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Memorandum No. 7 (1961)

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

Background. Some time ago the Commission decided that it would publish a pamphlet containing its tentative recommendation on Article VIII (Hearsay Evidence) of the Uniform Rules of Evidence and the research consultant's studies pertaining to this Article. This pamphlet will include the rules in the Hearsay Evidence Article as revised after the joint meeting with the State Bar Committee has been held. (The date of this joint meeting, which will be held sometime early in 1961, has not yet been set.)

It was anticipated that another such pamphlet would be published containing the tentative recommendation on Article V (Privileges) and the consultant's research studies on that Article and that several other similar pamphlets would be published to complete the coverage of the Uniform Rules.

This piecemeal publication is intended to give interested members of the bench and bar an early opportunity to review and comment on the Commission's tentative recommendations. After considering comments from these persons, the Commission plans to publish a pamphlet that will include a proposed statute setting out (1) all of the Uniform Rules as revised with code section numbers assigned and (2) the amendments and repeals of existing statute sections that will be made necessary if the revised rules are enacted as law. This pamphlet will represent the final

recommendation of the Law Revision Commission on the Uniform Rules of Evidence.

The procedure outlined above is somewhat similar to the procedure we have followed for the study on condemnation except that our tentative recommendations and the research consultant's studies will be distributed in printed form rather than in mimeographed form.

Description of Attached Material. The attached material (pink pages) includes a draft of a letter of transmittal and a draft of a tentative recommendation on Article VIII. This material is presented to the Commission for approval as to its form and content. It will, of course, be necessary to revise the material to incorporate any changes resulting from the joint meeting with the State Bar Committee.

The text of the revised rules is set out in the attached material in the form in which the text was approved by the Commission except for a few minor revisions hereinafter specifically noted. Below the text of each rule or subdivision of a rule is a comment. These comments have not been approved by the Commission. The initial draft of most of the comments was prepared by Commissioner McDonough and is based on his recollection of the reasons that influenced the Commission to make the revisions it did in the Hearsay Article.

Matters Noted for Special Attention. Each comment explaining a rule or subdivision of a rule should, of course, be carefully studied by the members of the Commission. In addition, a number of matters are noted below for special attention in connection with this tentative recommendation. Also, where the Commission and the State Bar Committee are not in agreement, that fact is noted. It is suggested that these areas of disagreement be

reconsidered by the Commission. The Commission and the State Bar Committee can then devote the time at the joint meeting to those matters on which we cannot reach an agreement prior to the joint meeting. Unless otherwise noted, the Commission and the State Bar Committee are in agreement.

Special attention is called to the following matters:

Rule 62

(1) State Bar Committee Objection. The Commission and the Committee are in agreement on this Rule except that the Committee believes that the definition of "statement" should be subdivision (1) of the Rule rather than subdivision (5) where the Commission placed it. The definition is contained in subdivision (1) of the Uniform Rule. The attached tentative recommendation adopts the suggestion of the State Bar Committee and places this definition in subdivision (1). The staff believes that this is desirable for two reasons. First, there will then be no need to distinguish between the URE text of the rule and the revised rule when making a specific reference to this definition. Second, this matter can more appropriately be considered when the draft statute for all the Rules is considered and code section numbers are assigned to the various sections of the revised rules.

(2) Staff revision. The staff has revised subdivisions (6) and (7) to uniformly refer to the person who made the statement as the "declarant." Under the URE text of these subdivisions, the declarant is sometimes referred to as the "declarant" and other times is referred to as the "witness." This revision has been incorporated in the attached tentative recommendation.

(3) Suggested staff revision. The objective of subdivision (7), as stated in the Comment thereto, "is to assure that unavailability is honest and not planned in order to gain an advantage." Hence the subdivision provides that physical absence of a person or his incapacity to testify do not make that person "unavailable" insofar as proponent is concerned unless such absence or incapacity is "due to procurement or wrongdoing of the proponent . . . for the purpose of preventing the [person] . . . from attending or testifying" or, is due to "the culpable neglect of" proponent. For example, if on the day of the hearing proponent gives declarant drugged whisky for the purpose of preventing him from testifying, proponent may not prove declarant's out-of-court statement under any hearsay exception which requires declarant's unavailability.

Moreover, if at the hearing the whereabouts of a declarant are unknown, but it appears that proponent had notice of declarant's intended disappearance and had opportunity to place him under subpoena but neglected so to do, this would probably be regarded as a case of declarant's absence due to proponent's "culpable neglect" and, as such, a case in which proponent could not make use of any hearsay exception requiring declarant's unavailability.

In such a case, the "culpable neglect" of proponent is, of course, neglect with reference to formal process to secure declarant's attendance as witness. Probably no other kind of neglect is intended by the expression "culpable neglect." Thus neglect to provide food for declarant thereby causing his death from malnutrition or

neglect to exercise due care thereby causing declarant's death from negligence, not being neglect directly related to securing declarant's attendance as a witness, is probably not within the meaning of the term as used in the subdivision.

The above is believed to be the proper interpretation of subdivision (7), although the expression "culpable neglect" is considered to be somewhat ambiguous.

However, the Law Revision Commission has amended the subdivision to change its meaning as above stated. The Commission has added language so that a witness is not "unavailable" if the "exemption, disqualification, death, inability or absence" of the declarant is due to the procurement or wrongdoing of the proponent for the purpose of preventing the witness from attending or testifying or to the "culpable act or neglect" of the proponent. The Commission, by thus adding "act or" has changed the probable meaning of the URE subdivision so that the out-of-court statement cannot be used even though the proponent's "culpable act" was not for the purpose of preventing the declarant from appearing and testifying. Thus, a defendant charged with first degree murder would be unable to introduce the decedent's dying declaration showing circumstances that would reduce the degree of the crime (such as lack of premeditation). Under the Commission's revision, the dying declaration would be excluded because defendant's "culpable act" caused the declarant's death and therefore declarant is not "unavailable" insofar as defendant is concerned. Other examples can be imagined insofar as other exceptions that depend on "unavailability" are concerned.

