6/19/61

Second Supplement to Memorandum No. 19(1961)

Subject: Study No. 34(L) - Uniform Rules of Evidence (Hearsay - Revised Rule 63(3); C.C.P. § 2016; P.C. §§ 686, 882, 1345, and 1362.)

This memorandum will consider the desirability of substituting the "unavailable as a witness" standard of Revised Rule 62(6) and (7) for the standards now set forth in C.C.P. § 2016. The memorandum will also consider the desirability of amending Penal Code §§ 686, 1345, and 1362 to accommodate the Commission's recommendations relating to hearsay.

In connection with the problems involved in these code sections, Revised Rule 63(3) will also be considered, for there are still some ambiguities left in that subdivision. Since the decisions to be made in regard to Revised Rule 63(3) may influence the decisions to be made upon the other problems, Revised Rule 63(3) will be discussed first.

REVISED RULE 63(3)

The problem involved in Revised Rule 63(3) is whether a deposition taken in a former action, but not introduced in evidence in the former action, is admissible in the subsequent action. The preliminary language of Revised Rule 63(3) states that it applies to "testimony given under oath or affirmation as a witness in another action or proceeding . . . or testimony in a deposition taken in compliance with law in such an action or proceeding . . . ." This language seems to imply that testimony in unintroduced depositions may be introduced in the subsequent trial, for the term beginning "testimony given under oath . . ."

seems broad enough to include deposition testimony that is actually read into evidence. However, paragraph (a) of Revised Rule 63(3) provides that former testimony may be introduced if it "is offered against a party who offered it in evidence on his own behalf in the other action . . . or against [his] successor in interest." Unless a deposition is introduced at the trial, the testimony taken in the deposition is not offered on behalf of anyone. The witness in a deposition "'belongs' to neither side." C.C.P. § 2016(f) provides "A party shall not be deemed to make a person his own witness for any purpose by taking his deposition." A deponent does become the witness of a party if the party introduces the deposition in evidence. (C.C.P. § 2016(f).) Hence, it appears that former testimony contained in deposition taken, but not introduced in evidence, in another action may not be introduced in a subsequent action under paragraph (a), for such evidence was not offered by anyone "on his own behalf" in the former action. This result seems proper, though, for a person does not vouch for the testimony in an unoffered deposition in the same way that he does for evidence that he introduces at a trial. Hence, no change is recommended in paragraph (a).

Paragraph (b) of Revised Rule 63(3) permits former testimony to be introduced in a civil action if "the issue is such that the party against whom the testimony was offered in the other action or proceeding had the right and opportunity for cross-examination" with a motive similar to that which the party against whom the evidence is offered has. Because of the reference to "party against whom the testimony was offered", the paragraph cannot be applied to testimony in a deposition if the deposition was not offered in evidence. The deposition section itself, C.C.P. § 2016,

does not liberalize the rule. It provides that the deposition may be used in a different action when the first action is dismissed and the second action involves the same parties, or their successors, and the same subject matter. So far as other actions than the ones specifically mentioned are concerned, § 2016(d) apparently leaves the matter to the general operation of the hearsay rule. Take this example:

> An accident occurs between an automobile, driven by Hotrod, and a Greyhound bus driven by Lushwell. Commuter, a passenger on the bus, is injured. Hotrod begins an action against Greyhound and Lushwell. Hotrod takes the deposition of Bystander who testifies that the bus "was way over the white line" and that "the driver was drunk." Greyhound settles with Hotrod, and his action never comes to trial. Commuter then begins his action against Greyhound. Bystander can no longer be found (his neighbors report that he left on a round-the-world cruise as soon as Commuter's action was filed). At the trial, Commuter offers Bystander's deposition. Objection on the ground of hearsay.
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> Ruling: Objection sustained. Commuter offers to prove that Greyhound financed Bystander's trip. Objection to the deposition still sustained. The deposition is not admissible under C.C.P. § 2016, for that section covers only (1) the action in which the deposition is taken and, (2) if the action in which the deposition is taken is dismissed, another action involving the same parties (or their successors) and the same subject matter . Section 2016 does not purport to cover the testimony-in-former-actions problem. The deposition is not admissible under Revised Rule 63(3)(a) or (b)

because it was never "offered" on behalf of or against anyone in a previous action. The deposition is not admissible under Revised Rule 63(3)(c), for that subdivision applies only to criminal actions or proceedings. The fact that Bystander is unavailable, or the fact that Bystander is unavailable at the instance of Greyhound, does not change the ruling, for the statement is hearsay under Rule 63 and falls within no exception.

