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Supplement to Memorandum No. 7(1961)

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

REPEAL AND ADJUSTMENT OF ADDITIONAL CODE SECTIONS

In Memorandum No. 7(1961) the staff indicated that a further recommendation would be made relating to the revision of existing code sections. The sections discussed in the present memorandum have not been previously considered by the Commission. The staff believes that certain adjustments are needed in the sections hereinafter mentioned in order to make them consistent with the actions taken by the Commission on the Uniform Rules. Attached to this memorandum on blue paper are the staff's suggested additions to the Commission's tentative recommendation.

REVISION OF CODE SECTIONS RELATING TO  
THE ADMISSION OF DEPOSITIONS IN CIVIL ACTIONS

Subdivision (d)(3) of Section 2016 of the Code of Civil Procedure sets forth certain conditions under which a deposition may be used as evidence in a civil action. These conditions are almost, but not quite, identical with the conditions which must be met to qualify a person as "unavailable as a witness" under Rule 62(6). The staff believes that the conditions for the admissibility of depositions taken in the same action should be no different -- and certainly no more stringent -- than the conditions for the admissibility of testimony taken in a former action

under Rule 63(2a) and Rule 63(3). Therefore, the staff recommends the substitution of the "unavailable as a witness" standard for the language used in subparagraphs (i) through (iii) of paragraph (3) of subdivision (d) of Section 2016.

REVISION OF CODE SECTIONS RELATING TO CONFRONTATION, DEPOSITIONS  
AND FORMER TESTIMONY IN CRIMINAL ACTIONS

Penal Code Sections 686, 882, 1345 and 1362 relate to the right of a defendant to confront witnesses and the conditions under which depositions and former testimony may be admitted in criminal actions. These sections are not only inconsistent with the Commission's actions on the Uniform Rules, they are inconsistent with each other.

The standard of unavailability

Section 686

Section 686 grants the defendant in a criminal trial the right to confront the witnesses against him. Three exceptions are stated:

(1) Where the charge has been preliminarily examined and the testimony taken down in the presence of the defendant and subject to the defendant's right of cross-examination, "the deposition of the 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";

(2) Where the testimony of a prosecution witness who is unable to give security for his appearance has been taken conditionally in the presence of the defendant and subject to the defendant's right of cross-examination, "the deposition of the 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

(3) Where testimony has been given on a former trial of the action in the presence of the defendant and subject to the defendant's right of cross-examination, such testimony may be admitted if the witness is "deceased, insane, out of jurisdiction" or "cannot with due diligence, be found within the state."

These standards for the admission of depositions and former testimony are inconsistent with the Uniform Rules as approved by the Commission. Rule 63(3) provides that the former testimony of a person who is unavailable as a witness may be admitted in criminal proceedings (a) where the defendant offered the testimony on his own behalf in the former action, or (c) where the former action was a criminal proceeding against the defendant and he had the right and opportunity to cross-examine the witness at that time with a similar motive.

Thus, if Section 686 is left unmodified, the testimony of a witness at the preliminary examination of the same action and the testimony of a witness unable to give security for his appearance taken by deposition in the same action will be admissible only if such witness is dead or insane or cannot be found within the State; but the testimony of a witness in a former action (including a former civil action) may be admissible if the witness is unavailable for any of the reasons specified in Rule 62(6) -- e.g., privilege, disqualification, death, physical or mental disability, absent beyond the reach of the court's process, or the proponent can't find him.

Similarly, if Section 686 is left unmodified, the testimony of a

witness at a former trial of the same action is admissible only if the witness is dead, insane or out of jurisdiction; but the testimony of the witness at a trial of a different action may be admissible if the witness is unavailable for any of the reasons stated in Rule 62.

For the sake of consistency, the staff recommends that Section 686 be amended to provide that the former testimony referred to therein is admissible when the declarant is "unavailable as a witness within the meaning of Rule 62 of the Uniform Rules of Evidence."

Sections 882, 1345 and 1362

There is a further difficulty with Section 686. It is inconsistent with Sections 1345 and 1362 even though all of these sections were enacted in 1872. Section 1345 appears in a chapter dealing with the taking of depositions of witnesses who may be unable to appear at the trial (the taking of the deposition is referred to as a "conditional examination" of the witness). Section 1345 provides that the deposition, or a certified copy thereof, may be read in evidence if the witness is unable to attend by reason of "death, insanity, sickness," "infirmity" or "continued absence from the state." Section 686 recognizes only death, insanity and absence from the State as grounds for reading a deposition.

Section 1362 appears in a chapter dealing with the depositions of material witnesses for the defendant who are out of the State. Here, the deposition may be read if the witness is unable to attend from "any cause whatever."

