

6/12/61

Memorandum No. 19(1961)

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

There is attached to this memorandum the Hearsay Article of the URE as it has been revised to date. The following matters are noted for your particular attention:

Rule 62(6)(a). The Commission deferred further consideration of this at the May meeting. It will be made the subject of a separate memorandum.

Rule 63(3). As it now reads, this subdivision is ambiguous. Whether it applies to testimony given at a former trial of the same action or proceeding is uncertain. It says that it applies to "testimony given under oath or affirmation as a witness in another action or proceeding. . . ."

Section 1870(8) of the Code of Civil Procedure is the section of the code that now permits the admission of former testimony. It states that evidence may be given of 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 language, "a former action between the same parties", has been construed to apply to a former trial of the same action or proceeding in which it is offered. (People v. Bird, 132 Cal. 261 (1901); Gates v. Pendleton, 71 C.A. 752 (1925), hg. den.) The language now recommended, "another

action or proceeding," does not seem to be sufficiently different from "a former action" to warrant a different result. However, to preclude the possibility that the change from "former" to "another" will be construed to compel a change in result, the staff recommends that "former" be substituted for "another" and that the following language be added at the end of Rule 63(3):

As used in this subdivision, "former action or proceeding" includes not only another action or proceeding but also a former hearing or trial of the same action or proceeding in which the statement is offered."

If this suggestion is adopted, Rule 63(3) should be adjusted to conform and would read as follows:

(3) 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~~] a former action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony in a 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 [~~either~~] former 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 party against whom the testimony was offered in the [~~either~~]

former action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the party against whom the testimony is offered has in the action or proceeding in which the testimony is offered; or

(c) In a criminal action or proceeding, the party against whom the testimony is offered was a party to the ~~[either]~~ former 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-ether-action-or-proceeding]~~ in an action or proceeding other than the action or proceeding in which the testimony is offered is not admissible.

As used in this subdivision, "former action or proceeding" includes not only another action or proceeding but also a former hearing or trial of the same action or proceeding in which the statement is offered.

There are other problems in connection with this subdivision that will be taken up in a subsequent memo concerning Rule 62(6)(a) and Penal Code Section 686. However, for the present, it should be pointed out that there is a different standard for the admission of former testimony in Penal Code Section 686. This need not concern the Commission at the present time, for Penal Code Section 686 declares a rule of confrontation, not a rule of hearsay. The defendant may waive his right of confrontation and introduce evidence that is admissible under the hearsay rule. But the fact that evidence is admissible

as an exception to the hearsay rule does not necessarily make such evidence admissible against the defendant in a criminal case, for such evidence may be excluded under the confrontation rule. (See People v. Bird, 132 Cal. 261 (1901).)

Rule 63(13). The last paragraph of the Comment is language not yet approved by the Commission.

Rule 63(15). The Comment to this subdivision has not been approved.

Rule 63(16). The present Health and Safety Code sections relating to vital statistics are concerned with birth, fetal death, death or marriage records. Hence, this subdivision has been revised to apply to these types of records. The proposed language of the subdivision and the proposed Comment have not been approved.

Rule 63(17). The footnotes to the Comment and the last sentence of the Comment have not been approved.

Rule 63(18)(19). The last sentences in the Comments have been slightly revised.

Rule 63(20). The punctuation in the Comment has been revised to carry out the scheme the Commission adopted in part at the May meeting.

Rule 63(21). This subdivision has been revised to carry out the action of the Commission. Neither the subdivision nor the Comment have been acted upon as yet. Consideration should be given to deleting the last sentence of this subdivision. It adds nothing to the existing law and is not appropriate for inclusion in the URE Hearsay Article; moreover, the Comment makes clear that the subdivision does not affect the effect to be given to the judgment.

Rule 63(22). Except for the first two sentences, the entire Comment is new.

Rule 63(25). The last sentence of the Comment is new.

Rule 63(26a). This is a new subdivision created out of former (26)(b)(ii).

Rule 63(28). The subdivision as revised has not been approved. The Comment also has not been approved.

Rule 63(29). The second sentence of the Comment is new. The second paragraph of the Comment has been rewritten.

Rule 63(30). The Comment has been revised to accomodate the changes made in the subdivision at the May meeting.

Rule 63(31). Further consideration of this subdivision was deferred at the May meeting. The staff suggests the changes in language shown by strikeout and underline in the Comment as a way of resolving the impasse that has developed.

Rule 64. The Comment needs to be approved.

Rule 65. The Comment has been revised.

Rule 66. The Comment has been revised to indicate that cases may be found in which such evidence has been admitted.

Rule 66A. This is the former Rule 63A. Inasmuch as the Commission decided that this would not be codified but would be included as an uncodified section of the enactment, the staff believes that the section is more appropriately located at the end of the URE article. Slight modifications in the Comment have been made to accomodate the revision.

ADJUSTMENTS AND REPEALS OF EXISTING STATUTES

In this portion of the recommendation, the code sections to be repealed have been set forth verbatim. The Commission should now

decide whether any changes are to be made in the form of the comments.

C.C.P. § 2016. The Commission should defer consideration of the proposed revision until Rule 62(6)(a) is considered in detail.

C.C.P. § 2047. This revision was made to carry out the direction of the Commission at the May meeting. The specific language and the explanation have not been considered by the Commission.

Penal Code §§ 686, 1345 and 1362. These sections are set out here so that the recommendation may be complete. Consideration of the proposed revisions and the explanations, though, should be deferred until Rule 62(6)(a) is considered in detail.

Respectfully submitted,

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