In constrast with paragraphs (a) and (b), paragraph (c) of Rule 63(3) does not require the deposition to have been offered in the prior action. Thus, if in the given example Lushwell is prosecuted for felony drunk driving, Bystander's deposition is no longer inadmissible hearsay. This is because paragraph (c) merely requires that the party against whom the testimony is offered have the right and opportunity for cross-examination in the former proceeding with a similar motive to that which he has in the criminal proceeding. There is no requirement that the deposition in the former action be offered on behalf of or against anyone. (It should be noted, however, that unless Pen. C. § 686 is amended, Revised Rule 63(3), insofar as it applies to criminal proceedings, relates only to the right of the defendant to introduce former testimony; for the prosecution is limited by the defendant's right of confrontation under Pen. C. § 686. This will be discussed more fully later.)

The Commission should also note that paragraph (c) apparently forbids the introduction of testimony at the preliminary in a subsequent action even though the evidence may have been introduced in the trial of the former action. So far as existing law is concerned, it appears that depositions taken in prior actions, but not offered in evidence in such

actions, are admissible as former testimony in subsequent actions between the same parties or their successors in interest under the provisions of C.C.P. § 1870(8). (Briggs v. Briggs, 80 Cal. 253 (1889).) The Commission has tentatively determined to repeal C.C.P. § 1870(8) on the grounds that it is superseded by Revised Rule 63(3).

The questions to be resolved by the Commission, then, are:

1. Should a deposition taken in a prior action, but not introduced in evidence in such action, be admissible in a later civil action against anyone who has a motive to cross-examine similar to that of any party to the prior action?

If so, this may be accomplished by revising the first portion of paragraph (b) to read. "(b) In a civil action or proceeding, the issue is such that [~~the~~] a party [~~against whom the testimony was offered in the other~~] to the former action or proceeding had the right and opportunity for cross-examination with an interest and motive similar . . . ."

2. Should a deposition taken in a prior action, but not received in evidence in such action, be admissible in a subsequent action only if the party against whom the evidence is sought to be introduced was a party to the former action?

If so, this may be accomplished by leaving paragraph (b) as is -- applying only to introduced depositions -- and by amending paragraph (c) to delete the "criminal action" limitation.

3. Should the testimony at a preliminary hearing in a prior criminal action, if received in evidence in such action, be admissible in a subsequent criminal action?

If so, this may be accomplished by revising the exception

in paragraph (c) to read: ". . . except that testimony given at a preliminary examination, but not received in evidence, in the other action or proceeding is not admissible."

4. Should a deposition taken in a prior action, but not received in evidence in such action, be inadmissible in a subsequent criminal action?

If so, this may be accomplished by revising the exception in paragraph (c) to read: ". . . except that testimony given at a preliminary hearing or in a deposition, but not received in evidence, in the other action or proceeding is not admissible."

In considering the foregoing questions, the Commission should keep in mind that, as Pen. C. § 686 now reads, Rule 63(3)(a) and (c) only limits the matters that may be introduced by the defendant in a criminal case. Under Penal Code § 686, the prosecution may not introduce former testimony from any previous case. (See People v. Bird, 132 Cal. 261 (1901).)

Another problem involved in Revised Rule 63(3) relates to its introductory language, "Subject to the same limitations and objections as though the declarant were testifying in person. . . ." This language indicates that the competency of the testimony is to be judged as of the time it is offered in evidence. In Professor Chadbourn's study, dated September 29, 1958, on "Whether Rules Which Disqualify Certain Persons as Witnesses Also Disqualify Hearsay Declarants" he indicates that certain rules of disqualification clearly apply only as of the time that the former testimony was given. For instance, the

disqualification for insanity or infancy is clearly determined as of the time that the former testimony was given. The applicable rule insofar as the disqualification of a spouse is concerned is not so clear. [1]

So far as the Dead Man's Statute is concerned, the law is again uncertain.[2]

