9/22/61

First Supplement to Memorandum No. 39(1961)

Subject: URE - Hearsay (Statements Relating to Boundary)

There is a common law exception to the hearsay rule that has been recognized in California cases even though it is not recognized in existing California statutes or in the URE. Because it appears neither in our present statutes nor in the URE, it has not as yet been considered by the Commission. The exception permits the introduction of the statements of deceased, distinterested persons upon questions of boundary. The exception is a narrow one and has received but limited application; however, it is presented to the Commission so that the entire field of hearsay evidence in California may be considered.

The California cases have defined the scope of the exception as follows:

> [T]he declarations on a question of boundary of a deceased person, who was in a situation to be acquainted with the matter, and who was at the time free from any interest therein, are admissible, and whether the boundary be one of a general or public interest, or be one between the estates of private proprietors. [Morton v. Folger, 15 Cal. 275, 280 (1860) per Field, C.J.]

The declarant, apparently, must have direct knowledge of the subject matter of his declaration. In the Morton case, supra, the testimony given in another action between other parties of the surveyor who originally laid out the boundaries of John A. Sutter's grant was held admissible, the surveyor being dead and his declaration relating to the location of the lines he had surveyed. In Morcom v. Baiersky, 16 Cal. App. 480 (1911), an 1870 map of a subdivision prepared by the surveyor

who prepared the recorded subdivision map was held admissible on a question of boundary. Cited with approval in the Morton case were numerous cases from other jurisdictions with similar holdings admitting statements such as that of a chain carrier in a survey party as to the location of certain monuments. A declaration of a surveyor as to the location of boundaries and monuments, however, is inadmissible if the surveyor was not the one who originally ran the line or established the monument in question. (Almaden Vineyards Corp. v. Arnerich, 21 Cal. App.2d 701 (1937); Spencer v. Clarke, 15 Cal. App. 512 (1911).)

Chief Justice Field indicated, and Wigmore (Evidence (3d ed.) §§ 1563 et seq.) corroborates, that the exception has been recognized in many jurisdictions in the United States. It arose because in the early unsettled condition of this country, many boundaries would have been unprovable if subsequent statements by the original surveyor or other members of the survey party were inadmissible. This was certainly the case in Morton v. Folger, supra, for at the time that boundary line was surveyed, there were only nomadic Indians in the neighborhood. The exception is of considerably less importance now that the State is well-settled. Only three California cases have been found applying the exception. One was in 1911 and two were in 1860.

If the Commission believes the exception of sufficient importance to retain, the following additional subdivision of Rule 63 is suggested:

(27.1) If the declarant is unavailable as a witness and had sufficient knowledge of the subject, a statement concerning the boundary of land 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.

Respectfully submitted,

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