6/8/60

Memorandum No. 55 (1960)

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

The Commission has completed a tentative revision of the Hearsay Division of the Uniform Rules of Evidence. The Commission will, of course, be reconsidering some of these decisions when it receives the comments and suggestions from the State Bar Committee on the Uniform Rules of Evidence. But it is anticipated that most of the tentative revision will not be changed as a result of these comments and suggestions.

Some time ago the Commission decided that it would publish a pamphlet containing its interim tentative recommendation and revision of the Hearsay Division together with the consultant's studies pertaining to the Hearsay Division. This publication would include the rules as revised after the Comments and suggestions of the State Bar are received. It was anticipated that another such pamphlet would be published containing the interim recommendation and revision of the Privileges Division of the Uniform Rules of Evidence and the consultant's studies on privileges and also that several other similar pamphlets would be published to complete the coverage of the Uniform Rules. A final pamphlet would be published containing the Uniform Rules integrated into the code with code section numbers assigned and this pamphlet would represent the final recommendation of the Law Revision Commission on the Uniform Rules of Evidence.

John McDonough has agreed to prepare an initial text of the recommenda-

tion on the Hearsay Division based on his recollection of the reasons that influenced the Commission to make the revisions it did in the Hearsay Division. John and I felt that the recommendation should be brief and should indicate the existing California law and the change to be made by the revised Uniform Rule. If a Uniform Rule was revised or rejected, the reason should be indicated.

John McDonough has prepared some samples of the form of recommendation we contemplate. These are attached as Exhibit I. They are in rough draft form and are not now presented for consideration as to their substance; we only want to get the Commission's reaction to this form of recommendation before John McDonough goes ahead and prepares similar recommendations for the rest of the Hearsay Division rules. However, if the recollection of any of the members of the Commission as to the reason for the recommendation differs from the reason given in the attached comment, John would appreciate knowing this at the June meeting so he can take this information into account when he polishes up the attached rought drafts. These recommendations probably will be presented to the Commission for approval at the same time the Commission considers the comments and suggestions of the State Bar.

The samples attached would, of course, be preceded by a general statement outlining the assignment and how we have proceeded and making reference to the research consultant's report for more detailed analysis. Assuming this was done, do the "Comments" attached seem adequate? Or is considerably more by way of detail and analysis necessary? Do the members of the Commission have any suggestions for improvement in the format?

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

RULE 63. HEARSAY EVIDENCE EXCLUDED -- EXCEPTIONS.

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

COMMENT

This language, prior to the word "except," states the hearsay rule in its classical form, with one qualification: because the word "statement" as used herein is elsewhere defined (Rule 62(1)) to mean only oral or written expression and assertive nonverbal conduct - i.e., nonverbal conduct intended by the actor as a substitute for words in expressing a matter, it excludes from hearsay at least some types of nonassertive conduct which our courts today would probably regard as amounting to extrajudicial declarations and thus hearsay -- e.g., the flight of X as evidence that he committed a crime. The Commission agrees with the draftsmen of the URE that evidence of nonassertive conduct should not be regarded as hearsay for two reasons.

First, such evidence, being nonassertive, does not involve the veracity of the declarant and one of the principal purposes of the hearsay rule is to subject the veracity of the declarant to cross-examination. Second, there is frequently a guarantee of the trustworthiness of the inference to be drawn from such nonassertive conduct in that the conduct itself evidences the actor's own belief in and hence the validity of the inference. To put it another way, these are cases in which actions speak louder than words.

The word "except" introduces thirty-two clauses which define various exceptions to the hearsay rule which the Commission recommends be enacted. These are commented upon individually below.

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

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

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

(c) Concerns a matter as to which the witness has no present recollection and is a writing which was made at a time when the facts recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory and the writing was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness's statement at the time it was made.

COMMENT

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

The Commission recommends, instead, that the present law respecting the admissibility of out-of-court declarations of trial witnesses be codified with some revisions. Accordingly, paragraph (a) restates the present law respecting the admissibility of prior inconsistent statements and paragraph (b) restates the present law regarding the admissibility of prior consistent statements except that in both instances the extrajudicial declarations are admitted as substantive evidence

in the cause rather than, as at the present, solely to impeach the witness in the case of prior inconsistent statements and to rebut a charge of recent fabrication in the case of prior consistent statements. The Commission believes that it is not realistic to expect a jury to understand and apply the subtle distinctions taken in the present law as to the purposes for which the extrajudicial statements of a trial witness may and may not be used. In any event, no great harm is likely to be done by the broader rule of admissibility proposed inasmuch as the declarant is available for cross-examination. It is implicit in paragraphs (a) and (b), of course, that the witness must take the stand and tell his story initially on vive voce examination before the extrajudicial statements covered by these exceptions are admissible.

Paragraph (c) restates and hence preserves the present rule making admissible what is usually referred to as "past recollection recorded." The language stating the circumstances under which such evidence may be introduced is taken largely from and embodies the substance of the language of C.C.P. § 2047. At the present time, as under the proposed provision, such writings are admitted as substantive evidence in the action or proceeding.

(2) ~~[Affidavits to the extent admissible by the statutes of this state;]~~ To the extent otherwise admissible under the law of this State:

(a) Affidavits.

