Date of Meeting: September 5-6, 1958

Date of Memo: August 20, 1958

Memorandum No. 5

Subject: Uniform Rules of Evidence

At the September meeting the Law Revision Commission should give consideration to the following Rules, and Subdivisions thereof, of the Uniform Rules of Evidence as to which the Commission has not taken a decision by a vote of five or more members, either as an original proposition (these are indicated by an asterisk) or since receiving the report of the State Bar Committee reporting that the Committee had taken a different view than that originally taken by the Commission:

Rule 62*

Rule 63, Subdivisions 6
7
9
10
15*) See staff report
16*) enclosed herewith
20
27
31*

Rule 64*

You have memoranda from Professor Chadbourn on all of the items listed above except Rules 62 and 64. The Commission has approved Subdivision (1) of Rule 62 which was analyzed in Professor Chadbourn's Memorandum on Rule 63.

Subdivision (7) is commented on briefly in footnote 11 of his Memorandum on Subdivisions (2) and (3). Professor Chadbourn will be prepared to comment orally on these and other aspects of Rule 62 at the September meeting. No memorandum on Rule 64 appears to be necessary.

Copies of memoranda prepared by members of the State Bar Committee on various of the items listed above will be sent to you prior to the meeting.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

P.S. I enclose also a copy of Memorandum prepared by Professor Chadbourn relating to changes in the Code of Civil Procedure which would be required if a separate Bill on the hearsay portions of the Uniform Rules of Evidence were to be introduced at the 1959 Session.

August 21, 1958

Memorandum submitted by Professor James H. Chadbourn

This Memorandum is a partial, preliminary investigation which seeks to discover some of the present code sections that would require repeal or modification in connection with the enactment of a bill based upon the hearsay provisions of the Uniform Rules of Evidence. The investigation is incomplete because I have found time thus far to consider only the relevant provisions of the Code of Civil Procedure but probably most of the affected provisions will be found there (Of course, the other codes and statutes must be considered before the investigation is complete) The investigation is preliminary not only because many of my conclusions as to particular code sections are extremely tentative but also because at this point there is doubt in some instances as to precisely what the provisions of the bill would be.

Part IV of the Code of Civil Procedure is entitled "Evidence." Hereinafter there is a reference to each of the sections which together constitute Part IV and there is an indication either of "no change" or of suggested repeal or amendment. For the most part the sections are noticed in the order in which they appear in Part IV.Where a section is reasonably short it is usually quoted verbatim; where not, its subject matter is indicated.

§ 1823. "Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact."

COMMENT: URE Rule 1 (1) defines "Evidence" as follows:

> " 'Evidence' is the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion, and hearsay."

URE 63 uses the term "evidence" in referring to "evidence of a statement." It seems to me that the expression "evidence of a statement" will carry the same meaning under either the Code of Civil Procedure or the URE definition. My opinion is, therefore, that § 1823 should be left intact in enacting a Hearsay Bill.

§ 1824. "Proof is the effect of evidence, the establishment of a fact by evidence."

COMMENT: URE Rule 1 (3) defines "proof" as follows:

> " 'Proof' is all of the evidence before the trier of the fact relevant to a fact in issue which tends to prove the existence or nonexistence of such fact."

Rule 63 uses the expression "statement . . . offered to <u>prove</u> the truth of the matter stated . . ." [Italics added.] It seems to me that the expression "offered to prove" will carry the same meaning under either the Code of Civil Procedure or the URE definition. My opinion is, therefore, that § 1824 should be left intact in enacting a Hearsay Bill.

§ 1825. Definition of the law of evidence.

COMMENT: No change.

§ 1826. " The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind."

COMMENT: No change.

§ 1827. "There are four kinds of evidence:

1. The knowledge of the court;
2. The testimony of witnesses;
3. Writings;
4. Other material objects presented to the senses."

COMMENT: No change.

§ 1828. "There are several degrees of evidence:

1. Primary and secondary.
2. Direct and indirect.
3. Prima facie, partial, satisfactory, indispensable and conclusive."

COMMENT: No change.

§ 1829. "Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents."

COMMENT: No change.

§ 1830. "Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument or oral evidence of its contents is secondary evidence of the instrument and contents."

COMMENT: No change.

§ 1831. "Direct evidence is that which proves the

fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example, if the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it, is direct."

COMMENT: No change.

§ 1832. "Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred."

COMMENT: No change.

§ 1833. "Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: the certificate of a recording officer is prima facie evidence of a record, but it may afterwards be rejected upon proof that there is no such record."