To preserve the original intent of the URE provision (that 62(7) is merely intended to assure that unavailability is honest and not due to an intent to keep the declarant from testifying or to a negligent failure to produce the declarant), the staff recommends that subdivision (7)(a) be revised to read:

(7) For the purposes of subdivision (6) of this rule, a declarant is not unavailable as a witness:

(a) If the judge finds that the exemption, disqualification, death, inability or absence of the declarant is due to [~~(i)~~] the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying; or [~~(ii) the culpable act, or neglect of such proponent; or~~]

(b) If the judge finds that the proponent because of culpable neglect failed to secure the presence of the declarant at the hearing; or

[~~(b)~~] (c) If unavailability is claimed because the declarant is absent beyond the jurisdiction of the court to compel appearance by its process and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship or expense.

The above revision has not been incorporated in the attached tentative recommendation.

Rule 63 - Opening Paragraph

The opening paragraph defines hearsay evidence as evidence of an out-of-court statement which is "offered to prove the truth of the matter stated" and provides that hearsay evidence is inadmissible. In several of the following subdivisions, the exceptions to this general rule repeat the language "offered to prove the truth of the matter stated." For instance, in subdivision (1), the rule is stated that hearsay evidence is inadmissible except "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. . . ." The underscored phrase is redundant, for if the evidence were not offered for this purpose it would not be hearsay under the opening paragraph and would not be inadmissible under the opening paragraph.

The underscored language is also defective in that it provides that the statements concerned are "admissible." None of the other subdivisions of Rule 63 provide that a statement "is admissible"; they merely provide that Rule 63 does not exclude the statement. The subdivisions are merely exceptions to Rule 63's rule of inadmissibility. Hence, if there is any other provision of law which would make the evidence involved inadmissible, the subdivisions would not make the evidence admissible.

The staff recommends, therefore, that "is admissible to prove the truth of the matter stated" be deleted from subdivision (1). The staff also recommends that the following language be deleted from the following subdivisions:

Subdivision (18): "to prove the truth of the recitals thereof."

(27): "as tending to prove the truth of the matter reputed."

(28): "to prove the truth of the matter reputed."

(29): "offered as tending to prove the truth of the matter stated."

(30): " to prove the truth of any relevant matter so stated."

There is similar language in several other subdivisions, but the staff believes the language serves a purpose in these subdivisions and should be retained. For your consideration, though, the language and subdivisions are:

Subdivision (14): "to prove the non-occurence of the act or event, or the non-existence of the condition."

(17): "to prove the content of the record"; "to prove the absence of a record in a specified office."

(19): "to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed."

(20): "to prove, against such person, any fact essential to sustain the judgment."

(21): "To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor."

(22): "To prove any fact which was essential to the judgment."

(31): "to prove facts of general notoriety and interest."

Rule 63(1)

Professor Chadbourn has prepared a supplemental memorandum on Rule 63(1). This memorandum notes the recent case of People v. Gould and suggests that the Commission's previous action on Rule 63(1) be reconsidered in light of the Gould case. The questions presented for decision by the Commission are stated on pages 4 and 5 of the supplemental memorandum prepared by Professor Chadbourn.

As Professor Chadbourn points out in his supplemental memorandum,

under Rule 63(1) as revised by the Commission, a statement (whether or not in writing) of a person who is a witness at the hearing is admitted (as substantive evidence) to prove the truth of the matter stated if inconsistent with the testimony of the witness at the hearing. However, under the revised rule, a statement of a witness at the hearing is not admissible to prove the truth of the matter stated where the witness testifies that he has no present recollection of the matter even if he testifies that the statement that he made was true (unless, of course, the statement falls under revised Rule 63(1)(c)).

Take this case: W is a witness in a criminal case. M, a male, and F, a female, are the defendants and are charged with robbing W. W testifies at the trial that M was not the man who robbed her and that, although she has no present recollection as to the identity of the woman who robbed her, she made an identification of the woman shortly after the robbery and that she was sure of the identity of the woman at that time. P, a police officer, is offered to testify that W identified M as one of the robbers and also identified F as the other robber. No written record was made of the identification. Testimony concerning M would come in as evidence of the identity of the criminal -- it is inconsistent with W's testimony at the hearing; testimony concerning F would be excluded -- it is not inconsistent with W's testimony and does not meet the requirement of a "writing" under revised Rule 63(1)(c).

It can be argued that a hearsay statement that is inconsistent with the declarant's testimony on the stand is less trustworthy than a hearsay statement which the declarant is willing to say was true when made. As to the inconsistent statement, there is neither a circumstantial guarantee

of trustworthiness nor testimonial support for its trustworthiness. As to the forgotten statement, there is at least testimonial support by the declarant for the truth of the statement. Yet the Commission would admit the inconsistent statement as substantive evidence but exclude the latter statement unless it is in writing. It would seem that if the law is to be changed to make the inconsistent statement substantive evidence, the Commission should go the whole way and also make the latter statement admissible as substantive evidence.

Accordingly, the staff suggests that the Commission consider the addition of the following paragraph to Rule 63(1);

> (d) Concerns a matter as to which the witness has no present recollection and is offered after the witness testifies that the statement he made was true.

Professor Chadbourn's supplemental memorandum suggests other alternatives for consideration of the Commission.

In connection with the staff suggestion, it should be recognized that the primary justification for the "past recollection recorded" exception to the hearsay rule (if it is to be regarded as a hearsay exception) is that there is an element of trustworthiness in the written record of the statement made at the 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. This element of a written record does not exist under the staff's suggested language. But, as noted above, there is no such requirement as a condition to the use of a prior inconsistent statement -- and under the revised rule such a statement is substantive evidence even if it was not in writing and not made under oath.