So far the differences between Section 686 and Sections 1345 and 1362 have merely been inconsistencies in principle. However, by virtue of the provisions of Section 882, there is a direct conflict between Section 686

and Section 1345. Section 882 appears in a chapter dealing with the taking of depositions of material witnesses who cannot give security for their appearance. It provides that the deposition of such a witness may be used upon the trial "except in cases of homicide, under the same conditions as mentioned in section thirteen hundred and forty-five." Thus, 882 and 1345 provide that a deposition of a witness who cannot give security may be read where the witness is dead, insane, sick, infirm or absent from the State; but 686 provides that such a deposition may be read only where the witness is dead, insane or absent.

The staff recommends that these inconsistencies be eliminated by substituting the standard used in Rule 63(3) -- that the declarant is "unavailable as a witness" -- in both Sections 1345 and 1362. This change will also prevent a defendant from using a deposition under these sections if the defendant caused the unavailability to prevent the deponent from appearing.

Cases in which depositions may be used.

Another matter should be noted also. Section 882 provides that the deposition of a witness for the people who is unable to give security for his appearance may be read "except in cases of homicide." Section 686, in referring to the reading of such a deposition, does not mention any limitation as to the nature of the case in which the deposition may be read. Section 1345, which deals with depositions of material witnesses who are about to leave the State or who will be unable to attend the trial because of sickness or infirmity, is subject to the provisions of Section 1335, which provides that the people may not take the deposition of such

a witness in death penalty cases. The staff recommends that the "homicide" limitation contained in Section 882 be incorporated in the portion of Section 686 that deals with the reading of the deposition of a witness unable to give security for his appearance. The staff does not recommend any other adjustment of these sections insofar as the "homicide" or "death penalty" limitations are concerned, for there is no direct conflict between the sections even though the principles are somewhat inconsistent.

Former testimony in another action.

Another matter should also be noted. Section 686 purports to list all of the situations in which a defendant does not have the right to confront the witnesses against him. It makes no exception for the situations that are covered by Rule 63(3)(a) and (c) -- testimony in a former action introduced by the defendant and testimony in a former criminal action in which the defendant had the right and opportunity to cross-examine with a similar motive. The enactment of Rule 63(3) will not, of its own force, make the evidence listed therein admissible. Rule 63(3) merely states an exception to Rule 63. That is, subdivision (3) merely provides that nothing in Rule 63 will make the evidence mentioned in subdivision (3) inadmissible. Hence, it is possible that Section 686 would render such evidence inadmissible despite the enactment of Rule 63(3). Therefore, the staff recommends that Section 686 be amended to permit Rule 63(3) to operate as an exception to the right of confrontation as well as an exception to the hearsay rule.

Use of depositions taken in the same action under Sections 1345 and 1362.

Section 686, too, does not refer to the deposition evidence which is

admissible under Sections 1345 and 1362. For some reason, insofar as depositions are concerned it refers only to the type of deposition taken under Section 882. If Sections 1345 and 1362 mean what they say -- that the depositions there mentioned may be read by either party at the trial -- Section 686 should also be amended to indicate that this may be done despite the right of confrontation.

Respectfully submitted,

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If the recommendations made in the Supplement to Memorandum No. 7 (1961) are approved, the following material should be added to the section on Adjustments and Repeals of Existing Statutes that is contained in the tentative recommendation on hearsay evidence:

Code of Civil Procedure

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 ~~(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.

#### Penal Code

Section 686. This section should be revised to 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, the testimony of such witness at the preliminary examination may be read if the judge finds that he is unavailable as a witness within the meaning of Rule 62 of the Uniform Rules of Evidence. [~~;-er~~]

(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. [~~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-the-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~~]

(c) [~~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 if the judge finds that the witness is unavailable as a witness

within the meaning of Rule 62 of the Uniform Rules of Evidence.

(d) The testimony given in a former action or proceeding may be admitted to the extent that it is otherwise admissible in a criminal action under the law of this State.

(e) Hearsay evidence may be admitted to the extent that it is otherwise admissible in a criminal action under the law of this State.

The amendments to subdivisions (a) and (c) (which substitute the phrase "unavailable as a witness" for the phrase "dead or insane or cannot with due diligence be found within the state" or a similar phrase) would make the standard for the admission of former testimony in the same action identical with the standard for admitting former testimony in a prior action under the provisions of Rule 63(3).

Subdivision (b) has been revised to reflect existing law. The provision which has been deleted from this subdivision inaccurately states the conditions under which a deposition may be admitted under the provisions of Penal Code Section 882 and entirely fails to provide for the admission of depositions as provided in Penal Code Sections 1345 and 1362.

Subdivisions (d) and (e) have been added so that Penal Code Section 686 will completely and accurately cover the subject of confrontation.

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 a former action under Rule 63(3). The revised sections would read:

1345. The deposition, or a certified copy thereof, may be read in evidence by either party on the trial [~~7-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 [~~7-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 [~~7~~] as if the witness had been examined orally in court.