8/8/61

Memorandum No. 28(1961)

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

Attached on yellow paper is the tentative recommendation on hearsay revised in accordance with the actions taken by the Commission at its July meeting. The following matters should be noted:

Revision of URE Rules 62-66, page 3. The staff has added footnote 3 appearing at the bottom of page 3.

Rule 62. In the comment, footnote 4 and the "i.e." clause to which the footnote is appended have been added to clarify the manner in which Rule 62 will operate. The last paragraph of the comment has also been added to explain subdivisions (8) and (9) which were added by the Commission at its last meeting.

Rule 63(3) and (3a). Inasmuch as the language of the "subject to" clauses at the beginning of subdivision (3) and subdivision (3a) as approved by the Commission at the July meeting is identical, these subdivisions have been combined into one subdivision (3) relating to former testimony which is offered against the party who was a party to the action in which the former testimony was given. Subdivision (3b), as approved by the Commission at its July meeting, has been renumbered (3a). This subdivision could not be combined with the other subdivisions relating to former testimony because the "subject to" clause is substantially different.

The staff has changed the language of the "subject to" clause in

subdivision (3a) in order to carry out the policy decisions adopted by the Commission at its July meeting. Under the revision all objections are open to the party against whom the evidence is offered; however, objections based on competency or privilege are determined as of the time the former testimony was given.

The comments to subdivisions (3) and (3a) are new.

Rule 63(9a). At its July meeting, the Commission directed the staff to prepare language which would preserve the rule stated in Code of Civil Procedure § 1849 relating to admissions of predecessors in interest. Although Section 1849 mentions only predecessors in interest of real property, California permits declarations of predecessors in interest to be used against successors to either real or personal property. (Smith v. Goethe, 159 Cal. 628, 115 Pac. 223 (1911).) Accordingly, paragraph (a) of subdivision (9a) has been drafted so that it covers both real and personal property.

A similar principle is involved in the admissions of joint owners, joint debtors or other persons jointly interested. Such statements are admissible now under subdivision 5 of Code of Civil Procedure Section 1870. In the draft recommendation which was presented at the July meeting, the staff recommended that this subdivision be repealed. The explanation, as it appeared in the July draft, was as follows:

> This subdivision should be deleted. The first sentence, relating to vicarious admissions of partners and agents, is superseded by the exceptions contained in Rule 63(8)(a) and 63(9)(a). The second sentence, relating to vicarious admissions of joint owners or joint debtors or other persons with joint interests, is superseded by Rule 63(10) insofar as the statements involved are declarations against interest and the declarant is unavailable. If the declarant is available as a witness, he may be called and asked about the subject matter of the statement, and if he testifies inconsistently,

> the prior statement may be shown under Rule 63(1)(a) as evidence of the truth of the matter stated. If the declarant is unavailable and the statement cannot be classified as a declaration against interest, the Commission does not believe that the statement is sufficiently trustworthy to be introduced as evidence. [Except for the last sentence, this explanation for deleting the second sentence of § 1870(5) is the same as the explanation that was given for repealing § 1849.]

The Commission should note that the exception dealing with declarations of joint obligors, joint obligees, joint tenants and predecessors in interest was apparently omitted from the Uniform Rules by design and not by inadvertence. The Uniform Law Commissioners explain that these subdivisions "adopt the policy of Model Code Rules 506, 507 and 508." (Comment, URE 63(7).) The American Law Institute explanation for omitting this exception to the hearsay rule is as follows:

> The common law rules covering the first three situations [declarations of joint obligors or joint obligees, declarations of joint tenants, and declarations of predecessors in interest] do not expressly require that the declaration be against the interest of the declarant. In the cases dealing with declarations of joint obligors and joint obligees, and joint tenants, the admitted declarations are always against such interest. In cases dealing with declarations of a predecessor in interest, the English courts admit only those affecting the quantity or quality of the declarant's interest, and all the admitted declarations are against interest. The American cases admit also declarations which affect only the declarant's power to convey. In all but two or three stray instances, the admitted declarations were against interest. There is no reason why a hearsay declaration. . . which is self serving or which has no indicium of verity should be received against the party merely because he happens to be in the relation of joint obligor, or joint owner, or predecessor in interest with the declarant. The application of the common law rules has resulted in absurd distinctions, particularly in bankruptcy actions and actions for wrongful debt and on policies of insurance. This Rule, therefore, rejects the statement of the common law to this extent, and takes care of these declarations under Rule 509 [declarations against interest]. In so doing, it is contrary to only two or three decisions, none of which carefully considered the problem. [Model Code pp. 252-253.]

The foregoing argument assumes the availability of the declarant, for under the Model Code all hearsay evidence was admissible if the

declarant was unavailable. Although this Commission has rejected the Model Code's principle that hearsay from unavailable declarants should be admissible, the reasons stated for omitting this common law exception to the hearsay rule are as germane to our present problem as they were to the Model Code. The Uniform Law Commissioners were apparently persuaded by this rationale for they, too, omitted this exception from the Uniform Rules even though they rejected the Model Code's underlying principle that hearsay is admissible if the declarant is unavailable.

Paragraph (b) of subdivision (9a) has been drafted to state the existing exception for declarations of joint owners, joint debtors or other persons jointly interested which is now contained in the second sentence of C.C.P. § 1870(5). Although the question of whether the principle of § 1870(5) should be continued in the Rules of Evidence has not been decided as a policy matter, the staff has written this exception into subdivision (9a) and has made appropriate adjustments in the recommendations relating to the repeal and adjustment of existing statutes in order to be consistent with the action taken by the Commission in regard to § 1849. The staff, however, is persuaded by the ALI argument, and recommends the repeal of both §§ 1849 and 1870(5) with the explanation previously appended to § 1870(5) (quoted above).

As subdivision (9a) is new, neither the subdivision nor the comment thereto have been approved as to language.

Rule 63(10). The underscored language at the end of the subdivision has been added to carry out the action of the Commission at the July meeting. In the Comment, limitation "(4)" has been added to the last paragraph because of the change made in the subdivision by the Commission.

Rule 63(12). The next to the last paragraph of the comment has been added to explain more fully the limitations of subdivision (12).

Rule 63(15). The comment has been revised as directed by the Commission at its July meeting.

Rule 63(22). The third sentence of the comment has been added as a justification for this exception to the hearsay rule. The Commission was unable to agree on a justification for this exception at the July meeting. This explanation is that given by the American Law Institute in its report on this exception as it appeared in the Model Code of Evidence. (Model Code p. 524.)

Rule 63(29). In order to express more accurately the existing California law the entire comment has been rewritten. You will note that the first paragraph of the comment no longer indicates that paragraph (a) goes beyond existing California law. This revision appears to be justified by such cases as Russell v. Langford, 135 Cal. 356 (1902), which held that a statement in a will was admissible as proof of the truth of its contents even though the will was but a year old when the action was tried.

Adjustments and Repeals of Existing Statutes. At the July meeting some question was raised concerning the repeal of statutes referring to "declaration, act or omission" in reliance upon a provision of the Uniform Rules which refers only to statements. Please note footnote 8 at the bottom of page 77 which was placed in the recommendation to explain how the Uniform Rules supersede such sections.

Code of Civil Procedure

Section 1848. The Southern Section of the State Bar Committee agrees

with the Commission that Section 1848 should be repealed; however, the Commission may want to revise the comment under this section in the tentative recommendation in view of the comment of the Southern Section concerning this section. The Southern Section stated:

> Proposed repeal of this section was approved, despite the fact that Prof. Chadbourn does not recommend repeal (he fails to comment at all) and despite the fact that the section does not appear to have any particular applicability to the rules on hearsay. The members of the Southern Section felt that C.C.P. § 1848 is so ambiguous and, on its face so idiotic that no useful purpose would be served by retaining it.

Section 1849. The comment has been revised in view of the action of the Commission at the July meeting.

Section 1870(5). The comment relating to the second sentence of this subdivision has been revised in order to make it consistent with the action taken by the Commission when it considered Section 1849.

Section 2016. The question to be resolved here 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. Moreover, if D were prosecuted for the "hit-run," the deposition would be admissible, for under Revised Rule 63(3a) the party against whom the deposition is being offered - the prosecution - would have an interest and motive for cross-examination similar to that of the plaintiff in the civil action in which the deposition was taken. Substituting a reference to Rule 62 for the definition of unavailability now contained in § 2016, therefore, would merely permit depositions to be used in the action in which taken to the same extent that testimony and depositions in other actions can be used where the ground for such use is "unavailability."

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(e).) 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 in the Second Supplement to Memo. 19(1961) (see note 2 on page 7), 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 attached tentative recommendation.

Section 2047. This section and the comment thereto were revised 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. Some of the problems involved in Penal Code § 686 were developed quite fully in the Supplement to Memorandum No. 7(1961) dated 2/6/61. That discussion will not be repeated here. It is sufficient to point out here that § 686 states the defendant's right to confront the witnesses against him. Three exceptions are stated:

(1) Testimony at the preliminary examination may be read if the witness is "dead or insane or cannot with due diligence be found within the state."

(2) Testimony of a prosecution witness contained in a deposition taken under the provisions of Section 882 of the Penal Code may be read if the witness is "dead or insane or cannot with due diligence be found within the state."

(3) Testimony of a witness for either prosecution or defense given on a former trial of the same action may be read if the witness is "deceased, insane, out of jurisdiction" or "cannot with due diligence be found within the state."

Although the right of confrontation might be considered to be applicable to hearsay generally, the cases have apparently construed this section so that it applies to hearsay that is admitted under the former testimony exception only. Hence, hearsay is admissible despite the declaration of this section and despite the fact that the particular hearsay involved does not fall within one of the stated exceptions of this section.[1]

When the Commission considered Rule 63(3), it assumed that the rule would be applicable to prosecution and defendant alike. Hence, standards were drafted to protect the defendant's right of confrontation. This

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1. People v. Alcalde, 24 Cal.2d 177 (1944)(hearsay of victim admitted under state of mind exception); People v. Weatherford, 27 Cal.2d 401 (1945)(hearsay of decedent admitted under declaration against interest and state of mind exceptions); People v. Gordon, 99 Cal. 227 (1893)(testimony of witness at prior trial of same action inadmissible - third exception to right of confrontation was not enacted until 1911).

assumption was not correct. 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.

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. Without such an amendment, much of the language of Rule 63(3) and (3a) is meaningless.

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. Under § 1362, the deposition is admissible if the deponent is "unable to attend the trial." 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. Take this example:

> D has a reputation as a mobster, but has never been convicted of a serious crime. D is charged with bribery of public officials. X, a former public official suspected of receiving the bribe, has made his way to Mexico, and all attempts to extradite him have proved unsuccessful. D takes X's deposition under §§ 1349-1362 of the Penal Code. In the deposition, X testifies that D had nothing to do with the alleged bribe.
>
> As the prosecution does not want to lose a golden opportunity to convict D of something, it offers to transport X to the trial of D and to return him again to Mexico without arresting him on the bribery charge. X attends the trial under these circumstances. X is not called by the prosecution, but is called by D. X invokes the self-incrimination privilege. D offers the deposition. Objection.
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> Ruling. Objection sustained. Under § 1362, the deposition

is admissible only if the deponent is unable to attend the trial. Since X is in attendance, even though he is privileged to refuse to testify, his deposition is inadmissible.