COMMENT: No change.

§ 1834. "Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute by proof of other facts. For example: on an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterwards connected with the fact in dispute."

COMMENT: No change.

§ 1836. "Indispensable evidence is that without which a particular fact cannot be proved."

COMMENT: No change.

§ 1837. "Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it."

COMMENT: Under URE 63 (20) a judgment of conviction of felony, (e.g., felony drunk driving) is admissible as evidence against the convicted party in a civil action for damages. However, the judgment is not conclusive and the record therefore can be contradicted. Thus 63 (20) would be inconsistent with the illustrative second sentence of § 1837. However, since 63(20) would probably not be in our Hearsay Bill, the point is probably moot.

§ 1838. "Cumulative evidence is additional evidence of the same character, to the same point."

COMMENT: No change.

§ 1839. "Corroborative evidence is additional evidence of a different character, to the same point."

COMMENT: No change.

§ 1844. "The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason."

COMMENT: No change.

§ 1845. "A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible."

COMMENT: No change.

§ 1846. "A witness can be heard only upon oath or affirmation, and upon a trial he can be heard only in the presence and subject to the examinations of all the parties, if they choose to attend and examine."

COMMENT: No change.

§ 1847. "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility."

COMMENT: No change.

§ 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."

§ 1849. "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."

COMMENT: Suppose A deeds Blackacre to B. Later B declares that he had agreed with A that the deed should operate as a mortgage. Still later B deeds the property to C. A now sues C to redeem the property. A wishes to prove B's declaration. B is available. Under § 1849 the evidence is admissible. Under Rule 63 (10) as originally drafted the evidence would be admissible. However,

under that rule as amended by the Commission to require that declarant be unavailable the evidence would be inadmissible. I think the rule of § 1849 is sound and recommend it be retained. In order to retain it, however, we would either have to include it in our Hearsay Bill as a specific exception or include in our Bill a general exception comparable to our exception for affidavits, i.e., an exception for any statement made admissible by any other law of this State. I like the latter alternative. This would serve to continue in operation any present hearsay exception which otherwise would be repealed by our Hearsay Bill, such as, for example: declarations of an available declarant with whom a party is "in privity" (declarant and party joint owners or joint obligors.) See infra under § 1870 (5).

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

COMMENT: This, it seems, is the 19th Century version of the so-called Res Gestae doctrine. It should be regarded as superseded by URE Rule 63 (4) and should be repealed.

> § 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."

COMMENT: Superseded by 63 (9) (c). Should be repealed.

§ 1852. "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."

COMMENT: Superseded by URE Pedigree Rules - 63 (23) - (27). Should be repealed.

§ 1853. "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."

COMMENT: Superseded by 63 (10). Should be repealed.

§ 1854. "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence."

COMMENT: This is involved in the Bar Committee's study of the Patton proposal to amend Rule 65 to make all of a declarant's hearsay statements relative to a matter admissible when any of such statements of his have been received. It seems, therefore, we must suspend judgment on the question of the extent, if any, of modification of this section.

§ 1855. "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1. When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made.
2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.
3. When the original is a record or other document in the custody of a public officer.
4. When the original has been recorded, and a certified copy of the record is made evidence by this Code or other statute.
5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

In the cases mentioned in subdivisions three and four, a copy of the original, or of the record, must be produced; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents."

COMMENT: This section should stand as is. See comment under § 1937.

§ 1855a. "When, in any action, it is desired to prove the contents of any public record or document lost or destroyed by conflagration or other public calamity and after proof of such loss or destruction, there is offered in proof of such contents (a) any abstract of title made and issued and certified as correct prior to such loss or destruction, and purporting to have been prepared and made in the ordinary course of business by any person, firm or corporation engaged in the business of preparing and making abstracts of title prior to such loss or destruction; (b) any abstract of title, or of any instrument affecting title, made, issued and certified as correct by any person, firm or corporation engaged in the business of insuring titles or issuing abstracts of title, to real estate whether the same was made, issued or certified before or after such loss or destruction and whether the same was made from the original records or from abstracts and notes, or either,

taken from such records in the preparation and upkeeping of its, or his, plant in the ordinary course of its business, the same may, without further proof, be admitted in evidence for the purpose aforesaid. No proof of the loss of the original document or instrument shall be required other than the fact that the same is not known to the party desiring to prove its contents to be in existence; provided, nevertheless, that any party so desiring to use said evidence shall give reasonable notice in writing to all other parties to the action who have appeared therein, of his intention to use the same at the trial of said action, and shall give all such other parties a reasonable opportunity to inspect the same, and also the abstracts, memoranda, or notes from which it was compiled, and to take copies thereof."

