement which he has made to the prosecution authorities. He has been granted the right to inspect the statements of third persons to the prosecution even where there is no indication that the prosecution intends to use those persons as witnesses at the trial. Vetter v. Superior Court, 189 Cal. App.2d 132, 10 Cal. Rptr. 890 (1961) (hearing denied). The defendant has been granted the right to inspect documents and tangible objects prior to trial. In at least one case he has been granted the right to inspect objects and documents that would not be admissible at the trial. Walker v. Superior Court, 155 Cal. App.2d 134, 317 P.2d 130 (1957) (inspection of State Laboratory Report granted even though the report itself would not be admissible evidence at the trial). The defendant may discover the identity of an informer where such identity is reasonably necessary to his defense.

The discovery rights granted the prosecution in criminal cases are somewhat more modest than those granted the defendant. Jones v. Superior Court, 58 Cal.2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (1962), held that the prosecution could obtain a certain amount of discovery in a rape prosecution. The defendant moved for a continuance of the trial on the ground that he was impotent and needed time to gather medical evidence relating to this defense. Upon motion of the prosecution, the defendant and his attorney were required to make available to the prosecution the names and addresses of any physicians and surgeons subpenaed to testify on behalf of the defendant in regard to this defense, the names and addresses of all physicians who treated the defendant prior to trial, the reports of doctors or other reports relating to the question

of the impotence of the defendant, and all Xrays of the defendant taken immediately following an injury he had suffered several years before. The California Supreme Court held that the trial court's order was too broad and could not be enforced. However, the Supreme Court said the trial court could order the defendant to reveal the names and addresses of witnesses he intended to call and to produce reports and Xrays he intended to introduce in evidence in support of his defense. Such a requirement would not violate the privilege against self-incrimination, it would merely advance the time at which the defendant would reveal the information. The case was, therefore, remanded for further proceedings in accordance with the Supreme Court's opinion. In People v. Lopez, 60 A.C. 171 (1963), the defendant, on motion of the prosecution, was ordered to produce the names and addresses of persons the defendant anticipated calling as alibi witnesses, written statements or notes of statements by such witnesses, and recordings, transcriptions of recordings and written statements or notes of statements of witnesses who had testified at the preliminary hearing. On appeal, the defendant objected that the granting of the order denied him a fair trial. The Supreme Court rejected the contention because the prosecution has a limited right of discovery. Moreover, neither the record nor the briefs indicated whether the information was actually furnished to the prosecution as a result of the order; hence, even if the prosecution had no right of discovery, the defendant was not in a position to complain of the order. 60 A.C. at 192-193.

New Jersey recommendation. The Commission should note the action taken by the New Jersey Committee on Rule 64. The New Jersey version is as follows:

> Whenever a declaration admissible by reason of paragraphs (2), (3), (13), (15), (16), (17), (18), (19), (21), (22), (29) or (31) of Rule 63 is a writing, the judge may exclude it at the trial if it appears that the writing was not made known to the adverse party at such time as to

prevent unfair surprise or deprive him of a fair opportunity to prepare to meet it.

The New Jersey Committee comments on their proposal:

> Rule 64 as presented here . . . differs from the Uniform Rule as to language and also applies to a larger number of exceptions . . . . The purpose of the Rule is to provide against surprise and to give sufficient opportunity for an adverse party to compare on a pretrail basis written hearsay of a secondary character against original records, etc. The rationale has been extended to include affidavits, depositions and several other forms of written hearsay as well. This should not unduly burden the proponent of the evidence, although it could be argued that the discovery procedures already in effect sufficiently protect adverse parties against surprise. Rule 64 should remove some of the sting from hearsay rules that have been liberalized. As one lawyer remarked when suddenly confronted with hearsay at the trial, "[W]e should have some opportunity to run it down." Ephraim Willow Creek Irrigation Co. v. Olson, 70 Utah 95, 106, 258 P. 216, 220 (1927).