The substitution of the Rule 62 definition of "unavailability" would permit D to use X's deposition in these circumstances just as he would if X had still been in Mexico at the time of the trial.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

8/4/61

[COVER]

State of California

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

THE UNIFORM RULES OF EVIDENCE

Article VIII. Hearsay Evidence

December 1961

Communications should be addressed to the California Law Revision Commission, School of Law, Stanford, California.

December 1961

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

THE UNIFORM RULES OF EVIDENCE

Article VIII. Hearsay Evidence

The Uniform Rules of Evidence (hereinafter sometimes designated as "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.[1] In 1956 the Legislature authorized and directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.

The tentative recommendation of the Law Revision Commission on Article VIII of the Uniform Rules of Evidence is set forth herein. This article, consisting of Rules 62 through 66, relates to the admissibility of hearsay evidence in proceedings conducted by or under the supervision of a court.

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[1] A copy of a printed pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is 60 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

GENERAL SCHEME OF URE RULES 62-66

The opening paragraph of URE Rule 63 provides:

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

With one important qualification, hereafter discussed,[2] this paragraph states the common-law hearsay rule. Subdivisions (1) through (31) of URE Rule 63 state a series of exceptions to the hearsay rule. The comment of the Commissioners on Uniform State Laws on the general scheme of URE Rule 63 is as follows:

> This rule follows Wigmore in defining hearsay as an extrajudicial statement which is offered to prove the truth of the matter stated . . . . The policy of the rule is to make all hearsay, even though relevant, inadmissible except to the extent that hearsay statements are admissible by the exceptions under this rule. In no instance is an exception based solely upon the idea of necessity arising from the fact of the unavailability of the declarant as a witness . . . . The traditional policy is adhered to, namely that the probative value of hearsay is not a mere matter of weight for the trier of fact but that its having any value at all depends primarily upon the circumstances under which the statement was made. The element of unavailability of the declarant or the fact that the statement is the best evidence available is a factor in a very limited number of situations, but for the most part is a relatively minor factor or no factor at all. Most of the following exceptions are the expressions of common law exceptions to the hearsay rule. Where there is lack of uniformity among the states with respect to a particular exception a serious effort has been made to state the rule which seems most sensible or which reflects the weight of authority . . . . The exceptions reflect some broadening of scope as will be noted in the comments under the particular sections. These changes not only have the support of experience in long usage in some areas but have the support of the best legal talent

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2. See the Comment of the Law Revision Commission to Rule 63 (opening paragraph), page 9.

in the field of evidence. Yet they are conservative changes and represent a rational middle ground between the extremes of thought and should be acceptable in any fact-finding tribunal, whether jury, judge or administrative body.

REVISION OF URE RULES 62-66

The Law Revision Commission tentatively recommends that URE Rules 62-66, revised as hereinafter indicated, be enacted as the law in California.[3] It will be seen that the Commission has concluded that many changes should be made in URE Rules 62-66. In some cases the suggested changes go only to language. In others, however, they reflect a considerably different point of view on matters of substance from that taken by the Commissioners on Uniform State Laws. In virtually all such instances the rule proposed by the Law Revision Commission is less liberal as to the admissibility of hearsay evidence than that proposed by the Commissioners on Uniform State Laws. Nevertheless, the tentative recommendation of the Commission would make a broader range of hearsay evidence admissible in the courts of this State than is now the case.

In the discussion which follows, the text of the Uniform Rule or a subdivision thereof as proposed by the Commissioners on Uniform State Laws is set forth and the amendments tentatively recommended by the Law Revision Commission are shown in strikeout type and italics. Each provision is followed by a comment of the Law Revision Commission.

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[3] The final recommendation of the Commission on the Uniform Rules will indicate the appropriate code section numbers to be assigned to the rules as revised by the Commission.

Where the Commission has proposed a modification which relates only to the form of the rule or the purpose of which is obvious upon first reading, no explanation of the Commission's revision is stated. In other cases the reasons for the Law Revision Commission's disagreement with the Commissioners on Uniform State Laws are stated.

For a detailed analysis of the various rules and the California law relating to hearsay, see the research study beginning on page _____. This study was prepared by the Commission's research consultant.

RULE 62. DEFINITIONS.

Rule 62. As used in [~~Rule 63 and its exceptions and in the following rules,~~] Rules 62 through 66:

(1) "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

(2) "Declarant" is a person who makes a statement.

(3) "Perceive" means acquire knowledge through one's [~~own~~] senses.

(4) "Public [~~Official~~"] officer or employee of a state or territory of the United States" includes [~~an official of a political subdivision of such state or territory and of a municipality,~~] an officer or employee of:

(a) This State or any county, city, district, authority, agency or other political subdivision of this State.

(b) Any other state or territory of the United States or any public entity in any other state or territory that is substantially equivalent to the public entities included under paragraph (a) of this subdivision.

(5) "State" includes each of the United States and the District of Columbia.

[~~(6) "A business" as used in exception (13) shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not,~~]

(6) [~~(7)~~] Except as otherwise provided in subdivision (7) of this rule, "unavailable as a witness" [~~includes situations where~~] means that the [~~witness~~] declarant is:

(a) Exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant. [~~, or~~]

(b) Disqualified from testifying to the matter. [~~, or~~]

(c) Dead or unable [~~to be present or~~] to testify at the hearing because of [~~death or then existing~~] physical or mental illness. [~~, or~~]

(d) Absent beyond the jurisdiction of the court to compel appearance by its process and the proponent of his statement could not in the exercise of reasonable diligence have secured the presence of the declarant at the hearing. [~~, or~~]

(e) Absent from the [~~place of~~] hearing [~~because~~] and the proponent of his statement does not know and with reasonable diligence has been unable to ascertain his whereabouts.

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

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

(b) If unavailability is claimed [~~under clause (d) of the preceding paragraph~~] 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. [~~and that the probable importance of the testimony is such as to justify the expense of taking such deposition.~~]

(8) "Former testimony" means testimony given under oath or affirmation as a witness in another action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony in a deposition taken in compliance with law in such an action or proceeding.

(9) "Another action or proceeding" includes a former hearing or trial of the same action or proceeding.

COMMENT

This Rule defines terms used in Rules 62-66. The Rule as proposed by the Commissioners on Uniform State Laws has been considerably revised in form in the interest of clarity of statement.

The significance of the definition of "statement" contained in URE 62(1) is discussed in the comment to the opening paragraph of Rule 63.

URE Rule 62(6) has been omitted because "a business" is used only in subdivisions (13) and (14) of Rule 63 and the term is defined there.

Rule 62 defines the phrase "unavailable as a witness," and this phrase is used in URE Rules 62-66 to state the condition which must be met whenever

the admissibility of hearsay evidence is dependent upon the present unavailability of the declarant to testify. The admissibility of evidence under certain hearsay exceptions provided by existing California law is also dependent upon the unavailability of the hearsay declarant to testify. But the conditions constituting unavailability under existing law vary from exception to exception without apparent reason. Under some exceptions the evidence is admissible if the declarant is dead; under others, the evidence is admissible if the declarant is dead or insane; under others, the evidence is admissible if the declarant is absent from the jurisdiction. For these varying standards of unavailability, Rule 62 substitutes a uniform standard.

The phrase "unavailable as a witness" as defined in Rule 62 includes, in addition to cases where the declarant is physically unavailable (dead, insane, or absent from the jurisdiction), situations in which the declarant is legally unavailable, i.e., where he is prevented from testifying by a claim of privilege[4] or is disqualified from testifying. There would seem to be no valid distinction between admitting the statements of a dead, insane or absent declarant and admitting those of one who is legally not available to testify. Of course, if the out-of-court declaration is itself privileged, the fact that the declarant is unavailable to testify at the hearing on the ground of privilege will not make the declaration admissible. The exceptions to the hearsay rule that are set forth in the subdivisions of Rule 63 do not declare that the evidence described is necessarily admissible. They merely declare that such evidence is not inadmissible under the hearsay rule. If there is some other rule of law -- such as privilege -- which renders the evidence

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[4] Under URE Rules 23-40, which will be the subject of a later recommendation of the Commission, a privilege must be claimed by the holder, or by some person

inadmissible, the court is not authorized to admit the evidence merely because it falls within an exception to the hearsay rule. Rule 62, therefore, will permit the introduction of hearsay evidence where the declarant is unavailable because of privilege only if the declaration itself is not privileged or inadmissible for some other reason.

The last clause of URE Rule 62 has been deleted by the Commission for it adds nothing to the preceding language.

Subdivisions (8) and (9) have been added to permit convenient use of the defined terms in the former testimony exceptions, Rule 63(3) and (3a). The definition of "another action or proceeding" given in subdivision (9) is the same as that given by the California courts to the term "former action" contained in subdivision 8 of Code of Civil Procedure Section 1870.

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entitled to claim it for him,in order to be operative. Hence, under Rule 62, it will be necessary for the declarant to be called as a witness and for the privilege to be claimed before the court may find the declarant unavailable on the ground of privilege.

RULE 63. HEARSAY EVIDENCE EXCLUDED - EXCEPTIONS.

Opening Paragraph: General Rule Excluding Hearsay Evidence.

Rule 63. Evidence of a statement which is made other than by a witness while testifying at the hearing and is offered to prove the truth of the matter stated is hearsay evidence and is inadmissible except:

COMMENT

This language, prior to the word "except," states the hearsay rule in its classical form, with one qualification: because the word "statement" as used herein is defined in Rule 62(1) to mean only oral or written expression and assertive nonverbal conduct -- i.e., nonverbal conduct intended by the actor as a substitute for words in expressing a matter -- it does not define as hearsay at least some types of nonassertive conduct which our courts today would probably regard as amounting to extrajudicial declarations and thus hearsay, e.g., the flight of X as evidence that he committed a crime. The Commission agrees with the draftsmen of the URE that evidence of nonassertive conduct should not be regarded as hearsay for two reasons. First, such evidence, being nonassertive, does not involve the veracity of the declarant and one of the principal purposes of the hearsay rule is to subject the veracity of the declarant to cross-examination. Second, there is frequently a guarantee of the trustworthiness of the inference to be drawn from such nonassertive conduct in that the conduct itself evidences the actor's own belief in and hence the truth of the

matter inferred. To put the matter another way, in such cases actions speak louder than words.

The word "except" introduces 31 subdivisions drafted by the Commissioners on Uniform State Laws which define various exceptions to the hearsay rule. These and several additional subdivisions added by the Commission are commented upon individually below.

Subdivision (1): Previous Statement of Trial Witness.