If the staff suggestion were adopted, a prior statement made by a witness who is available at the hearing could be used if:

(1) The statement is inconsistent with his testimony at the hearing (Statement need not be in writing); or

(2) The statement is a prior consistent statement offered to rebut a charge of recent fabrication (Statement need not be in writing); or

(3) The statement concerns a matter as to which the witness has no present recollection and the witness testifies that the statement he made was true (Statement need not be in writing); or

(4) The statement concerns a matter as to which the witness has no present recollection and is a writing made while the matter was fresh in the witness's memory.

If the Commission's concern with the adoption of Rule 63(1) of the URE was that it would permit a party to put in his case through written statements carefully prepared in his attorney's office, the statutory scheme outlined above would accomplish the apparent object of the URE subdivision without permitting the practice the Commission believed to be objectionable.

Rule 63(2)

The staff recommends that all of Rule 63(2) be deleted from the Uniform Rules. Rule 63(32) and Rule 63A will accomplish the same thing as Rule 63(2). If Rule 63(2) is deleted, Rule 63(2a) should be redesignated as Rule 63(2).

Rule 63(2a)

(1) Suggested staff revision. Rule 63(2a), as approved by the Commission, reads:

(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.

Rule 63(2a) is based on Section 1870(8) of the Code of Civil Procedure which reads:

> In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
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> * * *
>
> 8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter.

The words "former action or proceeding" appearing in Rule 63(2a) are ambiguous. The staff recommends that subdivision (2a) be revised so that the subdivision will clearly indicate that it applies both to a former action between the same parties or their predecessors in interest and also to a former trial of the same action or proceeding. The revised subdivision is set out in the tentative recommendation. Section 1870(8) has been interpreted to permit the introduction of evidence introduced at a former trial of the same action or proceeding in which it is offered (Gates v. Pendleton, 71 C.A. 752 (1925), hg. den.) as well as in another action between the parties. Section 1870(8) has also been interpreted to permit the introduction of evidence introduced in a former action between the parties' predecessors in interest. (Briggs v. Briggs, 80 Cal. 253 (1889).)

The revised subdivision is consistent with Rule 63(2)(d) and Rule 63(3).

(2) State Bar Committee objection. The Southern Section of the State Bar Committee objects to subdivision (2a). The following is an extract from the Minutes of the Southern Section (August 2, 1960):

> As to the Commission's proposed new subdivision (2a), the Southern Section is of the opinion that this new subdivision would broaden the scope of admissibility over what the Committee and the Commission previously had agreed upon. The

Southern Section is unaware of the Commission's motivation in suggesting this new subdivision. In its previously approved form, subdivision (2) would have made admissible the testimony of a witness, without further safeguards, only in a situation where such testimony was given in a prior trial of the same action. The Southern Section accepted this concept, but it did not then, and still does not, accept the principle that the testimony of a witness given in what could be an entirely different action should be admissible without further safeguards, which is what the Commission's new clause (2a) may accomplish. While it is true that the Commission's proposed new clause (2a) requires that the parties to both actions be the same and that the testimony relate to the "same matter", it seems to the Southern Section that these conditions may not impose adequate safeguards. For example, A sues B for divorce. In that action, a property settlement agreement is involved, and there is brief testimony concerning it. Some time later, an entirely different action arises between A and B, in which the status of one of their former assets may be a key issue. Although testimony in the first action technically may be related to the same matter that is involved in the second action, the two actions may have an entirely different character and emphasis, and there may be good reasons for the testimony to have been much less precise and exact in the first action than in the second.

Also, it seems to the Southern Section that the Commission's proposed new clause (2a) would make admissible some of the same testimony which subdivision (3) of Rule 63 purports to cover, but without imposing the same safeguards that subdivision (3) requires.

Rule 63(4)

The Commission and the State Bar Committee are in agreement on this subdivision except that the Committee would insert at the beginning of the paragraph prior to the word "statement," the words "if the declarant is unavailable as a witness or testifies that he does not recall the event or condition involved."

Rule 63(5)

(1) State Bar Committee objection. The State Bar Committee would

substitute the words "statement by a decedent" for the words in the URE subdivision "statement by a person unavailable as a witness because of his death." The Commission adopted the State Bar's suggestion by action on July 19, 1958, but later decided to return to the original language of the URE provision. The term "statement by a person unavailable as a witness because of his death" incorporates the definition of "unavailable as a witness" in Rule 62(6), (7).

The defendant as well as the prosecution may offer a dying declaration in evidence. But, as previously pointed out in connection with Rule 62(7), the language of Rule 62(7) will make impossible a dying declaration where the death of the declarant is due to the culpable act or neglect of the proponent of the evidence. This result would be avoided, though, if Rule 62(7) were revised as previously recommended.

(2) Possible revision suggested by staff. Note that this exception -- Rule 63(5) -- as now revised applies only when the declarant is unavailable "because of his death." Logically, there is no reason for the limitation just quoted. If the guarantees of trustworthiness -- voluntary declaration, sense of impending death, etc. -- are sufficient, the evidence is no less competent because the declarant is unavailable for some other reason. If the statement is trustworthy, it does not become less so merely because the declarant survives. Therefore, the staff suggests that the Commission consider deleting the limiting words "because of his death."

Rule 63(6)

(1) State Bar Committee objection. The Commission and the State Bar Committee are in disagreement on this subdivision. The Committee

would accept the original URE subdivision but would add at the end of the subdivision the words "or (c) under such other circumstances that the statement was not freely and voluntarily made." In addition, the Committee would change the words "public official" to "public officer" in subparagraph (b) and would eliminate the word "reasonably" in subparagraph (b).