The subdivisions listed in the New Jersey proposal are (2) affidavits, (3) former testimony, (13) business records, (15) official records, (16) vital statistics records, (17) copies of official writings, (18) marriage certificates, (19) property records, (21) judgment against person entitled to indemnity, (22) judgment determining public interest in land, (29) recitals in dispositive instruments, and (31) learned treatises.

Recommendation. In the light of the Jones and Lopez cases, Rule 64 could be made applicable in criminal cases. It does not require the defendant to disclose anything, it merely provides that he must give advance disclosure if he is going to disclose the matter at the trial.

The Commission's principal concern with Rule 64 was over the use of hearsay evidence for impeachment purposes. You will note that the New Jersey Committee omitted subdivision (1) pretrial statements of witnesses, and subdivisions (6), (7), (8), and (9) relating to confessions and admissions. These are the principal source of impeaching material. On occasion, of course, some of the other matters listed can be used for impeachment purposes, but if

the matter is also admissible under subdivision (1), (6), (7), (8), or (9), the evidence is admissible without regard to the requirements of Rule 64.

The matters omitted from the New Jersey version of Rule 64 are as follows: (4) spontaneous declarations; (5) dying declarations; (10) declarations against interest; (12) state of mind; (14) absence of business record; (20) judgment of previous conviction; (23) (24) (25) (26) (27) (28) family history statements and reputation evidence; and (30) commercial lists.

The reason for the exclusion of subdivision (4) and (5) is apparent: such statements are not likely to be in writing. The reason for the exclusion of subdivision (10) and (12) is not so apparent. Subdivision (14) cannot consist of a writing. The reason for the exclusion of subdivision (20) is not apparent, for it appears indistinguishable from other judgments such as those listed in subdivisions (21) and (22). The exclusion of reputation evidence is readily understandable, for reputation evidence is generally not in writing. The exclusion of family history statements that are in writing, however, is difficult to understand. The reason for the exclusion of commercial lists is not apparent.

If the principle underlying Rule 64 is sound, we think it should be extended to the following sections in the tentative hearsay statute: 1251 (recorded recollection), 1252 and 1253 (former testimony), 1263 (declaration against interest), Sections 1264-1267 (state of mind), 1269 (business record), 1271 (report of public employee), 1272 (vital statistic report), 1273 (copy of writing in public custody), 1274 (certificate of absence of public record), 1275 (certificate of marriage), 1280 (recorded documents), 1281 (judgment of previous conviction), 1282 (judgment against person entitled to indemnity), 1283 (judgment determining liability of third person), 1284-1287 (family

history statements and reputation of family history among members of the family), 1288 (community reputation), 1289 (statement concerning boundary by person with personal knowledge thereof), 1290 (reputation as to character), 1291-1292 (recitals in dispositive instruments and ancient documents), 1293 (commercial lists), 1294 (historical works, scientific books, etc.), and 1295 (hearsay evidence made admissible by other statutes).

We have omitted 1250 (prior inconsistent and prior consistent statements) in order to retain the right to impeach without giving advance warning. 1254 (spontaneous statements) and 1255 (dying declarations) are excluded because the nature of the statements involved indicates that they are unlikely to be in writing. Sections 1256-1262 are excluded for the same reasons that prompt the exclusion of prior statements of trial witnesses. So far as the remainder of the hearsay exceptions are concerned, we see little reason to distinguish one form of written hearsay from another. If it is a good idea to require pretrial disclosure of written hearsay that is to be relied on at the trial, all of the matters listed should be included.

In some cases a rule requiring pretrial disclosure of the listed hearsay would preclude effective impeachment. For example, a marriage certificate or public record of a marriage in some out of the way place could be effectively produced after a witness or party has testified that he or she was never married. We think, however, that it is more likely that such evidence would be used affirmatively to prove one's case rather than to attack the other party's case. When used affirmatively, it would be desirable for the other party to have advance warning so that the hearsay could be checked.