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

(a) Is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22;[5] or

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

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

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[5] Rule 22 will be the subject of a later study and recommendation by the Commission. The rule as proposed by the Commissioners on Uniform State Laws is as follows:

As affecting the credibility of a witness (a) in examining the witness as to a statement made by him in writing

statement at the time it was made, (iii) is offered after the witness testifies that the statement he made was a true statement of such fact and (iv) is offered after the writing is authenticated as an accurate record of the statement.

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inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement; (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

COMMENT

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

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

cause rather than, as at the present, solely to impeach the witness in the case of prior inconsistent statements and, in the case of prior consistent statements, to rebut a charge of recent fabrication. The Commission believes that it is not realistic to expect a jury to understand and apply the subtle distinctions taken in the present law as to the purposes for which the extrajudicial statements of a trial witness may and may not be used. Moreover, when a party needs to use a prior inconsistent statement of a trial witness in order to make out a prima facie case or defense, he should be able to do so. In many cases the prior inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy which gave rise to the litigation.

Paragraph (c), which makes admissible what is usually referred to as "past recollection recorded," makes no radical departure from existing law. The language stating the circumstances under which such evidence may be introduced, which the Commission believes provide sufficient safeguards of the trustworthiness of such statements to warrant their admission into evidence, is taken largely from and embodies the substance of the language of C.C.P. § 2047. There are, however, two substantive differences between paragraph (c) and existing California law:

First, our present law requires that a foundation be laid for the admission of such evidence by showing (1) that the writing recording the statement was made by the witness or under his direction, (2) that the writing was made at a time when the fact recorded in the writing actually

occurred or at such other time when the fact was fresh in his memory and (3) that the witness "knew that the same was correctly stated in the writing." On the other hand, under paragraph (c) the writing may be made not only by the witness himself or under his direction but also by some other person for the purpose of recording the witness's statement at the time it was made. In addition, since there is no requirement under paragraph (c) that the witness himself knew that the writing is a correct record of his statement, the testimony of the person who recorded the statement may be used to establish that the writing is a correct record of the statement. The foundation requirement of the present law excludes any record of a declarant's statement if the person recording the statement was not acting "under the direction" of the declarant. Yet such a statement is trustworthy if the declarant is available to testify that he made a true statement and the person who recorded the statement is available to testify that he accurately recorded the statement.

Second, under paragraph (c) the document or other writing embodying the statement is admissible while under the present law the declarant reads the writing on the witness stand and it is not otherwise made a part of the record unless it is offered by the adverse party.

Subdivision (2): Affidavits.

(2) [~~Affidavits to the extent admissible by the statutes of this state;~~]

COMMENT

The Commission does not recommend the adoption of subdivision (2). Rule 63(32) and Rule 66A will continue in effect the present statutes which set forth the conditions under which affidavits are admissible.

Subdivision (3): Former Testimony Offered Against a Party to the Former Action or Proceeding.

(3) [Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;] Subject to the same limitations and objections as though the declarant were testifying in person other than objections to the form of the question which were not made at the time the former testimony was given or objections based on competency or privilege which did not exist at that time, former testimony if the judge finds that the declarant is unavailable as a witness at the hearing and that:

(a) The former testimony is offered against a party who offered it in evidence on his own behalf in another action or

proceeding or against the successor in interest of such party; or

(b) The party against whom the testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity for cross-examination with an interest and motive similar to that which he has at the hearing except that in a criminal action or proceeding testimony given at a preliminary examination in a criminal action or proceeding other than the action or proceeding in which the testimony is offered and testimony in a deposition taken in another action or proceeding is not admissible under this paragraph unless it was received in evidence at the trial of such other action or proceeding.

COMMENT

The Commission recommends against the adoption of URE 63(3)(a). This paragraph would make admissible as substantive evidence any deposition taken "for use as testimony in the trial of the action in which it is offered" without the necessity of showing the existence of any such special circumstances as the unavailability of the deponent. In 1957 the Legislature enacted a statute (C.C.P. §§ 2016 - 2035) dealing comprehensively with discovery and the circumstances and conditions under which a deposition may be used at the trial of the action in which the deposition is taken. The provisions then enacted respecting admissibility of depositions are narrower than URE 63(3)(a). The Commission believes that it would be unwise to recommend substantive revision of the 1957 discovery legislation before

substantial experience has been had thereunder. Rule 63(32) and Rule 66A will continue in effect the existing law relating to the use of a deposition as evidence at the trial of the action in which the deposition is taken. Under existing law, the admissibility of depositions in other actions is apparently governed by the former testimony exception to the hearsay rule contained in subdivision 8 of Code of Civil Procedure Section 1870. Under the Uniform Rules as revised by the Commission, the admissibility of depositions in other actions will be governed by the former testimony exception contained in subdivisions (3) and (3a) of Rule 63.

The Commission recommends a modification of URE 63(3)(b). URE 63(3)(b) as proposed by the Commissioners on Uniform State Laws has two important preliminary qualifications of admissibility: (1) the declarant must be unavailable as a witness and (2) the testimony is subject to the same limitations and objections as though the declarant were testifying in person. The Law Revision Commission recommends that the first qualification be retained but that the second be modified. Under the Commission's modification, the nature of the objections which may be taken to former testimony depends upon whether the party against whom the evidence is introduced was a party to the former proceeding and, if so, whether he permitted the evidence to be introduced at that time without objection. In addition, the Commission's modification makes clear that the validity of objections based on privilege or on the competency of the hearsay declarant is determined by reference to the time the former testimony was given. Existing California law is not clear in this respect; some California decisions indicate that competency and privilege are to be determined as of the time the former testimony was given but others indicate that competency and privilege are

to be determined as of the time the former testimony is offered in evidence.

To accomodate this revision, the Commission has proposed two subdivisions dealing with former testimony: subdivision (3) which covers former testimony which is offered against a person who was a party to the proceeding in which the former testimony was given and subdivision (3a) which covers former testimony which is offered against a person whose motive for cross-examination is similar to that of a person who had the right and opportunity to cross-examine the declarant at the time the former testimony was given.

These provisions narrow the scope of the former testimony exception to the hearsay rule which is proposed by the Commissioners on Uniform State Laws. At the same time, they go beyond existing California law which admits testimony taken in another legal proceeding only if the proceeding was a former action between the same parties or their predecessors in interest, relating to the same matter, or was a former trial or a preliminary hearing in the action or proceeding in which the testimony is offered. However, the former testimony is admissible only if the party against whom it is offered previously offered it in his own behalf or if a party to the previous action had the right and opportunity to cross-examine the declarant at the time the former testimony was given with an interest and motive similar to that which the person against whom the evidence is offered has at the hearing. Thus, for example, a judge will exclude former testimony contained in a deposition that was taken, but not offered in evidence at the trial, in a different action if he determines that the deposition was taken for discovery purposes and that a party did not subject the witness to a thorough cross-examination in order to avoid a premature revelation of the weaknesses in his testimony or in the adverse party's case. In such a situation, the

interest and motive for cross-examination on the previous occasion is substantially different than the interest and motive of the party against whom such evidence is being offered at the trial of another action.

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

Subdivision (3a): Former Testimony Offered Against a Person Who May Not Have Been a Party to the Former Action or Proceeding.

(3a) Subject to the same limitations and objections as though the declarant were testifying in person other than objections based on competency or privilege which did not exist at the time the former testimony was given, former testimony if the judge finds that the declarant is unavailable as a witness at the hearing, that the former testimony is offered in a civil action or proceeding or against the people in a criminal action or proceeding and that the issue is such that a party to the action or proceeding in which the former testimony was given 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 at the hearing.

COMMENT

This subdivision is discussed in the comment to subdivision (3).

Former testimony is admissible in criminal cases under subdivision (3a) only against the prosecution. This limitation has been made to preserve the right of the person accused of crime to confront and cross-examine the witnesses against him. When a person's life or liberty are at stake --as they are in a criminal trial -- the Commission does not believe that the accused should be compelled to rely on the sufficiency of prior cross-examination conducted on behalf of some other person.

Subdivision (4): Contemporaneous and Spontaneous Statements.

(4) A statement:

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

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

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

COMMENT

Paragraph (a) may go beyond existing law. The Commission believes that there is an adequate guarantee of the trustworthiness of such statements in the contemporaneousness of the declarant's perception of

the event and his narration of it; in such a situation there is obviously no problem of recollection and virtually no opportunity for fabrication.

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

The Commission has deleted paragraph (c) of URE 63(4). This paragraph would make the statements with which it is concerned admissible only when the declarant is unavailable as a witness; hence its rejection will doubtless exclude the only available evidence in some cases where, if admitted and believed, such evidence might have resulted in a different decision. The Commission was substantially influenced in reaching its decision by the fact that Rule 63(4)(c) would make routinely taken statements of witnesses in personal injury actions admissible whenever such witnesses are unavailable at the trial. Both the authorship (in the sense of reduction to writing) and the accuracy of such statements are open to considerable doubt. Moreover, as such litigation and preparation therefor is routinely handled, defendants are more often in possession of statements meeting the specifications of Rule 63(4)(c) than are plaintiffs; and it is undesirable thus to weight the scales in a type of action which is so predominant in our courts.

Subdivision (5): Dying Declarations.

(5) A statement by a person [~~unavailable as a witness because of his death~~] since deceased if the judge finds that it would be admissible if made by the declarant at the hearing and was made under a sense of impending death, voluntarily and in good faith and [~~while the declarant was conscious of his impending death and believed~~] in the belief that there was no hope of his recovery. [;]

COMMENT

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

The Commission has substituted "since deceased" for "unavailable as a witness because of his death" so that the question whether the proponent caused the declarant's death to prevent him from testifying may not be considered in determining the admissibility of the declaration. (See URE

62(7)(a).) If the declaration would tend to exonerate the proponent of the evidence, the Commission does not believe a dying declaration should be withheld from the jury even though there is other evidence from which the judge might infer that the proponent caused the declarant's death to prevent him from giving incriminating testimony.

The Commission has rearranged and restated the language relating to the declarant's state of mind regarding the impendency of death, substituting the language of C.C.P. § 1870(4) for that of the draftsmen of the URE. It has also added the requirement that the statement be one that would be admissible if made by the declarant at the hearing. The Commission's research consultant suggests that the omission of this language from URE 63(5) was probably an oversight; in any event it seems desirable to make it clear that the declarant's conjecture as to the matter in question is not admissible.

Subdivision (6): Confessions.

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

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

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

(c) During a period while the defendant was illegally detained by a public officer or employee of the United States or a state or territory of the United States.

COMMENT

Paragraphs (a) and (b) and the preliminary language of this subdivision substantially restate the existing law governing the admissibility of defendants' confessions and admissions in criminal actions or proceedings. While the Commission has departed rather widely from the language of URE 63(6), it is believed that paragraph (a) states a principle which is not only broad enough to encompass all the situations covered by URE 63(6) but has the additional virtue of covering as well analogous situations which, though not within the letter of the more detailed language proposed by the draftsmen of the URE, are nevertheless within its spirit.