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1 In People v. Chadwick, 4 Cal. App 63 (1906), defendant was prosecuted for forgery, his wife testifying without objection at the trial. Defendant was then prosecuted for perjury in the first trial. The transcript of his wife's testimony at the first trial was read without objection in the second trial. Defendant invoked the spouse rule to prevent the wife from testifying at the second trial. On appeal, the District Court of Appeal affirmed and stated the broad proposition that the wife's prior testimony was admissible because the spouse rule does not prevent the showing of admissible hearsay declarations by the wife. The Supreme Court denied a hearing, but it commented that the judgment of the District Court of Appeal was sufficiently supported by the fact that no objection was raised to the introduction of the transcript. The court also said that such portions of the transcript as were needed to show the materiality of the defendant's perjured testimony were also admissible against him. The Chadwick case has been cited since for its broad statement that the spouse rule does not prevent the introduction of admissible hearsay declarations by a spouse (First National Bank v. De Moulin, 56 Cal. App. 313 (1922) People v. Peak, 66 Cal. App.2d 894(1944)); and several cases may be found in which admissible hearsay has been held not to be excluded by the spouse rule (e.g., People v. Swaile, 12 Cal. App. 192(1909) (letter from defendant to wife containing confession admitted); but no other case has been found involving the former testimony problem.

2 In Rose v. Southern Trust Company, 178 Cal. 580 (1918), the Supreme Court held that the deposition of a party and the testimony of a party taken in a former action against the decedent while the decedent was alive were inadmissible in an action to enforce a claim against the estate even though former testimony of the decedent was also introduced. The court relied in part upon Mitchell v. Haggenmeyer, 51 Cal. 108 (1875), which held that a deposition taken in the action against the estate prior to the enactment of the Dead Man's Statute was inadmissible on the trial of the action after the enactment of the deadman's statute. In McClenahan v. Keyes, 188 Cal. 574 (1922), the Supreme Court held that a defendant executor waived the Dead Man's Statute by taking the plaintiff's deposition, for a party must make his objections to the competency of a witness at the time of the taking of the deposition. These cases have not been overruled. However, in Kay v. Laventhal, 78 Cal. App. 293 (1926), a district court of appeal, without citation of any authority, held that the deposition of a plaintiff taken while the decedent was alive is admissible against the estate. The

The Commission may resolve the uncertainties in the existing law by revising Rule 63(3) to indicate clearly the time when the competency of the former testimony is to be determined. The staff recommends that the more recent cases (see footnote 2) be followed and that the competency of the former testimony be judged in all cases as of the time the former testimony was given. Specific language to achieve this result is not suggested. But the staff suggests that the policy question be resolved so that appropriate changes may be made upon revision of Rule 63(3) to incorporate other suggested changes.

Supreme Court denied a hearing. McKee v. Lynch, 40 Cal. App.2d 216 (1940), followed Kay v. Laventhal, and the court pointed out that the numerous authorities -- including Rose v. Southern Trust Company -- holding that the plaintiff's deposition is not admissible if it was taken during the decedent's life were cited and discussed at length in the petition for a hearing presented to the Supreme Court in Kay v. Laventhal. A hearing was also denied in the McKee case. It was recently followed again in Hays v. Clark, 175 Cal. App.2d 565 (1959). Thus, there are two inconsistent lines of authority -- one established by the Supreme Court, the other by opinions of the District Courts of Appeal which the Supreme Court has refused to review. The scope of evidence to be excluded by the Dead Man's Statute is, of course, a matter to be determined when the statute is considered.

The question to be resolved in connection with this section is whether the standard for unavailability as a condition for the introduction of a deposition taken in the same action should be consistent with the standard for unavailability as a condition for the introduction of testimony taken in a prior action, i.e., whether the URE standard of unavailability should be substituted for the standards for unavailability under C.C.P. § 2016.