So far as civil cases are concerned, it may be that the discovery tools available provide a party with adequate protection. The defendant in a

criminal case has a considerable array of discovery tools available to him. In the light of the Jones and Lopez cases, the prosecution may be able to protect itself against documentary hearsay evidence; but the scope of the prosecution's right to discovery is still somewhat uncertain.

On balance, we think URE Rule 64 prescribes a desirable rule and a provision similar thereto should be incorporated in our statute as Section 1203. It should be made applicable to the sections listed above.

Joe Ball amendment.

Subdivision (b) of Section 1271 contains the provision first recommended by Commissioner Ball when the Commission was considering evidence in eminent domain cases. The subdivision provides that a public employee whose written report is admitted under a hearsay exception may be called as an adverse witness and cross-examined as to the subject matter of his statement. The Commission asked the staff to consider what other exceptions to the hearsay rule such a provision might be made applicable to.

We think such a rule might be made applicable to Sections 1254 (spontaneous statements), 1264 (state of mind), 1266 (statement of previous symptoms), 1269 (business records), 1271 (report of public employee), 1272 (report of vital statistics), 1274 (certificate of absence of public record), and 1275 (certificate of marriage). We would include in this list declarations against interest but for the fact that we have provided that such statements are inadmissible unless the declarant is unavailable as a witness. We have excluded from the foregoing list all exceptions based on the unavailability of the declarant as a witness.

Section 1204.

Section 1204 is the same in substance as our URE Rule 66.1. We have a similar statute in our privileges division, Section 920.

Suggested additional section.

Our declaration against interest section (1263) contains a provision that the statement is inadmissible against the defendant in a criminal action unless the statement would be admissible under Section 1256 (the confession rule) against the declarant if he were the defendant in a criminal action. Should this provision be made general. That is, should it apply to all hearsay exceptions?

Section 1250.

Section 1250 is the same as our URE Rule 63(1)(a), (b), as revised at the February meeting.

Section 1251.

Section 1251 is the same as our URE Rule 63(1)(c).

Section 1252.

This is the same as our URE Rule 63(3). "Former testimony" is defined here, however, instead of in the definitions. We have defined the term here because it is used only in Sections 1252 and 1253 and is an artificial definition. The definition appeared in our URE Rule 62(8).

Section 1253.

This is the same as our URE Rule 63(3.1).

Section 1254.

This is the same as our URE Rule 63(4).

The Senate Subcommittee considering our recommendations expressed some concern that subdivision (b) does not require that the statement purport to state what the declarant was perceiving. Compare the language of subdivision (a)(1). The objection was made, however, after a quick look at the section and without thorough consideration. The last line of the section requires

the statement to narrate, describe or explain the act, condition or event being perceived by the declarant. Should the language be modified to correspond more closely with subdivision (a)?

Section 1255.

This is the same as our URE Rule 63(5).

Section 1256.

This is the same as our URE Rule 63(6) as revised at the February 1964 meeting.

Section 1257.

This is the same as our URE Rule 63(7).

Section 1258.

This is the same as our URE Rule 63(8)(b).

Unless a general section applicable to all hearsay exceptions is approved, perhaps a provision should be added to Section 1258 providing that the hearsay referred to is inadmissible against a criminal defendant unless it meets the requirements of Section 1256. California, like most other jurisdictions, does not make an admission by silence inadmissible because it was made while the defendant was in police custody. WITKIN, CALIFORNIA EVIDENCE 267 (1958). Cf., MATT. 27:13-14 (R.S.V.) ("Then Pilate said to him, 'Do you not hear how many things they testify against you?' but he gave him no answer, not even to a single charge . . .").

Section 1259.

Section 1259 is the same as our URE Rule 63(8)(a).