Paragraph (b) is technically unnecessary since the statute could not admit what the Constitutions of this State and of the United States exclude. It seems desirable to state that proposition here, however, both for the sake of completeness and to make it clear that the Commission has no thought that the Legislature, in enacting this provision, would be asserting that the matter of the admissibility of the confessions and admissions of defendants in criminal actions and proceedings is a matter solely within the competence of the Legislature to determine.

Paragraph (c) states a condition of admissibility that now exists in the federal courts but which has not been applied in the California courts. This paragraph will grant an accused person a substantial protection for his statutory right to be brought before a magistrate promptly, for the rule will prevent the State from using the fruits

of the illegal conduct of law enforcement officers. The right of prompt arraignment is granted to assure a person the maximum protection for his constitutional rights. Paragraph (c) will implement this purpose by depriving law enforcement officers of an incentive to violate the accused's right to be brought quickly within the protection of our judicial system.

Subdivision (7): Admissions by Parties.

(7) As against himself in either his individual or representative capacity, a statement by a person who is a party to [~~the~~] a civil action or proceeding 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;~~]

COMMENT

In making extrajudicial statements of a party admissible against him this exception merely restates existing law. The Commission has revised the subdivision so that it is applicable only in a civil action or proceeding. This revision makes explicit what the draftsmen of the URE undoubtedly intended, that admissions of a defendant in a criminal action are governed by subdivision (6).

The Commission has omitted the URE provision that an extrajudicial statement is admissible against a party appearing in a representative capacity only if the statement was made by him while acting in such capacity. The basis of the admissions exception to the hearsay rule is that because the statements are the declarant's own he does not need to cross-examine. Moreover, the party has ample opportunity to deny, explain or qualify the statement in the course of the proceeding. These considerations appear to the Commission to apply to any extrajudicial statement made by one who is a party to a judicial action or proceeding either in a personal or in a representative capacity. More time might be spent in many cases in trying to ascertain in what capacity a particular statement was made than could be justified by whatever validity the distinction made by the draftsmen of the URE might be thought to have.

Subdivision (8): Authorized and Adoptive Admissions.

(8) As against a party, a statement:

(a) By a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; [-;-] or

(b) Of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth. [-;-]

COMMENT

This exception restates in substance the existing law with respect to authorized and adoptive admissions.

Subdivision (9): Vicarious Admissions.

(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 [~~concerned a matter within the scope of an agency or employment of the declarant for the party and~~] was made before the termination of such relationship [~~,~~] and concerned a matter within the scope of the agency, partnership or employment and (ii) the statement is offered after, or in the judge's discretion subject to, proof by independent evidence of the existence of the relationship between the declarant and the party; or

(b) [~~the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination,~~] The statement is that of a co-conspirator of the party and (i) the statement was made prior to the termination of the conspiracy and in furtherance of the common object thereof and (ii) the statement is offered after proof by independent evidence of the existence of the conspiracy and that the declarant and the party were both parties to the conspiracy at the time the statement was made; or

(c) In a civil action or proceeding, one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability. [~~;~~]

COMMENT

URE 63(8)(a) makes authorized extrajudicial statements admissible. Paragraph (9)(a) goes beyond this, making admissible against a party specified extrajudicial statements of an agent, partner or employee, whether or not authorized. A statement is admitted under paragraph (9)(a), however, only if it would be admissible if made by the declarant at the hearing whereas no such limitation is applicable to authorized admissions. The practical scope of paragraph (a) is quite limited. If the declarant is unavailable at the trial, the self-inculpatory statements which it covers would be admissible under URE 63(10) because they would be against the declarant's interest. Where the declarant is a witness at the trial, many other statements covered by paragraph (a) would be admissible as inconsistent statements under URE 63(1). Thus, paragraph (a) has independent significance only as to self-exculpatory statements of agents, partners and employees who do not testify at the trial as to the matters within the scope of the agency, partnership or employment. For example, the chauffeur's statement following an accident, "It wasn't my fault; the boss lost his head and grabbed the wheel," would be inadmissible as a declaration against interest under subdivision (10), it would be inadmissible as an authorized admission under subdivision (8), but it would be admissible under paragraph (a) of subdivision (9). One justification for this narrow exception is that because of the relationship which existed at the time the statement was made it is unlikely that it would have been made unless it were true. Another is that the existence of the relationship makes it highly likely that the party will be able

to make an adequate investigation of the statement without having to resort to cross-examination of the declarant in open court.

The Commission has substituted for paragraph (a) of the URE subdivision language which substantially restates existing California law as found in Section 1870(5) of the Code of Civil Procedure. The revised paragraph is, however, somewhat more liberal than the existing California law; it makes admissible not only statements that the principal has authorized the agent to make but also statements that concern matters within the scope of the agency. Under existing California law only the former statements are admissible.

Paragraph (b) relates to the admissibility of hearsay statements of co-conspirators against each other. The Commission has substituted for the provision proposed by the Commissioners on Uniform State Laws language which restates existing California law as found in Section 1870(6) of the Code of Civil Procedure. The Commission believes that the more liberal URE rule of admissiblity would be unfair to criminal defendants in many cases.

Under paragraph (a) as revised by the Commission, the court may in its discretion receive the agent's statement in evidence subject to the later introduction of independent evidence establishing the relationship between the declarant and the party. Under paragraph (b), however, the court is not granted this discretion, for independent evidence of the existence of the conspiracy is required to be introduced before the statements of co-conspirators are introduced against the defendant. The discretion of the court has been limited in this respect to prevent the possibility that the co-conspirators' statements may be

improperly used by the trier-of-fact to establish the fact of the conspiracy and, in cases where the conspiracy is not ultimately established, to prevent the prejudicial effect this evidence may have upon the trier-of-fact in resolving the question of guilt on other crimes with which the defendant is charged.

Paragraph (c) restates in substance the existing California law, which is found in Section 1851 of the Code of Civil Procedure, except that paragraph (c) limits this exception to the hearsay rule to civil actions or proceedings. Most cases falling within this exception would also be covered by URE Rule 63(10) which makes admissible declarations against interest. However, to be admissible under URE 63(10) the statement must have been against the declarant's interest when made whereas this requirement is not stated in paragraph (c). Moreover, the statement is admissible under paragraph (c) irrespective of the availability of the declarant whereas under revised Rule 63(10) the statement is admissible only if the declarant is unavailable as a witness. Some of the evidence falling within this exception, would also be admissible under URE Rule 63(21) which makes admissible against indemnitors and persons with similar obligations judgments establishing the liability of their indemnitees.

Subdivision (9a): Declarations of Predecessors in Interest, Joint Owners, Joint Debtors and Other Persons Jointly Interested.

(9a) 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 a person from whom the party derived title to real or personal property and the statement concerned the property and was made while such person held title to the property.

(b) The statement is that of a joint owner, joint debtor or other person jointly interested with the party and (i) the statement was made before the termination of such relationship and concerned a matter within the scope of such relationship and (ii) the statement is offered after, or in the judge's discretion subject to, proof by independent evidence of the existence of the relationship between the declarant and the party.

COMMENT

Paragraph (a) of this subdivision restates in substance the principle of the existing California law found in Section 1849 of the Code of Civil Procedure. Although Section 1849 literally applies only to real property, the existing California case law permits declarations of predecessors in interest to be used against successors to either real or personal property.

Paragraph (b) of this subdivision restates in substance the existing California law found in the second sentence of subdivision 5 of Section 1870 of the Code of Civil Procedure.

Subdivision (10): Declarations Against Interest.

(10) [~~Subject to the limitations of exception (6),~~] If the declarant is not a party to the action or proceeding and the judge finds that the declarant is unavailable as a witness and had sufficient knowledge of the subject, a statement which the judge finds was at the time of the [~~assertion~~] statement so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to the risk of civil or criminal liability or so far [~~rendered~~] tended to render invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social [~~disapproval~~] disgrace in the community that a reasonable man in his position would not have made the statement unless he believed it to be true , except that a statement made while the declarant was in the custody of a public officer or employee of the United States or a state or territory of the United States is not admissible under this subdivision against the defendant in a criminal action or proceeding.[~~;~~]

COMMENT

Insofar as this subdivision makes admissible a statement which was against the declarant's pecuniary or proprietary interest when made, it restates in substance the common-law rule relating to declarations against interest except that the common-law rule is applicable only when the declarant is dead. The California rule on declarations against interest,

which is embodied in Sections 1853, 1870(4) and 1946 of the Code of Civil Procedure, is perhaps somewhat narrower in scope than the common-law rule.

The justifications for the common-law exceptions are necessity, the declarant being dead, and trustworthiness in that men do not ordinarily make false statements against their pecuniary or proprietary interest. The Commission believes that these justifications are sound and that they apply equally to the provisions of subdivision (10) which broaden the common-law exception. Unavailability for other causes than death creates as great a necessity to admit the statement. Reasonable men are no more likely to make false statements subjecting themselves to civil or criminal liability, rendering their claims invalid, or subjecting themselves to hatred, ridicule or social disgrace than they are to make false statements against their pecuniary or proprietary interest.

The Commission has departed from URE 63(10) by (1) limiting subdivision (10) to nonparty declarants (incidentally making the cross reference to exception (6) unnecessary); (2) writing into it the present requirement of C.C.P. § 1853 that the declarant have "sufficient knowledge of the subject"; (3) conditioning admissibility on the unavailability of the declarant and (4) prohibiting the use of such a declaration against the defendant in a criminal case if the declarant was in custody when the statement was made. With these limitations subdivision (10) states a desirable exception to the hearsay rule.

Subdivision (11): Voter's Statements.

[~~(11) A statement by a voter concerning his qualifications to vote or the fact or content of his vote.~~]

COMMENT

The Commission is not convinced that there is any pressing necessity for this exception or that there is a sufficient guarantee of the trustworthiness of the statements that would be admissible under this exception.

Subdivision (12): Statements of Physical or Mental Condition of Declarant.

(12) Unless the judge finds it was made in bad faith, a statement of:

(a) The declarant's [~~(a)~~] then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but except as provided in paragraphs (b), (c) and (d) of this subdivision not including memory or belief to prove the fact remembered or believed, when such [a] mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant. [~~; or~~]

(b) The declarant's previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition. [~~; or~~]

(c) A declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will.

(d) The declarant's intent, plan, motive or design at a time prior to the statement to prove such prior intent, plan, motive or design when it is itself an issue in the action or proceeding and the declarant is unavailable as a witness but not to prove any other fact.

COMMENT

Paragraphs (a) and (c) restate existing California law in substance. Paragraph (c) is, of course, subject to the provisions of

Section 350 and 351 of the Probate Code which relate to the establishment of the content of a lost or destroyed will.

Paragraph (b) states a new exception to the hearsay rule. While testimony may now be given relating to extrajudicial statements of the type described, it is received solely as the basis for an expert's opinion and not as substantive evidence. The Commission believes that the circumstances in which such statements are made provide a sufficient guarantee of their trustworthiness to justify admitting them as an exception to the hearsay rule.