(2) Suggested staff revision. Subdivision (6), as revised by the Commission, may eliminate the foundation showing now required before a confession may be introduced. The California cases have required that, before offering the confession, the prosecution must first lay a foundation by preliminary proof of its free and voluntary nature. Revised subdivision (6) would appear to make this foundation unnecessary. In addition, revised subdivision (6) creates a doubt as to whether the prosecution will still have the burden of proof of showing that the confession was free and voluntary. Accordingly, the staff suggests that subdivision (6) be revised to read:

> (6) In a criminal action or proceeding, as against the defendant, a previous statement by him relative to the offense charged, [unless] if the judge finds pursuant to the procedures set forth in Rule 8 that the statement was made:
>
> (a) Under circumstances not likely to cause the defendant to make a false statement; [or] and
>
> (b) Under such circumstances that it is not inadmissible under the Constitution of the United States or the Constitution of this State.

The above suggestion has not been incorporated into the attached tentative recommendation.

Rule 63(7)

The staff believes that the words "as against himself" in subdivision (7) are ambiguous. Do these words mean against "himself" in his "individual capacity" or do they permit admission of a statement made in an "individual capacity" against, for example, an estate represented by the declarant?

It is suggested that the subdivision would be clearer if it were phrased as follows:

(7) Except as provided in subdivision (6) of this rule, as against himself in either his individual or representative capacity, a statement by a person who is a party to the action or proceeding irrespective of whether such statement was made in his individual or a representative capacity, ~~[and if the latter, who was acting in such representative capacity in making the statement;]~~

Rule 63(9)

The Commission and the State Bar Committee are in agreement on this subdivision except that the Committee feels that if it is advisable to require independent evidence of the existence of a conspiracy under subparagraph (b), there should likewise be a requirement of independent proof of agency under subparagraph (a) in order to avoid any implication as a result of the amendment of subparagraph (b) that no such proof is necessary. Accordingly, the Committee would amend subparagraph (a) to read as follows:

> (a) The statement is offered after, or in the judge's discretion, subject to, proof by independent evidence that an agency existed and that the declarant was an agent of the party at the time the statement was made, and the statement concerned a matter within the scope of the agency or employment of the declarant for the party and was made before the termination of such relationship.

C.C.P. Section 1848 provides:

> The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot affect another.

C.C.P. Section 1870(5) reads:

> In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
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> * * *
>
> 5. 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. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party.

Under C.C.P. Section 1870(5) and Section 1848, declarations of the partner or agent cannot prove the fact of the agency or authority; the existence of the relationship must be shown independently, e.g., by the

testimony of the agent or another.

Witkin, California Evidence, § 230, after stating the above rule, suggests this qualification:

> In practice, however, this rule is subject to some evasion: (a) The agent's statement, though not affirmative evidence, may be used to impeach his testimony that he was not an agent (Carter v. Carr (1934) 139 C.A. 15, 25, 33 P.2d 852; see 4 Wigmore, § 1078, p. 125.) (b) The agent's statement may perhaps be offered as affirmative circumstantial evidence, e.g., to show that the other party dealt with him as an agent, or to show his own intent to act for his principal rather than for himself. (See Carter v. Carr, supra, 139 C.A. 24; McCormick, p. 519; 4 Wigmore, § 1078, p. 124; cf. Rest., Agency §§ 284, 289.

See the comment to Rule 63(9)(a) which points out the changes this paragraph will make in the existing California law.

If it is desired to incorporate a requirement that the relationship of agent, partner or employee be established by independent evidence, it is suggested that the following revision be made in Subdivision (9)(a), rather than adopting the revision suggested by the State Bar Committee:

> (9) As against a party, a statement which would be admissible if made by the declarant at the hearing if:
>
> (a) The statement is that of an agent, partner or employee of the party and (i) the statement was made prior to the termination of the relationship and concerned a matter within the scope of the agency, partnership or employment of the declarant for the party and (ii) the statement is offered after proof by independent evidence of the existence of the relationship between the declarant and the party.

Rule 63(10)

The Commission and the State Bar Committee are not in agreement on this subdivision.

The Committee agrees with the Law Revision Commission except that the northern section would change the words "social disapproval" to "social disgrace." The southern section has indicated that it has no strong feeling one way or another on this but felt that it would be advisable to follow the Commission.

The southern section has also suggested that the following words be inserted at the beginning of the section "except as against an accused in a criminal proceeding." The northern section has not as yet come to a conclusion on this proposal.

Rule 63(12)

The Commission adopted this section as originally proposed.

The State Bar Committee would add a paragraph (c) to read as follows:

> (c) State of mind at a prior time, when the prior state of mind of the declarant is in issue, provided that no assertion of fact contained in such statement is competent to prove the truth of the fact asserted and provided, further, that the declarant is unavailable as a witness.

If the State Bar's revision is acceptable to the Commission, it is suggested that it be rephrased to read as follows:

> (c) State of mind at a prior time when the prior state of mind of the declarant is in issue and the declarant is unavailable as a witness, but no assertion of fact contained in such statement is competent to prove the truth of the fact asserted.

The following is an extract from the Minutes of the February 13, 1960 meeting of the Southern Section of the State Bar Committee:

> Messrs. Kaus and Kadison submitted a report in which they suggested a revision of subdivision (12) in the light of Williams vs. Kidd, 170 Cal. 631, and other California cases dealing with the admissibility of extra judicial declarations as to state of mind. The matter was discussed at considerable length. The members generally were of the opinion that where state of mind actually is in issue, it is artificial and illogical to limit the admissibility of state of mind declarations only to those declarations involving existing state of mind; that by limiting admissibility only to declarations involving existing state of mind we are adopting an artificial measuring rod; namely, the manner of expression rather than the substance of what is said. For example, assume a gift case where state of mind at the time of delivery is in issue. Assume two alternative declarations: (1) "I gave my property to my sister last year"; and (2) "I don't own the property now." Although (1) and (2) mean the same thing in substance, (1) presumably would not come in under the existing state of mind doctrine whereas (2) would.
>
> The committee members were in agreement that there is a real danger in admitting declarations of past intent in situations where the relevancy of the declarations is their use as an inference to prove that some other relevant fact occurred; that, however, there is no similar danger where the actual issue is what the declarant's state of mind was at a given time, and where the declarations of his intent at that time is not going to be used simply as one relevant fact to prove something else.
>
> Subdivision (12) finally was approved in the . . . form [set out above].
>
> All of the members present were in general agreement as to the desirability of the revision of subdivision (12) as it reads above, except that there was a substantial difference of opinion (4 to 3 in favor) as to whether unavailability of the declarant as a witness should be a requirement under clause (c).