Section 1259 relates to admissions by agents that were authorized to be made. Sections 1260 and 1261 also relate to admissions by agents. Both Sections 1260 and 1261 have a provision requiring evidence of the

requisite relationship to be introduced before the admission is introduced. The judge, however, may vary the order of proof. In contrast, Section 1259 says nothing concerning the order of proof. The problem is the same, and under existing law the general rule is that the agency must be shown first, but the judge may alter the order of proof. CODE OF CIV. PROC. § 1870(5) provides:

> After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence [is admissible].

Notwithstanding the phrase "after proof", the admission may be admitted subject to its being stricken out if not connected up. Brea v. McGlashan, 3 Cal. App.2d 454, 467, 39 P.2d 877 (1934).

We recommend, therefore, that a provision similar to subdivision (d) of Sections 1260 and 1261 be added to Section 1259.

Should the words "the statement" be substituted for the remainder of the sentence following the word "make"? Should "expressly or impliedly" be inserted before "authorized"?

Section 1260.

This is the same as our URE Rule 63(9)(b) as revised at the February meeting.

Subdivision (c) of Section 1260 came from the URE. No California case has imposed such a requirement. The reason for the requirement in the URE was that the admissions were not limited to those in furtherance of the conspiracy. The URE abandoned the agency rationale for the conspiracy exception and made statements of conspirators admissible as admissions if they related merely to the subject matter. We have restored the traditional conspiracy exception. It is based on agency principles. Only those admissions

made in furtherance of the conspiracy are admissible. Hence, Section 1260 is really a specific application of the rule stated in Section 1259. 1259 does not have any requirements similar to subdivision (c). Because the rule as revised by the Commission deals with a specific type of authorized admission, and not statements of conspirators generally, we recommend that subdivision (c) be deleted.

In subdivision (d), we recommend that the phrase "proof of the existence" be changed to "evidence sufficient to sustain a finding of the existence". The judge does not have to be persuaded of the existence of the conspiracy. Rule 8, as revised by the Commission so indicates. To avoid any apparent inconsistency, the word "proof" should be revised as indicated.

Section 1261.

This is the same as our URE Rule 63(9)(a) as revised at the February meeting.

We do not recommend the deletion of subdivision (c) here as we did in Section 1260. The theory of admissibility is different. Authorized admissions of agents, partners, and employees are covered by Section 1259. Section 1259 covers existing law. Section 1261, therefore, has independent significance only insofar as those statements of agents, partners, or employees are concerned that they were not authorized to make. The theory is that an agent or employee would not be likely to make an untrue statement adverse to his employer's interest during the continuance of the agency or employment relationship. These statements, therefore, are admitted because of the circumstantial guarantee of trustworthiness. Authorized admissions, on the other hand, are admitted because it is the party himself (through the agent or employee) who made the statement. Circumstantial evidence of trustworthiness

is an irrelevant consideration so far as authorized admissions are concerned. Because the statements in Section 1261 are admitted because it is believed they are trustworthy, it is not unreasonable to require that the statement be made upon personal knowledge and not in terms of opinion.

The Senate Subcommittee expressed some concern over this section. They expressed the view that it is based on an unrealistic theory. Employers and employees deal with each other at arm's length. Frequently, there is no particular feeling of loyalty between them. Frequently, there is animosity between them. Hence, the mere fact that a person is employed by another provides no guarantee that he will say only true things concerning the subject matter of the employment.

Section 1262.

This is the same as RURE 63(9)(c).

Subdivision (c) of this section is not existing law. It is suggested that the following be substituted for subdivisions (b) and (c) of Section 1262:

> (b) The statement would be admissible if offered against the declarant in an action upon that liability, obligation, or duty.

The revision expresses more accurately the existing law as found in Section 1851 of the Code of Civil Procedure which provides that "whatever would be the evidence for or against such person is prima facie evidence between the parties."

Section 1263.

This is the same as RURE 63(10) as revised at the February meeting.

Subdivision (c) does not permit a declaration against interest made while a person is in custody to be admitted in a criminal action unless it would be admissible against the declarant if he were the defendant in a criminal action. There seems to be no reason for limiting this subdivision to statements made while in custody. Statements taken in violation of constitutional guarantees should be excluded even though not made while in custody. We suggest that subdivision (c) be revised to read:

> (c) A statement is not made admissible by this section unless the statement would be admissible under Section 1256 against the declarant if he were the defendant in a criminal action.