Paragraph (d) may, in one respect, broaden the state of mind exception as now declared by the California courts. Decisions now justify the admission of declarations of a previous state of mind upon the theory that there is a sufficient continuity of mental state so that a declaration showing the declarant's then existing belief concerning the previous mental state is relevant to determine what the previous mental state was. Under this rationalization, and under the state of mind exception as stated in paragraph (a), it is possible that a distinction might be drawn between substantially equivalent statements on the basis of the particular words used. For example, if the issue is whether a deed was given to another person with intent to pass title, a statement by the donor that he does not own the property in question or a statement by the donor that the donee does own the property in question would be admissible as evidence of his present state of mind which would be relevant to show the previous intent to pass title. However, it is possible that the statement by the donor, "I gave that property to B,"

might be excluded because the words on the surface do not show present state of mind but show merely memory of past events. To preclude the drawing of any such distinction, paragraph (d) abandons the "continuity of state of mind" rationalization for the admission of declarations which show a previous mental state and provides directly for the admission of such declarations to prove a previous intent, plan, motive or design of the declarant.

In another respect, though, paragraph (d) narrows the state of mind exception as presently declared by the California courts. In a recent criminal case, the California Supreme Court permitted statements reporting threats by the defendant to be introduced to show the state of mind of the declarant--to show the declarant's fear of the defendant--when the purpose of showing that state of mind was, not merely to show the declarant's fear, but to give rise to the inference that the defendant engaged in acts which gave rise to the fear. Previously, the courts uniformly had held that state of mind evidence could not be used to prove past acts, either of the declarant or of any other person. Paragraph (d) restores this limitation by permitting a statement of a past state of mind to be used to prove only that state of mind when the state of mind of the declarant is itself an issue and forbidding a statement of past state of mind to be used to prove any other fact. In this respect, paragraph (d) supplements paragraph (a) which does not permit evidence of a present memory or belief to be used to prove the fact remembered or believed. The Commission believes that this limitation is necessary to preserve the hearsay rule.

The provision that a statement covered by subdivision (12) is not admissible if the judge finds that it was made in bad faith is a desirable safeguard. It is not believed to be more restrictive than the discretion presently given to the trial judge insofar as statements covered by paragraph (a) are concerned.

Subdivision (13): Business Records.

(13) ~~[Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness;]~~ A writing offered as a record of an act, condition or event if the custodian or other qualified witness testifies to its identity and the mode of its preparation and if the judge finds that it was made in the regular course of a business, at or near the time of the act, condition or event, and that the sources of information, method and time of preparation were such as to indicate its trustworthiness. As used in this subdivision, "a business" includes every kind of business, governmental activity, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

COMMENT

This is the "business records" exception to the hearsay rule as stated in language taken from the Uniform Business Records as Evidence Act which was adopted in California in 1941 (Sections 1953e-1953h of the Code of Civil Procedure) rather than the slightly different language now proposed by the Commissioners on Uniform State Laws. If there is any difference in substance between the two provisions, the Commission believes that it is preferable to continue with existing law which appears to have provided an adequate business records exception to the hearsay rule for

nearly 20 years. This subdivision does not, however, include the language of Section 1953f.5 of the Code of Civil Procedure because that section is not contained in the Uniform Act and inadequately attempts to make explicit the liberal case-law rule that the Uniform Act permits admission of records kept under any kind of bookeeeping system, whether original or copies, and whether in book, card, looseleaf or some other form. The Commission has concluded that the case-law rule is satisfactory and that Section 1953f.5 may have the unintended effect of limiting the provisions of the Uniform Act.

The Commission has added the words "governmental activity" to the definition of "a business" so that it may be clear from the face of the statute that records maintained by any governmental agency, including records maintained by other states and the federal government, are admissible if the foundational requirements are met. This addition reflects existing California law, for the Uniform Business Records as Evidence Act has been construed to be applicable to governmental records.

Subdivision (14): Absence of Entry in Business Records.

(14) Evidence of the absence [~~of a memorandum or record~~] from the [~~memoranda or~~] records of a business (as defined in subdivision (13) of this rule) of a record of an asserted act, [~~event or~~] condition [,] or event, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that:

(a) It was the regular course of that business to make [~~such memoranda~~] records of all such acts, [~~events or~~] conditions or events, at or near the time [~~thereof or within a reasonable time thereafter~~] of the act, condition or event, and to preserve them; and

(b) The sources of information and method and time of preparation of the records of that business are such as to indicate that the absence of a record of an act, condition or event warrants an inference that the act or event did not occur or the condition did not exist.

COMMENT

The evidence admissible under this subdivision is probably now admissible in California; but the courts have not clearly indicated whether it is admitted under an exception to the hearsay rule or as direct evidence inasmuch as such evidence does not concern an extrajudicial statement but rather the absence of one and the inferences to be drawn therefrom.

Under Rule 62, it is likely that such evidence would not be regarded as hearsay. However, the Commissioners on Uniform State Laws suggest and the Commission believes that it is desirable to remove any doubt on the admissibility of such evidence by the enactment of subdivision (14).

Subdivision (15): Reports of Public Officers and Employees.

[~~(15)--Subject to Rule 64 written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation;~~]

COMMENT

The Commission does not recommend subdivision (15). Much of the evidence referred to in this subdivision is admissible under the provisions of subdivision (13). If a report or finding of a public officer cannot meet the foundational requirements of subdivision (13), there is not a sufficient guarantee of the trustworthiness of the report or finding to warrant its admission into evidence.

Subdivision (16): Reports of Vital Statistics.

(16) [~~Subject-to-Rule-64,~~] Writings made as a record [,] or report [~~or-finding-of-fact~~] of a birth, fetal death, death or marriage, if the judge finds that [~~(a)~~] the maker was [~~authorized-by-statute-to-perform, to-the-exclusion-of-persons-not-so-authorized, the-functions-reflected in-the-writing, and-was~~] required by statute to file the writing in a designated public office [~~a-written-report-of-specified-matters-relating to-the-performance-of-such-functions,~~] and [~~(b)~~] the writing was made and filed as [so] required by the statute. [~~;~~]

COMMENT

This subdivision as revised by the Commission is limited to official reports concerning birth, death and marriage. Reports of such events occurring within the State are now admissible under the provisions of Section 10577 of the Health and Safety Code. The revised subdivision will broaden the exception to include similar reports from other jurisdictions. The Commission believes that the URE subdivision states too broad an exception to the hearsay rule in view of the great number and variety of reports that must be filed with various administrative agencies.

The cross reference to URE Rule 64 has been deleted because the Commission does not recommend approval of Rule 64. (See the comment on Rule 64.)

Subdivision (17): Content of Official Record.

(17) [~~Subject to Rule 64,~~] (a) If meeting the requirements of authentication under Rule 68, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein. [;]

(b) If meeting the requirements of authentication under Rule 69, to prove the absence of a record in a specified office, a writing made by the official custodian of the official records of the office, reciting diligent search and failure to find such record. [;]

COMMENT

Paragraph (a) makes it possible to prove the content of an official record or of an entry therein by hearsay evidence in the form of a writing purporting to be a copy of the record or entry, provided the copy meets the requirements of authentication under Rule 68.[6] It should be noted that paragraph (a) does not make the official record or entry itself admissible; warrant for its admission must be found in some other exception to the hearsay rule.

Paragraph (b) makes it possible to prove the absence of a record in an office by hearsay evidence in the form of a writing from the

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6. Rule 68 will be the subject of a later study and recommendation by the Law Revision Commission. The rule as proposed by the Commissioners on Uniform State Laws is as follows:
A writing purporting to be a copy of an official record or of an entry therein, meets the requirement of authentication if (a)

official custodian thereof stating that no such record has been found after a diligent search, provided the writing meets the requirements of authentication under Rule 69.

Both exceptions are justified by the likelihood that such statements made by custodians of official records are highly likely to be accurate and by the necessity of providing a simple and inexpensive method of proving such facts.

The cross reference to URE Rule 64 has been deleted because the Commission does not recommend approval of Rule 64. (See the comment on Rule 64.)

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the judge finds that the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept; or (b) evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry; or (c) the office in which the record is kept is within this state and the writing is attested as a correct copy of the record or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record; or (d) if the office is not within the state, the writing is attested as required in clause (c) and is accompanied by a certificate that such officer has the custody of the record. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

7. Rule 69 will be the subject of a later study and recommendation by the Law Revision Commission. The rule as proposed by the Commissioners on Uniform State Laws is as follows:

A writing admissible under exception (17)(b) of Rule 63 is authenticated in the same manner as is provided in clause (c) or (d) of Rule 68.

Subdivision (18): Certificate of Marriage.

(18) [~~Subject to Rule 64, certificates~~] A certificate that the maker thereof performed a marriage ceremony, to prove the [~~truth of the recitals thereof~~] fact, time and place of the marriage, if the judge finds that:

(a) The maker of the certificate was, at the time and place certified as the time and place of the marriage, [was] authorized by law to perform marriage ceremonies; [;] and

(b) The certificate was issued at that time or within a reasonable time thereafter. [;]

COMMENT

This exception is broader than existing California law, which is found in Sections 1919a and 1919b of the Code of Civil Procedure. These sections are limited to church records and hence, as respects marriages, to those performed by clergymen. Moreover, they establish an elaborate and detailed authentication procedure whereas certificates made admissible by subdivision (18) need only meet the general authentication requirement of Rule 67 that "Authentication may be by evidence sufficient to sustain a finding of . . . authenticity. . . ."

It seems unlikely that this exception would be utilized in many cases both because it will be easier to prove a marriage by the official record thereof under Health and Safety Code Section 10577 and because such evidence is likely to have greater weight with the jury. The

Commission believes, however, that where the celebrant's certificate is offered it should be admissible. The fact that the certificate must be one made by a person authorized by law to perform marriages and that it must meet the authentication requirement of Rule 67 provides sufficient guarantees of its trustworthiness to warrant this exception to the hearsay rule.

The cross reference to URE Rule 64 has been deleted because the Commission does not recommend approval of Rule 64. (See the comment on Rule 64.)

Subdivision (19): Records of Documents Affecting an Interest in Property.

(19) [~~Subject to Rule 64~~] The official record of a document purporting to establish or affect an interest in property, 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, if the judge finds that:

(a) The record is in fact a record of an office of a state or nation or of any governmental subdivision thereof; [~~,~~] and

(b) [~~An applicable~~] A statute authorized such a document to be recorded in that office. [~~.~~]

COMMENT

This exception largely restates existing California law, as found in Section 1951 of the Code of Civil Procedure (documents relating to real property) and Section 2963 of the Civil Code (chattel mortgages).

The cross reference to URE Rule 64 has been deleted because the Commission does not recommend approval of Rule 64. (See the comment on Rule 64.)

Subdivision (20): Judgment of Previous Conviction.