Subdivision (12)(a) Admits many declarations which are germane to declarant's state of mind at a prior time. To illustrate: suppose T's will is contested on the ground of alleged undue influence of X. The will was executed on June 1. On June 15 T said to W "I am afraid of X." Under subdivision (12)(a). W may testify to T's statement. The statement relates T's state of mind as of the time the statement is made (June 15). Such statement is relevant to the state of mind pre-existing on June 1, because it is reasonable to infer that T's mental state on June 15 was likewise his mental state on June 1.

In the above respects subdivision (12)(a) merely declares common-law doctrines. This is made clear by the following explanation which McCormick gives (p. 567 and pp. 569-570):

> As a later outgrowth of the exception for declarations of bodily pain or feeling, there evolved the present exception to the hearsay rule admitting statements or declarations of a presently existing mental state, attitude, feeling or emotion of the declarant. . . .
>
> The . . . declaration must describe a then-existing state of mind or feeling, but this doctrine is not as restrictive in its effect as might be supposed. Another principle widens the reach of the evidence. This is the notion of the continuity in time of states of mind. If a declarant on Tuesday tells of his then intention to go on a business trip the next day for his employer, this will be evidence not only of his intention at the time of speaking but of a similar purpose the next day when he is on the road. And so of other states of mind.
>
> Moreover, the theory of continuity looks backward too. Thus, when there is evidence that a will has been mutilated by the maker his subsequent declarations of a purpose inconsistent with the will are received to show his intent to revoke at the time he mutilated it Accordingly, we find the courts saying that whether a payment of money or a conveyance was intended by the donor

as a gift may be shown by his declarations made before, at the time of, or after the act of transfer.

This rationale is followed in California. For example, in Estate of Anderson, 185 Cal. 700, 198 Pac. 407 (1921) decedent's will was contested on the ground of undue influence of her aunt. Evidence was offered that after executing the will decedent expressed fear of her aunt. The evidence was held admissible, the court reasoning as follows:

> The only exception to the rule against hearsay within which [the evidence] . . . could come is the exception which admits declarations indicative of the declarant's intention, feeling, or other mental state, including his bodily feelings. But such declarations are competent only when they are indicative of the declarant's mental state at the very time of their utterance, and only for the purpose of showing that mental state. . . . As may be seen from the foregoing statement of the exception, in order that a declaration be within it two things are requisite: (a) the declaration must be indicative of the mental state of the declarant at the very time of utterance, and (b) his or her mental state at that time must be material to an issue in the cause, i.e., have a reasonable evidentiary bearing upon such issue. . . . [The evidence] meets both the requirements necessary in order to bring a declaration within the exception. It (a) indicated her then state of mind toward her aunt, and (b) her then state of mind as so indicated was material, since the fact that she then feared her aunt had a reasonably direct bearing on what her mental attitude toward her aunt may have been at a previous and not far distant time, when she executed the will.

See also Whitlow v. Durst, 20 C.2d 523 (1942) (issue: were H and W reconciled on July 16; evidence: thereafter H said they would never be reconciled; held, admissible, because "When intent is a material element of a disputed fact, declarations of a decedent made after[wards] that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule . . ."); Watenpaugh v. State Teachers' Retirement, 51 C.2d 675 (1959) (issue: intent with which decedent executed designation of

beneficiary; evidence: thereafter decedent told his wife she was beneficiary; held admissible because "The declarations of a decedent may be admissible under certain circumstances to prove a state of mind at a given time although uttered . . . after that time, on the theory that under these circumstances the 'stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distances up or down the current,'" citing, inter alia, Estate of Anderson, supra.)

Moreover, the holding in Williams v. Kidd is explainable and supportable on the basis of this rationale. (McCormick, p. 750, note 13; McBain, 19 Calif. L. Rev. at p. 252) There, declarations of the decedent showing that at the time of the declarations he regarded himself as the owner of certain property were admitted to show that he delivered a deed to the property at a previous time without the intent requisite to pass title.

Let us now suppose, however, that on June 15 X spoke as follows to W: "I remember that I was afraid of X last June 1." This, it seems, is in the words of subdivision (12)(a) "a statement of the declarant's . . . memory or belief to prove the fact remembered or believed." As such, the statement is inadmissible under subdivision (12)(a). However, it seems that the statement would be admissible under the State Bar Committee's proposed subdivision (12)(c).

In the opinion of the staff subdivision (12)(c) is not necessary to preserve the rule of Williams v. Kidd (see above). However, the Commission should consider whether in its opinion there are other valid reasons to approve proposed subdivision (12)(c).

As just noted, subdivision (12)(a) and the present law provide for admitting evidence of a statement showing an existing state of mind or intent to show the existence of a state of mind or intent before or after the declaration where such state of mind or intent is sought to be proved. Wattenbaugh v. State Teachers' Retirement, 51 Cal.2d 675, 336 P.2d 165 (1959). Also, as provided both in the rule and by present law, a declaration showing an existing state of mind or intent is admissible to prove future acts or conduct of the declarant. People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627 (1944). Generally, too, as provided in the rule, a declaration showing an existing state of mind is not admissible to prove past acts or conduct of the declarant. If this limitation did not exist, the hearsay rule would be repealed insofar as the declarant's statements relate to his own conduct. (His statement, "I went to Boston," would be admissible to show his state of mind -- that he thought he went to Boston -- which is relevant to show that he actually went there.)