The staff suggests that paragraph (3) of subdivision (b) be deleted. This requirement--that the declarant is unavailable as a witness--would change existing law. The statements admissible under Section 1263 are probably more reliable than testimony on the stand. Moreover, the same statement will be shown if the declarant is a witness; unless he repeats it on the stand, it will come in as a prior inconsistent statement.

Section 1264.

This is the same as RURE 63(12)(a).

Sections 1264, 1265, 1266, and 1267 do not apply to statements "made in bad faith". The Senate subcommittee raised a question concerning the meaning of this phrase. The committee wondered whether it is intended to mean anything different from Section 1285(b):

> This section does not make a statement admissible if the statement was made under circumstances that the declarant in making such a statement had motive or reason to deviate from the truth.

Professor Chadbourn (at pages 513 and 514 of the Hearsay study) indicates that the phrase may mean that the statement must be made "without any

obvious motive to misrepresent" and " in a natural manner and not under circumstances of suspicion." Professor Chadbourn quotes Professor McCormick to the effect that the phrase probably requires the trial judge to consider the circumstances of the declaration and to determine "whether they were uttered spontaneously or designedly with a view to making evidence."

If this phrase means the same thing as Section 1285(b), the language of Section 1285(b) should be inserted in each of these four sections in lieu of the "bad faith" language. Should there be such a requirement in Section 1267 at all?

Section 1265.

This is the same as RURE 63(12)(b).

Section 1266.

This is the same as RURE 63(12)(c).

Section 1267.

This is the same as RURE 63(12)(d).

Section 1268.

This is the substance of the hearsay exception approved at the February meeting. It provides an exception to permit repeal of the Dead Man Statute.

We suggest that this section be revised to read:

> 1268. A statement is not made inadmissible by Section 1200 when offered [~~in an action against an~~] by the executor or administrator in an action against him upon a claim or demand against the estate of the declarant [~~is not made inadmissible by Section 5059~~] if the statement was made upon the personal knowledge of the declarant and in good faith at a time when the matter had been recently perceived by him and while his recollection was clear and when the declarant in making such statement had no motive or reason to deviate from the truth.

The revisions of this section are based in part on URE Rule 4(c). These revisions should make the section more acceptable and provide some guarantee of trustworthiness that is not now provided by the section.

Section 1269.

This is the same as RURE 63(13).

Section 1270.

This is the same as RURE 63(14).

Section 1271.

This is the same as RURE 63(15) as revised at the February meeting.

We suggest that the following sentence be added to subdivision (b): "A writing otherwise admissible under this section is not inadmissible because the public employee who made the writing is unavailable as a witness."

Section 1272.

This is the same as RURE 63(16).

Section 1273.

This section is the same as RURE 63(17)(a) as revised at the February meeting.

We believe that this section is defective. When a copy of a public record is offered, the copy is a statement by the copyist asserting that its contents are the same as the original record. If the copyist testifies at the hearing, there is no hearsay problem. However, if the statement is "made other than by a witness while testifying at the hearing" and is "offered to prove the truth of the matter stated" (i.e., that the original record states what the copyist says it states), it is hearsay.

To what extent should the hearsay of copyists of official records be admissible? The URE Rule 63(17) stated that any "writing purporting to be a copy of an official record" is admissible if authenticated as

Provided in Rule 68 (now Section 1412). The words "purporting to be" were, no doubt, intended to mean the statement of the copyist is admissible under the hearsay exception provided in what is now Section 1273.

To meet this problem, we suggest that Section 1273 be revised to read:

> 1273. A statement that a writing is a copy of a writing in the custody of a public employee is not made inadmissible by Section 1200 when offered to prove that the copy is a true copy of the writing in the custody of the public employee if the statement meets the requirements of Section 1412.