[~~(20)--Evidence of a final judgment adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment;~~]

COMMENT

The Commission declines to recommend subdivision (20). There is no counterpart to this exception in our present law. Evidence admitted under this subdivision would likely be given undue weight and would therefore be highly prejudicial to the party against whom it is introduced. There is no pressing necessity for creating such an exception: if the witnesses in the criminal trial are no longer available, their former testimony will in many cases be admissible under subdivision (3) of Rule 63; if the witnesses are still available, they can be called to testify concerning the disputed facts.

Subdivision (21): Judgment Against Persons Entitled to Indemnity.

(21) To prove [~~the wrong of the adverse party and the amount of damages sustained by the judgment creditor~~] any fact which was essential to the judgment, evidence of a final judgment if offered by [a] the judgment debtor in an action or proceeding to:

(a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment; [~~, provided the judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action;~~]

(b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment; or

(c) Recover damages for breach of a warranty substantially the same as a warranty determined by the judgment to have been breached.

COMMENT

URE 63(21) restates in substance a principle of existing California law. The subdivision has been revised to incorporate a similar principle found in the cases dealing with warranties. The purpose of the subdivision is to make clear that such judgments are not inadmissible because they are hearsay. The effect to be given such judgments when introduced must be determined by other law. See, for example, Civil Code Section 2778(5) and (6) and Code of Civil Procedure Sections 1908 and 1963(17).

Subdivision (22): Judgment Determining Public Interest in Land.

(22) To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the [~~public or of a state or nation or~~] United States or a state or territory of the United States or governmental subdivision thereof in land, if [~~offered by a party in an action in which any such fact or such interest or lack of interest is a material matter;~~] the judgment was entered in an action or proceeding to which the entity whose interest or lack of interest was determined was a party.

COMMENT

URE 63(22) creates a new exception to the hearsay rule insofar as the law of this State is concerned. However, the exception is supported by the case law of some jurisdictions. Certainly evidence of this sort is superior to reputation evidence which is admissible on questions of boundary both under subdivision (27) and Code of Civil Procedure Section 1870(11). The Commission has revised the subdivision to require that the public entity involved be a public entity in the United States and a party to the litigation resulting in the judgment. The materiality condition has been deleted as unnecessary, for it merely reiterates the general principle that evidence must be material to be admissible.

Subdivision (23): Statement Concerning One's Own Family History.

(23) If the judge finds that the declarant is unavailable as a witness, a statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, [~~if~~] unless the judge finds that the [~~declarant is unavailable;~~] statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

COMMENT

As drafted URE 63(23) restates in substance existing California law as found in Section 1870(4) of the Code of Civil Procedure except that Section 1870(4) requires that the declarant be dead whereas unavailability of ~~the declarant~~ for any of the reasons specified in Rule 62 makes the statement admissible under URE 63(23).

The Commission has revised URE 63(23) to provide that a statement to which it applies is not admissible if the court finds that the statement was made under such circumstances that the declarant had a motive to deviate from the truth in making the statement.

Subdivision (24): Statement Concerning Family History of Another.

(24) Unless the judge finds that the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth, a statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge finds that the declarant is unavailable as a witness and finds that:

(a) [~~finds that~~] The declarant was related to the other by blood or marriage; or

(b) [~~finds that he~~] The declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared [~~,~~] and made the statement (i) [~~as~~]upon information received from the other or from a person related by blood or marriage to the other [~~,~~] or (ii) [as]upon repute in the other's family. [~~, and (b) finds that the declarant is unavailable as a witness;~~]

COMMENT

As drafted URE 63(24)(a) restates in substance existing California law as found in Section 1870(4) of the Code of Civil Procedure except that under the latter the statement is admissible only if the declarant is dead whereas under the former unavailability for any of the reasons specified in Rule 62 is sufficient.

URE 63(24)(b) is new to California law but the Commission believes that it is a sound extension of the present law to cover a situation that is within its basic rationale - e.g., to a situation where the declarant was a family housekeeper or doctor or so close a friend as to be "one of the family" for purposes of being included by the family in discussions of its history.

Here again, as in subdivision (23), the Commission has added language which will permit the trial judge to refuse to admit a declaration of this kind where it was made in such circumstances as to cast doubt upon its trustworthiness.

Subdivision (25): Statement Concerning Family History Based on Statement of Another Declarant.

[~~(25)--A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;~~]

COMMENT

The Commission does not recommend the adoption of URE 63(25). This exception would make it possible to prove by the hearsay statement of one declarant that another declarant made a hearsay statement where the earlier statement made falls under subdivision (23) or (24) of Rule 63 but the subsequent statement does not fall under any of the recognized exceptions to the hearsay rule. The Commission can see no justification for thus forging a two-link chain of hearsay just because the first hearsay declaration would have been admissible if it could have been shown by competent evidence to have been made. There is nothing to guarantee the trustworthiness of the second hearsay statement.

Of course, if both statements are within exceptions to the hearsay rule, the evidence will be admissible under Rule 66.

Subdivision (26): Reputation in Family Concerning Family History.

(26) Evidence of reputation among members of a family, to prove the truth of the matter reputed, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage [;].

COMMENT

Subdivision (26) restates in substance the existing California law, which is found in subdivision (11) of Section 1870 of the Code of Civil Procedure, except that Section 1870(11) requires that the family reputation in question have existed "previous to the controversy." The Commission does not believe that this qualification need be made a part of subdivision (26) because it is unlikely that a family reputation on a matter of pedigree would be influenced by the existence of a controversy even though the declaration of an individual member of the family, covered in subdivisions (23) and (24), might be.

Subdivision (26a): Entries Concerning Family History.

(26a) To prove the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage, entries in family bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts or tombstones, and the like.

COMMENT

This subdivision restates in substance the existing California law found in subdivision (13) of Section 1870 of the Code of Civil Procedure.

Subdivision (27): Community Reputation Concerning Boundaries, General History and Family History.

(27) Evidence of reputation in a community [~~as tending~~], to prove the truth of the matter reputed, if [~~(a)~~] the reputation concerns:

(a) Boundaries of, or customs affecting, land in the community [,] and the judge finds that the reputation, if any, arose before controversy. [~~, or~~]

(b) [~~the reputation concerns~~] An event of general history of the community or of the state or nation of which the community is a part [~~,~~] and the judge finds that the event was of importance to the community. [~~, or~~]

(c) [~~the reputation concerns~~] The date or fact of birth, marriage, divorce [~~,~~] or death [~~, legitimacy, relationship by blood or marriage, or race ancestry~~] of a person resident in the community at the time of the reputation. [~~, or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community;~~]

COMMENT

Paragraph (a) restates in substance the existing California law as found in subdivision (11) of Section 1870 of the Code of Civil Procedure.

Paragraph (b) is a wider rule of admissibility than California's present rule, as found in subdivision (11) of Section 1870 which provides in relevant part that proof may be made of "common reputation existing previously to the controversy, respecting facts of a public or general interest more than thirty years old." The 30-year limitation is essentially arbitrary. The important question would seem to be whether a community reputation on the matter involved exists; its age would appear to go more to its venerability than to its truth. Nor does the Commission believe that it is necessary to include in paragraph (b) the qualification that the reputation existed previous to the controversy. It is unlikely that a community reputation respecting an event of general history would be influenced by the existence of a controversy.

Paragraph (c) restates what has been held to be the law of California under Code of Civil Procedure Section 1963(30) insofar as proof of the fact of marriage is concerned. However, this paragraph has no counterpart in California law insofar as proof of other facts relating to pedigree is concerned, proof of such facts by reputation now being limited to reputation in the family. The Commission believes that paragraph (c) as proposed by the Commissioners on Uniform State Laws is too broad in that it might be construed in particular cases to permit proof of what is essentially idle neighborhood gossip relating to such matters as legitimacy and race ancestry. Accordingly, the Commission has limited this paragraph to proof by community reputation of the date or fact of birth, marriage, divorce or death.

Subdivision (28): Reputation as to Character.

(28) [~~If a trait of a person's character at a specified time is material,~~] To prove the truth of the matter reputed, evidence of [~~his~~] a person's general reputation with reference [~~thereto~~] to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated. [~~, to prove the truth of the matter reputed,~~]

COMMENT

Subdivision (28) restates the existing California law in substance. The materiality condition stated in the URE subdivision was omitted as unnecessary, for it merely reiterates the general principle that evidence must be material to be admissible. Of course, character evidence is admissible only when the question of character is material to the matter being litigated. The only purpose of the subdivision is to declare that reputation evidence as to character or a trait of character is not inadmissible under the hearsay rule.

Subdivision (29): Recitals in Documents Affecting Property: Ancient Documents.

(29) Evidence of a statement relevant to a material matter, contained in:

(a) A deed of conveyance or a will or other [~~document~~] writing purporting to affect an interest in property, [~~offered as tending to prove the truth of the matter stated,~~] if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property [,] and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement. [,]

(b) A writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter.

COMMENT

Paragraph (a) restates in substance the existing California law relating to recitals in dispositive instruments. Although language in some cases appears to require that the dispositive instrument be ancient, cases may be found in which recitals in dispositive instruments have been admitted without regard to the age of the instrument. The Commission believes that there is a sufficient likelihood that the statements made in a dispositive document will be true to warrant the admissibility of such documents without regard to their age. The words "offered as tending to prove the truth of the matter stated" have been deleted from the URE subdivision because they are unnecessary.

Paragraph (b) clarifies the existing California law relating to the admissibility of recitals in ancient documents by providing that such recitals are admissible under an exception to the hearsay rule. Section 1963(34) of the Code of Civil Procedure provides that a document more than 30 years old is presumed genuine if it has been generally acted upon as genuine by persons having an interest in the matter. The Supreme Court, in dictum, has stated that a document meeting this section's requirements is presumed to be genuine -- presumed to be what it purports to be -- but that the genuineness of the document imports no verity to the recitals contained therein. Recent cases decided by district courts of appeal, however, have held that the recitals in such a document are admissible to prove the truth of the facts recited. And in some of these cases the courts have not insisted that the hearsay statement itself be acted upon as true by persons with an interest in the matter; the evidence has been admitted upon a showing that the document containing the statement is genuine. The Commission does not believe that the age of a document is a sufficient guarantee of the trustworthiness of a statement contained therein to warrant the admission of the statement into evidence. Accordingly, paragraph (b) makes clear that the hearsay statement itself must have been generally acted upon as true for at least a generation by persons having an interest in the matter.

Subdivision (30): Commercial Lists and the Like.

(30) [~~Evidence of~~] Statements [~~of matters of interest to persons engaged in an occupation~~], other than opinions, 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 by persons engaged in that occupation and is~~] generally used and relied upon by [~~them,~~] persons engaged in an occupation as accurate.

COMMENT

Subdivision (30) has no counterpart in the California statutes. However, there has been some indication in judicial decisions that this exception may exist in California.

The Commission recommends subdivision (30) because the use of such publications at the trial will greatly simplify and thus expedite the proof of the matters contained in them. The trustworthiness of such publications is adequately guaranteed by the fact that, being used in the business community for the purpose for which they are offered in evidence, they must be made with care and accuracy to gain the confidence and reliance of the persons who purchase them.