However, there is a major exception to the restriction that existing state of mind is not admissible to prove past acts or conduct. In will cases, the declaration of a decedent that he has made a will is admissible to show that he actually made a will. Estate of Morrison, 198 Cal. 1, 242 P. 939 (1926). Also, the declaration of a decedent that he has a will in existence is admissible to show that the decedent did not do an act, i.e., did not revoke the will. Estate of Thompson,

44 Cal. App.2d 774, 112 P.2d 397 (1941). The Uniform Rule would exclude such evidence as it is presently worded. It provides that the declarant's statement of "memory or belief" is not admissible "to prove the fact remembered or believed." Hence, a decedent's statement that he has or has not made a will or revoked or did not revoke a will would be inadmissible to prove that fact, even though such a statement might be admissible to show the intent with which the disputed fact was done if there was independent evidence that the disputed fact was done.

It is true that the rule in the will cases is not based on a logical analysis. But it is a well established rule in California and elsewhere. Therefore, the staff has revised Rule 63(12) to add language to codify the rules set forth in the will cases. To be perfectly consistent, the language might be broadened to apply to the deed and gift cases. But this would go beyond the existing law and the staff believes that the exception dealing with declarations against interest will deal adequately with the deed and gift cases. Language has been added to Rule 63(12) as set out in the attached tentative recommendation to codify the exception relating to will cases.

Rule 63(13)

The Commission and State Bar are in agreement on this subdivision which, as revised, embodies the present Uniform Business Records as Evidence Act as enacted in California. Since the approval of this rule, though, the Legislature added Section 1953f.5 to the Uniform Act in

1959. This section provides:

> Subject to the conditions imposed by Section 1953f, open book accounts in ledgers, whether bound or unbound, shall be competent evidence.

Assemblyman Hanna, who introduced the bill to enact this section, has explained that it was introduced

> "because of certain trial court determinations which raised the question whether or not card files used in business machines came within the accepted definition of 'open book accounts'; the technical distinction being made on the basis that a book would be bound in some manner. We felt that this section of the code should keep pace with the business procedures being utilized by a large number of wholesale and retail merchants. We are advised that our bill made this inclusion clear."

A related bill was also introduced by Assemblyman Hanna which resulted in the enactment of Section 337a of the Code of Civil Procedure. This section now defines "book account" to mean a detailed record of transactions between a debtor and creditor entered in the regular course of business and kept in a reasonably permanent form such as a bound book, sheets fastened in a book or cards of a permanent character.

The staff believes that Section 337a of the Code of Civil Procedure adequately solves the problem revealed by Assemblyman Hanna. The staff believes the problem is primarily a limitation of actions problem, for there is no requirement in the Uniform Business Records as Evidence Act requiring the business records to be in an "open book." At the most, all Section 1953f.5 does is make explicit the liberal case-law rule. It may, however, have the unintended effect of limiting the provisions of the Uniform Act as it was construed by prior cases. Witkin's California Evidence at pages 323-324 states:

> The common law rule called for "original entries" or "books of original entry," on the theory that these were

more likely to be accurate than copies subsequently entered. Business practices, however, often made literal compliance with this requirement impossible. And modern cases, both before and after the Uniform Act (which eliminates the requirement), tend to admit records kept under any kind of bookkeeping system, whether original or copied, and whether in book, looseleaf, card or other form. [citing many cases -- automobile repair shop; work cards transcribed by bookkeeper); (construction job; foreman's daily report sheets); contractor's time-book for construction work); (pumper's daily gauge reports, run tickets, etc.); (lien claimant's informal "composition book" containing his entries of hours worked and materials used); (duplicate sales tag entered on permanent "hard sheet" comparable to ledger leaf -- Burroughs Bookkeeping Machine System); (linen service; duplicate delivery tag or ticket showing amounts delivered on particular dates); (ambulance company "trip ticket" and "log book"); (Veterans Loan appraisal file kept by bank); (chain store produce clerk's tally sheet)]

The Uniform Act refers to the record of "an act, condition or event," i.e., its coverage goes beyond bookkeeping entries of debit and credit. A special report, or report of a nonrecurring act or event, may be received if it was made in the course of business or professional duty. [citing cases]

Accordingly, the staff does not recommend the amendment of subdivision (13) of Rule 63 to include the matter added to the Uniform Act in 1959. The matter is brought to your attention, though, for the Rule as approved does not include the 1959 addition to the Uniform Act.

Rule 63(15)

The northern section of the State Bar Committee has approved this subdivision as proposed by the Commission. The southern section, however, would prefer the language contained in the U.R.E. with the following language added at the end:

> . . . provided that such findings could have been testified to by said public officer or employee had he been called as a witness. The fact that a public officer

or employee has made findings of fact or drawn conclusions shall constitute prima facie proof that he was qualified to do so, provided, however, that no such reports or findings of fact shall be admissible if offered in evidence by or on behalf of any such public officer or employee making or participating in the making of such investigation or written report, or by or on behalf of any party, government or governmental authority under whose jurisdiction, authority, control, or supervision, or at whose request such investigation or written report was made, unless such report or finding of fact is admissible under a statute or ordinance or rule expressly authorizing its admissibility.

The northern section has not reached a final conclusion on this proposal by the southern section.

The language suggested by the southern section appears to be directed at an ambiguity in the Commission's draft. The meaning of "statements of fact" is somewhat unclear. Does it mean a statement of "a thing done" (Webster's) whether or not the declarant perceived the thing reported? Or does it refer only to those things which the declarant perceived? Is the declarant's statement that the green car went through the red light any less a statement of fact because it is based upon his conclusions from the statements of witnesses, the location of the cars, skid marks and other matters which he perceived?

The language proposed by the southern section answers this important question by extending the exception only to findings that the declarant

could have testified to if he had been called as a witness.

This is in accord with the existing California law, as is indicated by the following quote from Witkin, California Evidence, p. 333:

> The usual official statement received in evidence is one which is based upon the performance of duty or personal observation of facts by the official, and this satisfies the knowledge requirement . . . . On the other hand, the official report of an investigation may be based in whole or in part on information gained from others or conclusions of the official. Although Uniform Rule 63(15)(c) approves the admission of such a report, the general tendency of the courts is to exclude matters which would not be permitted as testimony of the officer on the stand. (See Unif. Rule 63(15), Comment [pointing out that proposed rule goes beyond common law, and justifying departure by requirements of notice to adverse party]; . . . .)