The requirement that the statement meet the requirements of Section 1412 is not essential. It may be a helpful cross reference to the pertinent authentication section, however.

Section 1274.

This is the same as RURE 63(17)(b) as revised at the February meeting.

It might be helpful to provide a cross reference to Section 1413 (formerly Rule 69) in this section by adding at the end "if the writing meets the requirements of Section 1413."

Section 1275.

This is the same as RURE 63(18).

Section 1280.

This is the same as RURE 63(19).

The word "document" is used in the first line. Should the word "writing" be substituted?

There is a further problem in connection with Section 1280 that arises out of the codification of Section 1451. The language of the two sections should be conformed when they are intended to mean the same thing. This problem, however, together with other problems relating to the proof of public writings and records, will be presented to you by a later memo.

Section 1281.

This section was approved at the February meeting.

Vehicle Code Section 40834, enacted at the 1963 session, provides:

> A judgment of conviction for any violation of this code or of any local ordinance relating to the operation of a motor vehicle or a finding reported under Section 1816 shall not be res judicata or constitute a collateral estoppel of any issue determined therein in any subsequent civil action.

Should Section 1281 be subject to Vehicle Code Section 40834, or should Vehicle Code Section 40834 be made subject to Section 1281?

The Vehicle Code section was enacted to prevent plaintiffs from relying on judgments convicting the defendants of Vehicle Code violations. Whether plaintiffs could do so in the absence of the Vehicle Code section is uncertain. Teitelbaum Furs, Inc. v. Dominion Insur. Co., 58 Cal.2d 601, held that a person convicted of a crime was estopped from bringing an action against another based on the same occurrence. It did not deal with the question whether a plaintiff could rely on the judgment as against Teitelbaum. Professor Currie in an article entitled Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 STAN. L. REV. 281 (1957), argues that a judgment against a defendant in one case cannot be used to conclusively establish the facts determined in favor of a plaintiff in another case. He states, "I predict with confidence that the Supreme Court of California will not hold that the former judgment is res judicata in these circumstances." at page 285. His position is that the Bernhard doctrine of collateral estoppel can be asserted defensively but not offensively.

A recent case, Newman v. Larsen, 36 Cal. Rptr. 883 (1964), held contrary to Professor Currie's thesis. A defendant found guilty of

aggravated assault was sued for civil damages on the basis of the assault. The court held that the defendant was conclusively bound by the criminal judgment against him. The opinion, however, does not discuss the Currie article nor the implications of the cases cited and discussed in the Currie article. We do not know whether a hearing was requested in the case.

Whatever the fate of the Teitelbaum doctrine, Vehicle Code Section 40834 prohibits the use of vehicle convictions for res judicata or collateral estoppel. Section 1281, however, merely makes felony conviction evidence; hence, there is no technical inconsistency. Should 1281 be revised to indicate that it applies notwithstanding the Vehicle Code, or should the evidentiary use of vehicle convictions be prohibited also?

Section 1282.

This is the same as RURE 63(21).

Section 1283.

This is the same as RURE 63(21.1).

Section 1284.

This is the same as RURE 63(23).

Section 1285.

This is the same as RURE 63(24).

Section 1286.

This is the same as RURE 63(26).

Section 1287.

This is the same as RURE 63(26.1).

Section 1288.

This is the same as RURE 63(27) as revised at the February meeting.

Section 1289.

This is the same as RURE 63(27.1).

Section 1290.

This is the same as RURE 63(28).

Section 1291.

This is the same as RURE 63(29).

Section 1292.

This is the same as RURE 63(29.1).

Section 1293.

This is the same as RURE 63(30).

Section 1294.

This is the same as RURE 63(31).

Section 1295.

This is the same as RURE 63(32).

There are other matters with respect to the proposed statute sections on hearsay evidence that we will raise in a memorandum prepared for a future meeting.

Respectfully submitted,

John H. DeMoully
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