"Unavailability" under C.C.P. § 2016 may be compared with "unavailability" under Revised Rule 62(6) by the following table. Where unavailability is relied on, the respective sections permit the testimony to be introduced if the declarant is:

Rule 62(6)	C.C.P. § 2016
(a) Privileged from testifying about the matter	No provision
(b) Disqualified from testifying to the matter	No provision
(c) Dead or unable to testify because of physical or mental illness.	(i) Dead; (iii) Unable to attend or testify because of age, sickness, infirmity, or imprisonment.
(d) Absent beyond reach of court's process and proponent could not have secured his presence with reasonable diligence.	(ii) Beyond 150 miles or out of State, unless it appears proponent procured the absence.
(e) Absent and proponent does not know and has been unable to discover whereabouts with reasonable diligence	(iv) Absent and proponent has been unable to procure attendance by subpena

Revised Rule 62(7) provides that a declarant is not unavailable if any of the listed conditions is due to the procurement or wrongdoing of the proponent. There is no similar condition in C.C.P. § 2016 applicable to all of the conditions listed.

C.C.P. § 2016 also permits a deposition to be used when such exceptional circumstances exist as to make such use desirable. This provision is not considered here because it is not a condition involving unavailability.

It is apparent from the foregoing table that there is not a great amount of difference between the standards except insofar as Revised Rule 62(6) adds privilege and disqualification as grounds for unavailability. To understand what the substitution of the URE standard would mean, then, it is necessary to consider how the additional Revised Rule 62(6) grounds, - privilege and disqualification - would operate in connection with C.C.P. § 2016.

In the First Supplement to Memorandum No. 19(1961), it was pointed out that Revised Rule 62(6)(a) does not permit privileged evidence to be introduced. It only permits unprivileged evidence to be introduced which would be introduced anyway if the declarant stayed at least 150 miles from the court. The operation of Revised Rule 62(6) will be similar in relation to C.C.P. § 2016. Take this example:

Self-incrimination. [This privilege is chosen because it is about the only one that would not be waived by testifying in a deposition anyway.]

> P, a pedestrian, is struck by a green Buick while crossing a street in a cross-walk. The automobile does not stop. P sues D, alleging that D is the driver and that D failed to stop for a red light. D denies committing the offense. D locates a witness, W, who will testify at the trial that the car involved had a dented left rear fender and a license number beginning ZT . . . .

D then locates X, the owner of a green Buick meeting W's description, and takes his deposition. X, still thinking he is in the clear, admits in the deposition that he owns a green Buick, that it has a dented left rear fender, that its license number is ZTC 335, and that he was driving it at the particular time involved. At the trial, D calls W, then calls X. X, seeing that D has discovered his complicity, invokes the privilege against self-incrimination. D then offers X's deposition. Objection on the ground of hearsay.

Ruling: Objection sustained. The testimony does not fall within the declaration against penal interest exception, nor does it fall within any other exception to the hearsay rule. The witness is not "unavailable" as defined in C.C.P. § 2016, so the testimony is not admissible under that section. Of course, the judge might rule that "such exceptional circumstances exist as to make it desirable . . . to allow the deposition to be used." But, there is no assurance in Section 2016 that the judge will so rule.

If the "unavailability" standards of Revised Rule 62(6) were substituted, the evidence would be clearly admissible.

It should be noted that, if the action against D were a different civil action than the one in which the deposition was taken, the deposition would be admissible as former testimony under Revised Rule 63(3) because the Rule 62 standard of unavailability is there used. However, if D were prosecuted for the "hit-run," the deposition would not be admissible, for under Revised Rule 63(3)(c) the party against whom the deposition is being

offered - the prosecution - was not a party to the former proceeding. This matter will be developed more fully in the discussion of Penal Code § 686.

So far as Revised Rule 62(6)(b) is concerned, the addition of disqualification as a ground for unavailability under § 2016 would probably not change the existing law. The important thing to note is that, when a deposition is introduced, objection may be made to the deposition or any part of it for any reason which would require the exclusion of the evidence if the witness were then present and testifying. (C.C.P. § 2016(3).) Hence, if the deposition of a witness is inadmissible under the Dead Man's Statute, his deposition would remain inadmissible for subdivision (e) would still remain in C.C.P. § 2016. As pointed out previously, it is somewhat difficult to determine just what the existing law is.

But in any event, it is unlikely that the substitution of Revised Rule 62(6) will have any great effect on the existing law; for the admissibility of depositions taken from witnesses who are incompetent at the time of trial will depend upon the interpretation given by the Supreme Court to the provision that such depositions are subject to any objection which "for any reason . . . would require the exclusion of the evidence if the witness were then present and testifying."