So far as the "conclusions" of a public officer or employee are concerned (his opinion based on the facts he observed), the southern section's proposal would make the report itself prima facie evidence of the qualifications of the declarant to draw such conclusions (i.e., to give such opinion evidence).

Under the southern section's language, the question arises whether the court should exclude reports if it cannot determine whether the declarant perceived the events reported. In MacLean v. San Francisco, 151 Cal. App.2d 133, 311 P.2d 158 (1957), the trial court excluded a police accident report because it did not show whether the facts reported were based upon the declarant's observations or upon the statements of bystanders; but the officers who prepared the report were called and testified on the matters of which they had knowledge, using the report to refresh recollection. Under the Commission's proposed language, it might be held that such a report should be received, for it contained a statement of facts and the officer who prepared the report had the duty

to investigate the facts and prepare the report. But apparently the southern committee's language would require the court to determine that the declarant could competently testify to the matters reported before the report could be received.

If the Commission did not intend to let reports into evidence unless the reporting officer had first-hand knowledge of the reported facts or was qualified to form an opinion from the facts he personally observed, the staff suggests that this subdivision be modified as follows to make this intent clear:

> (15) Subject to Rule 64, a statement[s] [of fact] contained in a written report made by a public officer or employee of the United States or by a public officer or employee of a state or territory of the United States, if such statement would be admissible if made by him at the hearing and the judge finds that the making [thereof] of the report was within the scope of the duty of such officer or employee and that it was his duty to:
>
> (a) Perform the act reported; or
>
> (b) Observe the act, condition or event reported; or
>
> (c) Investigate the facts concerning the act, condition or event.

One further revision to subdivision (15) should be considered by the Commission. Subdivision (15) is, of course, intended to include official records made by a public officer or employee. However, the section applies only to "reports" made by a public officer or employee. It might be desirable to insert after "written report" the words "or

official record" and after the word "reported" in paragraphs (a) and (b) the words "or recorded."

Rule 63(16)

The southern section of the State Bar Committee concurred with the Commission except for the elimination of the reference to Rule 64. The northern section objects to the elimination of the reference to Rule 64 and recommends that the subdivision be limited specifically to the types of reports that are made for vital statistics purposes, such as birth certificates, marriage certificates and death certificates. Unless the subdivision is so limited, the northern section recommends that the subdivision be limited to "statements of fact" contained in the writing. The northern section, too, believes that the language, ". . . authorized by a statute of the United States or of a state or territory of the United States to perform, to the exclusion of persons not so authorized, the functions reflected in the writing . . .", is unclear.

Concerning the elimination of the reference to Rule 64, see the comment below relating to subdivision (17), (18) and (19).

One further revision of subdivision (16) should be considered by the Commission. The staff believes that subdivision (16) would be improved if it were revised as follows:

(16) A statement contained in a written report [~~writings~~] made by a person [~~persons~~] other than a public [~~officers or employees~~] officer or employee [~~as a record, report or finding of fact~~], if such statement would be admissible if made by him at the hearing and the judge finds that:

(a) The maker was authorized by a statute of the United States or of a state or territory of the United States to perform, to the exclusion of persons not so authorized, the functions reflected in the [~~writing~~] report, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions; and

(b) The [~~writing~~] report was made and filed as required by the statute.

Rule 63 (17), (18) and (19)

The State Bar Committee does not agree with the elimination of "Subject to Rule 64" from these three exceptions. As a practical matter, it is difficult to understand why the introduction of an original official record should be subject to Rule 64 [under Rule 15] when the introduction of a copy of the record is not subject to Rule 64 [under Rule 17]. The Bar states that it "has found itself unable to understand this action."

Rule 63(20)

The State Bar Committee disapproves of this rule. It further recommends that, if the Commission recommends the rule, the rule should be amended to indicate the judgment is not conclusive but "tends" to prove the necessary facts.

Rule 63(21)

The State Bar Commitee believes the subdivision is somewhat unintelligible. The Committee states that it believes that any change in

the rules set forth in Civil Code Section 2778 (governing the relationships between indemnitors and indemnitees) would be unwise. The Committee suggests a revision which would read as follows:

> (21) Where under the law of this State a judgment against a person who is entitled to be indemnified or exonerated by another against a liability is not conclusive in any subsequent action which the former may bring against the latter for indemnity or exoneration, such judgment may be offered in evidence by the former in any such action as prima facie evidence of the facts determined thereby.

Rule 63 (23) and (24)

The Bar Committee had approved these rules as originally proposed and has not taken a position on the language relating to ante litem motem which has been added. The Southern Section has reservations about the precise language with which the ante litem motem qualification has been added. It comments that "to exceed or fall short of the truth" seems to be meaningful only with respect to statements concerning age. In addition, the Southern Section believes that "existing controversy" is too vague and can be interpreted to include backyard arguments. It believes that the subdivision should be reworded so that it clearly refers to a legal controversy of some sort.

The Southern Committee also reports that there is substantial opinion among its members that the ante litem motem qualification should go to the weight of the evidence, not its admissibility.

The complaint concerning the words "to exceed or fall short of the truth" might be met by revising them to read "to deviate from the truth."

Rule 30.

The State Bar Committee suggests that the subdivision be revised to read as follows:

(30) Evidence of [~~statements of~~] matters, other than opinions, which are of general interest to persons engaged in an occupation, contained in a tabulation, list, directory, register, [~~periodical~~] or other published compilation [~~to prove the truth of any relevant matter so stated~~] if the judge finds that the [~~compilation is published for use~~] information is generally used and relied upon by persons engaged in that occupation [~~and is generally used and relied upon by them~~] for the same purpose or for purposes for which the information is offered in evidence.