The words "to prove the truth of any relevant matter so stated" have been deleted from the URE subdivision because they are unnecessary.

Subdivision (31): Learned Treatises.

(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, that the treatise, periodical or pamphlet is a reliable authority in the subject.]~~ Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, to prove facts of general notoriety and interest.

COMMENT

Revised subdivision (31) consists of the language of Section 1936 of the Code of Civil Procedure as modified in form only to conform to the general format of the hearsay statute recommended by the Commission.

The admissibility of published treatises, periodicals, pamphlets and the like has long been a subject of considerable controversy in this State, much of it centered upon the desirability of permitting excerpts from medical treatises to be read into evidence. Many of the criticisms that are made concerning the present California statute might be resolved by removing some of the present limitations upon the scope of cross-examination of expert witnesses. The Commission plans to study and report on the scope of permissible cross-examination at a later date in connection with its study of the Uniform Rules of Evidence.

Subdivision (32): Evidence Admissible Under Other Laws.

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

COMMENT

There are many statutes in the California codes that provide for the admission of various types of hearsay evidence. Subdivision (32) will make it clear that hearsay evidence which is admissible under any other statute which is not repealed in connection with the enactment of these rules will continue to be admissible.

No comparable exception is included in URE Rule 63 because URE Rules 62-66 purport to provide a complete system governing the admission and exclusion of hearsay evidence.

RULE 64. DISCRETION OF JUDGE UNDER CERTAIN EXCEPTIONS TO EXCLUDE EVIDENCE

~~[Rule 64.--Any writing admissible under exceptions (15), (16), (17), (18), and (19) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.]~~

COMMENT

The Commission does not recommend the adoption of Rule 64. No such requirement of pretrial disclosure now exists as to the evidence referred to in Rule 64 or, for that matter, to other documentary evidence. The Commission believes that modern discovery procedures provide the adverse parties adequate opportunity to protect themselves against surprise.

RULE 65. CREDIBILITY OF DECLARANT

Rule 65. Evidence of a statement or other conduct by a declarant inconsistent with a statement of such declarant received in evidence under an exception to Rule 63 [,] is not inadmissible for the purpose of discrediting the declarant, though he is given and has had no opportunity to deny or explain such inconsistent statement or other conduct. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

COMMENT

This rule deals with the impeachment of one whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. It has two purposes. First, it makes clear that such evidence is not to be excluded on the ground that it is collateral. Second, it makes clear that the rule applying to impeachment of a witness - that a witness may be impeached by a prior inconsistent statement only if a proper foundation is laid by calling his attention to the statement and permitting him first to explain it - does not apply to a hearsay declarant.

Thus, Rule 65 would permit the introduction of evidence to impeach a hearsay declarant in one situation where such impeaching evidence would now be excluded. Our decisions indicate that when testimony given by a witness at a former trial is read into evidence at a

subsequent trial because the witness is not then available, his testimony cannot be impeached by evidence of an inconsitent statement unless the would-be impeacher laid the necessary foundation for impeachment at the first trial or can show that he had no knowledge of the impeaching evidence at the time of the first trial. The Commission believes, however, that the trier of fact at the second trial should be allowed to consider the impeaching evidence in all cases.

No California case has been found which deals with the problem of whether a foundation is required when the hearsay declarant is available as a witness at the trial. The Commission believes that no foundation for impeachment should be required in this case. The party electing to use the hearsay of such a declarant should have the burden of calling him to explain or deny any alleged inconsistencies that tend to impeach him.

Rule 63(1)(a) provides that evidence of prior inconsistent statements made by a witness at the trial may be admitted to prove the truth of the matters stated. In contrast to Rule 63(1)(a), the evidence admissible under Rule 65 may not be admitted to prove the truth of the matter stated. Inconsistent statements that are admissible under Rule 65 may be admitted only to impeach the hearsay declarant. Unless the declarant is a witness and subject to cross-examination upon the subject matter of his statements, there is not a sufficient guarantee of the trustworthiness of his out-of-court statements to warrant their reception as substantive evidence unless they fall within some recognized exception to the hearsay rule.

Rule 66. A statement within the scope of an exception to Rule 63 [~~shall~~] is not [be] 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.

COMMENT

This rule would make it possible to prove by the hearsay statement of one declarant that another declarant made a hearsay statement where each of the statements falls within an exception to Rule 63. Although California cases may be found in which such evidence has been admitted, the Commission is not aware of any California case where the admissibility of "multiple hearsay" evidence has been analyzed and discussed. But since each statement must fall within an exception to the hearsay rule there is a sufficient guarantee of the trustworthiness of the statements to justify this qualification of the hearsay rule.

The Commission has revised the rule to make it clear that, on occasion, several hearsay statements may be admitted under this rule. For instance, evidence of former testimony is admissible under Rule 63(3). The evidence of such former testimony may be in the form of the reporter's record, which is admissible under Rule 63(13). A properly authenticated copy of the report would be admissible under Rule 63(17). Even though "triple hearsay" is here involved, the Commission believes that there is a sufficient guarantee of the trustworthiness of each statement, for each of them must fall within an exception to the hearsay rule.

RULE 66A. SAVINGS CLAUSE

Rule 66A. Nothing in Rules 62 to 66, inclusive, shall be construed to repeal by implication any other provision of law relating to hearsay evidence.

COMMENT

No comparable provision is included in the URE, but the Commission has added this provision to make it clear that Rules 62-66 and the existing code provisions dealing with the admission of hearsay evidence are to be treated as cumulative. The proponent of hearsay evidence may justify its introduction upon the basis of a URE exception or an existing code provision or both.

Some of the existing statutes providing for the admission of hearsay evidence will, of course, be repealed when the URE is enacted. The Commission hereinafter recommends the repeal of all present code provisions which are general hearsay exceptions and which are either inconsistent with or substantially coextensive with the Rule 63 counterparts of such provisions. The statutes that will not be repealed when the URE is enacted are, for the most part, narrowly drawn statutes which make a particular type of hearsay evidence admissible under specifically limited circumstances. It is neither desirable nor feasible to repeal these statutes. This savings clause will make it clear that these statutes are not impliedly repealed by Rule 63.

ADJUSTMENTS AND REPEALS OF EXISTING STATUTES

Scattered through the various codes are a number of statutes relating to hearsay evidence. Some of these statutes deal with the problem of hearsay generally, while others deal with the admissibility and proof of certain specific documents and records or with a specific type of hearsay in particular situations. The Commission has studied these statutes in the light of the Commission's tentative recommendation concerning Article VIII (Hearsay Evidence) of the Uniform Rules of Evidence.

The Commission tentatively recommends the repeal of those code provisions that set forth general exceptions to the hearsay rule which are inconsistent with or substantially coextensive with the exceptions provided in subdivisions (1) through (31) of Rule 63 as revised by the Commission. The Commission, however, does not recommend the repeal of the numerous provisions dealing with a particular type of hearsay evidence in specific situations. These provisions are too numerous and too enmeshed with the various acts of which they are a part to make specific repeal a desirable or feasible venture. Moreover, many of these provisions were enacted for reasons of public policy germane to the acts of which they are a part and not for considerations relating directly to the law of evidence. For example, the provisions of Section 2924 of the Civil Code, which makes the recitals in deeds executed pursuant to a power of sale prima facie evidence of compliance with certain procedural requirements and conclusive evidence thereof in favor of bona fide purchasers, are to further

a policy of protecting titles to property acquired pursuant to such deeds. The Commission has not considered these policies in its study of the Hearsay Article of the Uniform Rules of Evidence, for these policies are not germane to a study to determine what hearsay is sufficiently trustworthy to have value as evidence. Therefore, the Commission does not recommend any change in these statutes; and, to remove any doubt as to their continued validity, the Commission has hereinbefore recommended the addition of provisions to the Uniform Rules of Evidence to make it clear that other laws authorizing the admission of hearsay evidence which are not repealed will have continued validity.

Set forth below is a list of the statutes which, in the opinion of the Commission, should be revised or repealed. The reason for the suggested revision or repeal is given after each section or group of sections.[8] References in such reasons to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

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[8] A number of the sections listed below refer to the "declaration, act or omission" of a person in defining an exception to the hearsay rule. The superseding provisions of the Uniform Rules of Evidence refer only to a "statement." Rule 62 defines a "statement" as a declaration or assertive conduct, that is, conduct intended by the declarant as a substitute for words. Rule 63 in stating the hearsay rule provides only that "statements" offered to prove the truth of the matter asserted are hearsay and inadmissible. Hence, insofar as these sections of the Code of Civil Procedure refer to nonassertive conduct or to statements which are themselves material whether or not true, these sections are no longer necessary for evidence of such facts is not hearsay evidence under the Uniform Rules.

Code of Civil Procedure

Section 1848 provides:

> 1848. 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.

This section should be repealed. It deals with the extent to which out-of-court declarations, acts or omissions may be used to the prejudice of a party, and this is covered by the opening paragraph of Rule 63 and the numerous exceptions thereto.

Section 1849 provides:

> 1849. Declarations of predecessor in title evidence. Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former.

This section should be repealed. It is superseded by Rule 63(9a)(a) relating to admissions of predecessors in interest.

Section 1850 provides:

> 1850. Declarations which are a part of the transaction. Where, also, the declaration, act, or omission forms a part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction.

This section should be repealed. It is superseded by Rule 63(4) providing an exception to the hearsay rule for contemporaneous and spontaneous declarations.

Section 1851 provides:

> 1851. And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties.

This section should be repealed. It is superseded by the exception stated in Rule 63(9)(c).

Section 1852 provides:

> 1852. Declaration of decedent evidence of pedigree. The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible.

This section should be repealed. It is superseded by the pedigree exceptions contained in subdivisions (23), (24), (26) and (27) of Rule 63.

Section 1853 provides:

> 1853. Declaration of decedent evidence against his successor in interest. The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest.

This section should be repealed. It is an imperfect statement of the declaration against interest exception and is superseded by Rule 63(10).

Section 1870(2) provides in part:

> 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

2. The act, declaration, or omission of a party, as evidence against such party;

This subdivision should be deleted. It is superseded by the admissions exception contained in Rule 63(7).

Section 1870(3) provides:

1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto;

This subdivision should be deleted. It is superseded by the admissions exception stated in Rule 63(8)(b).

Section 1870(4) provides:

1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death;

This subdivision should be deleted. The first clause is superseded by the pedigree exception contained in Rule 63(23). The second clause is superseded by the exception relating to declarations against interest contained in Rule 63(10). The third clause is superseded by the dying declaration exception contained in Rule 63(5).

Section 1870(5) provides:

1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

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;

This subdivision should be deleted. The first sentence, relating to vicarious admissions of partners and agents, is superseded by the exceptions contained in Rule 63(8)(a) and 63(9)(a). The second sentence, relating to vicarious admissions of joint owners or joint debtors or other persons with joint interests, is superseded by Rule 63(9a)(b).