(b) Depositions taken in the action or proceeding in which they are offered.

(c) Testimony given by a witness at the preliminary examination in the criminal action or proceeding in which it is offered.

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

COMMENT

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

Paragraph (b) preserves the existing law concerning the admissibility of depositions taken in the action or proceeding in which they are offered. The Commission recommends against the adoption of subdivision (3) of the URE insofar as it would make admissible as substantive

evidence any deposition "taken for use as testimony in the trial of the action in which it is offered," without the necessity of showing the existence of any such special circumstances as the nonavailability of the deponent. In 1957 the Legislature enacted a statute (C.C.P. §§ 2016-2035) dealing comprehensively with discovery, including provisions relating to the taking and admissibility of depositions (C.C.P. § 2016 et seq.). The provisions then enacted respecting admissibility of depositions are narrower than URE Rule 63(3). The Commission believes that it would be unwise to recommend revision of the 1957 legislation at this time, before substantial experience has been had thereunder.

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

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

(2a) In a civil action or proceeding, testimony of a witness given in a former action or proceeding between the same parties, relating to the same matter, if the judge finds that the declarant is unavailable as a witness.

COMMENT

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

The proposed provision would permit such evidence to be introduced in a wider range of cases than does existing law (C.C.P. § 1870(8)) which conditions admissibility of testimony in a former action upon the witness's being deceased, out of the jurisdiction or unable to testify. "Unavailable as a witness" is defined in Rule 62 and includes, in addition to these cases, situations in which the witness is exempted from testifying on the ground of privilege or is disqualified from testifying. The Commission perceives no reason why the general definition of unavailability which it has recommended for the purpose of exceptions to the hearsay rule should not be applicable here.

(3) [Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;] Subject to the same limitations and objections as though the declarant were testifying in person, testimony given under oath or affirmation as a witness in another action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony taken by deposition taken in compliance with law in such an action or proceeding, but only if the judge finds that the declarant is unavailable as a witness at the hearing and that:

(a) Such testimony is offered against a party who offered it in evidence on his own behalf in the other action or proceeding or against the successor in interest of such party; or

(b) In a civil action or proceeding, the issue is such that the adverse party in the other action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the

adverse party has in the action or proceeding in which the testimony is offered; or

(c) In a criminal action or proceeding, the present defendant was a party to the other action or proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the action or proceeding in which the testimony is offered except that the testimony given at a preliminary examination in the other action or proceeding is not admissible.

COMMENT

This proposed provision is a modification of Rule 63(3)(b) of the URE. The modifications narrow the scope of the exception to the hearsay rule which is proposed by the Commissioners on Uniform State Laws.

At the same time this provision goes beyond existing California law which admits testimony taken in another legal proceeding only if the other proceeding was a former trial or a preliminary hearing in the action or proceeding in which the testimony is offered. It should be noted that there are two substantial preliminary qualifications of admissibility in the proposed rule: (1) the declarant must be unavailable as a witness and (2) the testimony is subject to the same limitations and objections as though the declarant were testifying in person. In addition, the testimony is made admissible only in the quite limited circumstances

delineated in paragraphs (a), (b) and (c). The Commission believes that with these limitations and safeguards it is better to admit than to exclude the former testimony because it may in particular cases be of critical importance to a just decision of the cause in which it is offered.

(4) A statement:

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

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

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

COMMENT

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

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

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

(5) A statement by a person unavailable as a witness because of his death if the judge finds that it was made upon the personal knowledge of the declarant, under a sense of impending death, voluntarily and in good faith and [~~while the declarant was conscious of his impending death and believe~~] in the belief that there was no hope of his recovery. [;]

COMMENT

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

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

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

(6) [~~In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged if, and only if, the judge finds that the accused when making the statement was conscious and was capable of understanding what he said and did, and that he was not induced to make the statement (a) under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (b) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same;~~] In a criminal action or proceeding, as against the defendant, a previous statement by him relative to the offense charged, unless the judge finds pursuant to the procedures set forth in Rule 8 that the statement was made:

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

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

COMMENT

This provision states a rule governing the admissibility of the defendant's confession and admissions in a criminal action or proceeding. While the Commission has departed rather widely from the language of Rule 63(6) of the URE, it is believed that paragraph (a) states a principle which is not only broad enough to encompass all the situations covered by URE Rule 63(6) but

also 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 is neverthless within its spirit.

Paragraph (b) is technically unnecessary inasmuch as the ground is already covered by the Constitutions of this State and of the United States. It seems desirable to restate the proposition here, however, both for the sake of completeness and to make it clear that the Commission has no thought that the Legislature, in enacting this provision, would be asserting that the matter of the admissibility of the confessions and admissions of defendants in criminal actions and proceedings is a matter solely within the competence of the Legislature to determine.

The proposed provision is believed to restate existing law in respect of the admissibility of confessions. In treating admissions of criminal defendants in the same way as confessions, however, the proposed provision states a much more restrictive rule respecting admissibility than presently obtains. The virtue of this proposed change is that (1) it applies the same rule of law to types of evidence which are virtually identical in substance, thus eliminating a very questionable distinction in the existing law and (2) it will make it unnecessary in the future to attempt to make the often difficult, if not impossible, determination whether a particular extrajudicial statement is a confession or only an admission.