The phrase "to prove the truth of any relevant matter so stated" which the Bar has stricken in its suggestion is probably unnecessary, for under the basic statement of Rule 63 the evidence is not hearsay if it is not introduced for that purpose.

Rule 63(31).

The Bar Committee reports that its northern section approves of the action of the Commission, but the southern section prefers the original proposal contained in the URE with the following modifications:

(31) A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge [~~takes judicial notice or a witness expert in the subject testifies~~] finds that the treatise, periodical or pamphlet is a reliable authority in the subject.

However, the southern section reports that, in the interest of unanimity, it is willing to accept the action of the Commission and the northern section.

Rule 63(32).

The northern section of the State Bar Committee has not considered this addition to the Uniform Rules. The southern section believes that the language is inexact. It states that "any hearsay evidence not admissible under subdivisions (1) through (31)" indicates that these subdivisions state rules of inadmissibility. Actually, it is Rule 63 that declares certain evidence is not admissible and subdivisions (1) through (31) merely declare that certain evidence is not inadmissible. The southern section suggests the following revision of subdivision (32):

(32) Any hearsay evidence not admissible under [~~subdivisions (1) through (31) of~~] this Rule 63 but declared by some other law of this State to be admissible.

The revision suggested above is not technically accurate because subdivision (32) will be a part of Rule 63 and will provide that the hearsay rule does not prevent the admission of certain hearsay evidence.

A technically accurate subdivision that will meet the objection of the southern section is set out below:

(32) Any hearsay evidence [~~not admissible under~~] that does not fall within an exception provided by subdivisions (1) through (31) of this rule, but is declared by some other law of this State to be admissible.

The changes shown above are directed to subdivision (32) as approved by the Commission.

However, it is difficult to see why it is necessary to determine that the hearsay sought to be introduced is inadmissible under Rule 63 before reliance may be placed on another law. The same result might be achieved if the subdivision were revised to read:

> (32) Hearsay evidence declared to be admissible by any other law of this State.

This suggested revision has been incorporated in the tentative recommendation.

Rule 63A.

Rule 63A was approved by the Commission in substantially the following form:

> 63A. Where hearsay evidence falls within an exception provided by subdivisions (1) through (31) of Rule 63 and when such evidence is also declared to be admissible by some law of this State other than such subdivision, such subdivision shall not be construed to repeal such other law.

The northern section of the Bar Committee has not considered this rule. The southern section has approved it.

The staff suggests that Rule 63A be revised to save other laws both consistent and inconsistent with subdivisions (1) through (31) of Rule 63. The following language is suggested:

> 63A. Where hearsay evidence is declared to be admissible by any law of this State, nothing in Rule 63 shall be construed to repeal such law.

This suggested revision has been incorporated in the tentative recommendation.

Rule 64.

The Bar Committee has agreed to the inclusion of a reference to Rule 63(29) in this rule. But it reports that it is unable to understand the action of the Commission in deleting the references to subdivisions (16), (17), (18) and (19). As pointed out previously, there does seem to be some inconsistency in this action of the Commission. An original official record must be served under Rule 64, but a copy of the same record is admissible without such service. A record of an action by a public official must be served under Rule 64, but an official report of an action by someone other than a public official is not subject to this requirement. Under Rule 63(15) a report of a marriage performed by a judge is inadmissible unless Rule 64 is complied with, but under Rule 63(16) a report of a marriage performed by a minister is admissible without complying with Rule 64.

Rule 66.

The second paragraph of the proposed Law Revision Commission comment to Rule 66 is not in accordance with Professor Chadbourn's analysis of this Rule. Professor Chadbourn does not believe that the rule applies to any more than "double hearsay." His study on this rule raises the possibility that the rule may be construed to exclude triple hearsay. The staff, however, believes that multiple hearsay may be reached by repeated applications of Rule 66. For instance, if former testimony (Rule 63(3)) is to an admission (Rule 63(7)) and is sought to be proved by a properly authenticated copy (Rule 63(17)) of the official report (Rule 63(15)) of such testimony, the copy is within an exception and is not inadmissible on the ground that it is offered to prove the official report of the testimony, for the official report is within an exception. The official report is not inadmissible on the ground that it relates prior testimony, for the prior testimony is

within an exception. The former testimony is not inadmissible on the ground that it includes an admission, for the admission is within an exception.

However, if the Commission believes that Rule 66 is not sufficiently clear, the staff believes that it may be clarified by revising it to read as follows:

> Rule 66. A statement within the scope of an exception to Rule 63 is not inadmissible on the ground that [~~it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself~~] the evidence of such statement is hearsay evidence if the hearsay evidence of such statement consists of one or more statements each of which meets the requirements of an exception to Rule 63.

Professor Chadbourn included in his study another suggested revision of Rule 66 in order to solve the problem. However, he did not recommend its approval because he believed the courts would work out the solution to the problem without legislative guidance. His proposed revision is as follows:

> 66. A statement within the scope of an exception to Rule 63 shall not be inadmissible on the ground that it includes [~~a statement made by another declarant~~] one or more statements by an additional declarant or declarants and is offered to prove the truth of the included statement or statements if such included statement [~~itself~~] meets or such included statements meet the requirements of an exception or exceptions.

Adjustments and Repeals of Existing Statutes

The adjustments and repeals set out in the draft of the tentative recommendation are in accord with decisions previously made by the Commission except as noted below.

C.C.P. Section 1951 has been revised to conform it to Rule 63(19). This is in accord with a previous decision by the Commission but the Commission has never considered what changes should be made in Section 1951 to conform it to Rule 63(19).

C.C.P. Section 2047 has been revised to make it consistent with Rule 63(1)(c) and to delete the last sentence which is superseded by Rule 63(1)(c). The Commission has never considered the specific revision suggested in the draft of the tentative recommendation.

Additional adjustments of existing statutes will be recommended in the Supplement to Memorandum No. 7(1961) (to be sent).

Respectfully submitted,

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Executive Secretary