Section 1870(6) provides:

1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy;

This subdivision should be deleted. It is superseded by the exception relating to admissions of co-conspirators contained in Rule 63(9)(b).

Section 1870(7) provides:

1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

7. The act, declaration, or omission forming part of a transaction, as explained in section eighteen hundred and fifty;

This subdivision should be deleted. It is superseded by Rule 63(4) relating to contemporaneous and spontaneous declarations.

Section 1870(8) provides:

> 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> 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;

This subdivision should be deleted. It is superseded by subdivision (3) of Rule 63 which relates to former testimony.

Section 1870(11) provides:

> 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> 11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary;

This subdivision should be deleted. It is superseded by the community reputation exception contained in Rule 63(27).

Section 1870(13) provides:

> 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> 13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family Bibles, or other family books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree;

This subdivision should be deleted. It is superseded by the reputation and pedigree exceptions contained in Rule 63(26), Rule 63(26a) and Rule 63(27).

Section 1893. This section should be revised to read:

> 1893. Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor [~~,-and-such-copy-is admissible-as-evidence-in-like-cases-and-with-like-effect as-the-original-writing~~].

The language deleted is superseded by the exception pertaining to copies of official records contained in Rule 63(17).

Section 1901 provides:

> 1901. A copy of a public writing of any state or country, attested by the certificate of the officer having charge of the original, under the public seal of the state or country, is admissible as evidence of such writing.

This section should be repealed. It is superseded by the exception pertaining to copies of official records contained in Rule 63(17).

Sections 1905, 1906, 1907, 1918 and 1919 provide:

> 1905. A judicial record of this state, or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof. That of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form.

> 1906. A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and a seal, or of the legal keeper of the record with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge, or presiding magistrate, that the person making the attestation is the clerk of the court or the legal keeper of the record, and, in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country.

1907. A copy of the judicial record of a foreign country is also admissible in evidence, upon proof:

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it;
2. That such original was in the custody of the clerk of the court or other legal keeper of the same; and,
3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.

1918. Other official documents may be proved, as follows:

1. Acts of the executive of this state, by the records of the state department of the state; and of the United States, by the records of the state department of the United States, certified by the heads of those departments respectively. They may also be proved by public documents printed by order of the legislature or congress, or either house thereof.
2. The proceedings of the legislature of this state, or of congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk or printed by their order.
3. The acts of the executive, or the proceedings of the legislature of a sister state, in the same manner.
4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the executive of the United States.
5. Acts of a county or municipal corporation of this state, or of a board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book published by the authority of such county or corporation.
6. Documents of any other class in this state, by the original, or by a copy, certified by the legal keeper thereof.
7. Documents of any other class in a sister state, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme, superior, or county court, or mayor of a city of such state, that the copy is duly certified by the officer having the legal custody of the original.
8. Documents of any other class in a foreign country, by the original, or by a copy, certified by the legal keeper thereof, with a certificate, under seal, of the country or sovereign, that the document is a valid and subsisting

document of such country, and the copy is duly certified by the officer having the legal custody of the original, provided, that in any foreign country which is composed of or divided into sovereign and/or independent states or other political subdivisions, the certificate of the country or sovereign herein mentioned may be executed by either the chief executive or the head of the state department of the state or other political subdivision of such foreign country in which said documents are lodged or kept, under the seal of such state or other political subdivision; and provided, further, that the signature of the sovereign of a foreign country or the signature of the chief executive or of the head of the state department of a state or political subdivision of a foreign country must be authenticated by the certificate of the minister or ambassador or a consul, vice consul or consular agent of the United States in such foreign country.

9. Documents in the departments of the United States government, by the certificate of the legal custodian thereof.

1919. A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record.

These sections should be repealed. They are superseded by subdivisions (13), (17) and (19) of Rule 63 pertaining to the admissibility of governmental records and copies thereof.

Section 1920 provides:

1920. Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein.

This section should be repealed. It is superseded by the business records exception contained in subdivision (13) and by various specific exceptions that will continue to exist under subdivision (32) and Rule 66A.

Section 1920a provides:

1920a. Photographic copies of the records of the Department of Motor Vehicles when certified by the department, shall be admitted in evidence with the same force and effect as the original records.

This section should be repealed. It is superseded by the exception pertaining to copies of official records contained in Rule 63(17).

Section 1921 provides:

> 1921. A transcript from the record or docket of a justice of the peace of a sister state, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein.

This section should be repealed. It is superseded by the exception pertaining to copies of official records contained in Rule 63(17).

Section 1926 provides:

> 1926. An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry.

This section should be repealed. It is superseded by the business records exception contained in Rule 63(13).

Section 1936 provides:

> 1936. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest.

This section should be repealed. It has been incorporated in the Uniform Rules as Rule 63(31).

Section 1946 provides:

> 1946. The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:
>
> 1. When the entry was made against the interest of the person making it.
> 2. When it was made in a professional capacity and in the ordinary course of professional conduct.
> 3. When it was made in the performance of a duty specially enjoined by law.

This section should be repealed. The first subdivision is superseded by the declaration against interest exception of Rule 63(10); the second subdivision is superseded by the business records exception contained in Rule 63(13); and the third subdivision is superseded by the business records exception contained in subdivision (13) and the various specific specific exceptions which will continue under subdivision (32) and Rule 66A.

Section 1947 provides:

> 1947. When an entry is repeated in the regular course of business, one being copies from another at or near the time of the transaction, all the entries are equally regarded as originals.

This section should be repealed. It is superseded by the business records exception contained in Rule 63(13).

Section 1951. The last clause of this section is superseded by Rule 63(19) pertaining to the proof of official records of documents affecting interests in real property and should be deleted. The revised section would read as follows:

> 1951. Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof [~~;-also,-the-original record-of-such-conveyance-or-instrument-thus-acknowledged or-proved,-or-a-certified-copy-of-the-record-of-such conveyance-or-instrument-thus-acknowledged-or-proved,-may be-read-in-evidence,-with-the-like-effect-as-the-original instrument,-without-further-proof~~].

Sections 1953e through 1953h provide:

> 1953e. The term "business" as used in this article shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.
>
> 1953f. A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of

business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

1953f.5. Subject to the conditions imposed by Section 1953f, open book accounts in ledgers, whether bound or unbound, shall be competent evidence.

1953g. This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it.

1953h. This article may be cited as the Uniform Business Records as Evidence Act.

These sections should be repealed. They are the Uniform Business Records as Evidence Act which has been incorporated in the Uniform Rules as Rule 63(13).

Section 2016. This section should be revised so that it conforms to the Uniform Rules. The revision merely substitutes "unavailable as a witness" for the more detailed language in Section 2016 and makes no significant substantive change in the section. The revised portion of the section would read as follows:

* * *

(d) At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party to the record of any civil action or proceeding or of a person for whose immediate benefit said action or proceeding is prosecuted or defended, or of anyone who at the time of taking the deposition was an officer, director, superintendent, member, agent, employee, or managing agent of any such party or person may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (i) that the witness is unavailable as a witness within the meaning of Rule 62 of the Uniform Rules of Evidence; or ~~[dead; or (ii) that the witness is at a greater distance than 150 miles from the place of trial or hearing, or is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition, or (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v)~~] (ii) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Section 2047. This section should be revised to delete the last sentence which is superseded by Rule 63(1)(c). The remainder of the section should be revised to remove the limitation upon the type of writings that may be used to refresh recollection. As when a witness's recollection is refreshed he testifies to present recollection rather than to the matter contained in the refreshing memorandum, there is no reason to require the memorandum to meet the necessarily strict standards that a document purporting to contain recorded memory must meet. The section should also be revised to grant the adverse party the right to see not only the documents used to refresh a witness's recollection in the court room but also the documents used to refresh the witness's recollection just before he entered the court room. Revised Section 2047 would read as follows:

2047. ~~[When-Witness-May-Refresh-Memory-From-Notes.]~~ If a witness ~~[is-allowed-to-refresh]~~ refreshes his memory respecting a fact ~~[, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case]~~ by a writing either while testifying or prior thereto, the writing must be produced, and may be seen by the adverse party ~~[,]~~ who may, if he chooses , cross-examine the witness about it ~~[,]~~ and may read it to the jury. ~~[So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution.]~~

Penal Code

Section 686. This section now sets forth three exceptions to the right of defendant in a criminal trial to confront the witnesses against him. These exceptions purport to state the conditions under which the court may admit testimony taken at the preliminary hearing, testimony taken in a former trial of the action and testimony in a deposition that is admissible under Penal Code Section 882. The section inaccurately sets forth the existing law, for it fails to provide for the admission of hearsay evidence generally or for the admission of testimony in a deposition that is admissible under Penal Code Sections 1345 and 1362, and its reference to the conditions under which depositions may be admitted under Penal Code Section 882 is not accurate. As Rule 63(3) and (3a) covers the situations in which testimony in another action or proceeding and testimony at the preliminary hearing is admissible as exceptions to the hearsay rule, Section 686 should be revised by eliminating the specific exceptions for these situations and by substituting for them a general cross reference to admissible hearsay. The present statement of the conditions under which a deposition may be admitted should also be deleted, and in lieu of the deleted language there should be substituted language that accurately provides for the admission of depositions under Penal Code Sections 882, 1345 and 1362. The revised section would read:

686. In a criminal action the defendant is entitled:

1. To a speedy and public trial.

2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel.

3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except [~~that~~] :

(a) [~~Where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane or cannot with due diligence be found within the state; and except also that in the case of offenses hereafter committed the testimony on behalf of the people or the defendant of a witness deceased, insane, out of jurisdiction, or who cannot with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted.~~] Hearsay evidence may be admitted to the extent that it is otherwise admissible in a criminal action under the law of this State.

(b) The deposition of a witness taken in the action may be read to the extent that it is otherwise admissible under the law of this State.

Sections 1345 and 1362. These sections should be revised so that the conditions for admitting the deposition of a witness that has been taken in the same action are consistent with the conditions for admitting the testimony of a witness in another action or proceeding under Rule 63(3) and (3a). The revised sections would read:

1345. The deposition, or a certified copy thereof, may be read in evidence by either party on the trial [~~,-upon-its appearing~~] if the judge finds that the witness is [~~unable-to attend,-by-reason-of-his-death,-insanity,-sickness,-or-infirmity, or-of-his-continued-absence-from-the-state~~] unavailable as a witness within the meaning of Rule 62 of the Uniform Rules of Evidence. [~~Upon-reading-the-deposition-in-evidence,~~] The same objections may be taken to a question or answer contained [~~therein~~] in the deposition as if the witness had been examined orally in court.

1362. The depositions taken under the commission may be read in evidence by either party on the trial [~~,-upon-it-being shown~~] if the judge finds that the witness is [~~unable-to-attend from-any-cause-whatever;-and~~] unavailable as a witness within the meaning of Rule 62 of the Uniform Rules of Evidence. The same objections may be taken to a question in the interrogatories or to an answer in the deposition [~~,~~] as if the witness had been examined orally in court.