As the amendment to § 2016 recommended by the staff would not effect any great change in the law, as the amendment would make the standards for the admissibility of former testimony and depositions the same insofar as these standards depend on unavailability, and as the amendment might, in some cases, permit unprivileged and competent evidence to be introduced which now might be excluded, the staff recommends that § 2016 be amended as indicated in the draft attached to Memorandum No. 19(1961).

When the Commission considered Rule 63(3), it assumed that the rule would be applicable to prosecution and defendant alike. Hence, standards were placed in the subdivision to protect the defendant's right of confrontation. For instance, former testimony is admissible in a criminal case only if the person against whom the evidence is offered was a party to the former action; and testimony at a preliminary hearing of a previous action is inadmissible. The Commission explained these requirements in the Comment as protections for the defendant's right of confrontation and cross-examination.

This assumption was not correct, however, and the carefully thought out policies for protecting the defendant actually curtail the defendant's rights. In People v. Bird, 132 Cal. 261 (1901), the Supreme Court pointed out that Penal Code Section 686 prohibits the prosecution from introducing former testimony except as provided in that section; but the defendant is not restricted by Section 686 - he may introduce any former testimony admissible under the general hearsay rule. Under Section 686, the prosecution may introduce only testimony taken at the preliminary hearing in the same case, testimony in a deposition taken in the same case and testimony given on a former trial of the same case. Insofar as the former testimony exception is broader, it is a rule of evidence available only to the defendant. As Section 686 has not been modified by the Commission, Revised Rule 63(3)(c) prohibits only the defendant from introducing testimony at a prior trial to which the prosecution was not a party and prohibits only the defendant from introducing former testimony given at the preliminary hearing of a different action.

If the Commission desires Revised Rule 63(3) to have the full meaning that was intended when the Commission redrafted this subdivision, Penal

Code § 686 should be amended to provide an exception for hearsay generally. Then Rule 63(3) would be operative in criminal actions to the same extent that other exceptions to the hearsay rule are operative. Such an amendment would also be desirable as a declaration of the existing law insofar as hearsay generally is concerned.

It was pointed out in the prior memorandum (No. 7 Supp. (1961)) that the second exception stated in Penal Code § 686 inaccurately states the existing law. Section 686 provides that a deposition taken under Section 882 may be read if the witness is dead, insane or cannot with due diligence be found within the state. However, Penal Code § 882 provides that depositions taken under its provisions may be read, except in cases of homicide, if the witness is unable to attend because of death, insanity, sickness, or infirmity, or continued absence from the state. Moreover, Penal Code § 686 does not provide for the reading of depositions which are admissible under Penal Code §§ 1345 and 1362. These contradictions in the present statutory law should be corrected by substituting a general reference to depositions that are admissible in criminal actions for the present incorrect cross-reference to Penal Code § 882.

Penal Code §§ 1345 and 1362

The staff has previously suggested the substitution of a reference to Rule 62 for the present standards of unavailability contained in these sections. Section 1345 relates to depositions of witnesses who may be unable to attend the trial. The section states that such depositions may be read by either party if the witness is unable to attend by reason of death, insanity, sickness, infirmity or continued absence from the state. For practical purposes, the only change that will be made by the substitution of the cross-reference to Rule 62 will be to add privilege and disqualification as grounds of unavailability. Take this example:

> D is charged with manslaughter. D claims that X is the real culprit. X is ill and in prison anyway, so he testifies in a deposition that he in fact did commit the crime. The prosecution doesn't believe X and goes ahead with D's trial. At the time of trial, X has fully recovered and regrets having made his previous statement. D calls X as a witness, but X invokes the privilege against self-incrimination. D then offers the deposition. Objection.
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> Ruling: Objection sustained. X is not unavailable as defined in Section 1345 at the present time. If the Rule 62 definition of unavailability were substituted, the deposition would be admissible just as it would be under existing law if X had remained ill.

Section 1362 relates to depositions of material witnesses who are out of the state. Such depositions may be taken only on application of the defendant.

The staff suggests the substitution of the Rule 62 definition of unavailability so that the defendant may introduce the deposition even though the witness actually attends the trial and invokes either privilege or disqualification and refuses to testify.

Respectfully submitted,

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