COMMENT: The destruction or loss of a document excuses non-production of the document as proof of its terms and lays a foundation for secondary evidence under both C.C.P. § 1855 and URE Rule 70. If, however, such secondary evidence is hearsay e.g., a certificate or an affidavit (cf. viva voce testimony of a witness who testifies from present memory as to the terms of the document,) we must find some exception to the hearsay rule to make it admissible. When the hearsay is in the form of a purported certificate, i.e., a certified copy by the custodian of the public document, the evidence (tho hearsay) is admissible under Rule 63 (17) and its C.C.P. counterparts. § 1855a, however, deals with a special and different kind of hearsay, viz, the abstracts therein specified. These abstracts would not be made admissible by 63 (17). Possibly they would be admissible under 63 (13). I recommend leaving § 1855a intact in order to

be sure that the method of proof therein provided for continues in force. The new general exception to Rule 63 which I recommend under §§ 1848 - 1849 would, if added to Rule 63, operate here to make sure that § 1855a is not repealed.

§ 1855b provides for proceedings to record a copy of a lost or defaced map. No hearsay problems. No change.

§ 1856.Parol Evidence Rule. No hearsay problems. No change.

§§ 1857 - 1866. Canons of construction. No hearsay problems. No change.

§§ 1867 - 1869. Immaterial allegations need not be proved. Evidence must be relevant and material. A party must prove his affirmative allegations. No hearsay problems. No change.

> § 1870. "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> 1. The precise fact in dispute;
> 2. The act, declaration, or omission of a party, as evidence against such party;
> 3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto;
> 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;

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;
6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy;
7. The act, declaration, or omission forming part of a transaction, as explained in Section 1850;
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;
9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein;
10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given;
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;
12. Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation;
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;
14. The contents of a writing, when oral evidence thereof is admissible;
15. Any other facts from which the facts in issue are presumed or are logically inferable;
16. Such facts as serve to show the credibility of a witness, as explained in Section 1847."

COMMENT:

§ 1870 (1). No change.

§ 1870 (2). Superseded by 63 (7). Repeal. Note: (7) refers only to "statement." On the other hand

§ 1870 (2) refers to "act, declaration or omission." However, under 62 (1) "statement" includes assertive acts or conduct. Under 63 only statements are hearsay. Thus non-assertive acts or omissions are admissible as non-hearsay. Thus 62 (1) plus 63 plus 63 (7) would cover the area of "act, declaration or omission" of a party now embraced by § 1870 (2).

§ 1870 (3). Superseded by 63 (8) (b). Repeal.

§ 1870 (4). Clause one superseded by 63 (23); clause two superseded by 63 (10); clause three superseded by 63 (5). Repeal § 1870 (4) in toto.

§ 1870 (5) first sentence. Superseded by 63 (8) (a) and (9) (a). Repeal.

§ 1870 (5) second sentence. 63 (10) as originally drafted would have made admissible against a party the declaration of a person jointly interested with the party provided such declaration was against the interest of the declarant (as usually it would be.) Such declaration would be admissible even though the declarant is available. I.e., 63 (10) in its original form would have covered most of the ground embraced by § 1870 (5) second sentence.

63 (10) as amended by the Commission to require the unavailability of the declarant would not, however, cover, as 1870 (5) now does, declarations of an available declarant. I recommend retaining the present rule by the device of including the new general exception to Rule 63 discussed under §§ 1848 - 1849.

§ 1870 (6). Superseded by 63 (9) (b). Repeal.

§ 1870 (7). Superseded by 63 (4) (b). Repeal

§ 1870 (8). Not superseded by 63 (2) as amended by Commission. But should not § 1870 (8) be amended to embody the URE version of unavailability stated in URE 62 (7) ?

§ 1870 (9). No hearsay problem. No change.

§ 1870 (10). No hearsay problem. No change.

§ 1870 (11). Superseded by 63 (27). Repeal.

§ 1870 (12). No hearsay problem. No change.

§ 1870 (13). Superseded by 63 (26). Repeal.

§ 1870 (14). Leave intact. See comment under §§ 1855 and 1937.

§ 1870 (15) (16). No hearsay problems. No change.

§§ 1871 - 1872. Expert witnesses. No hearsay problems. No change.

§ 1875. Judicial Notice. No hearsay problems. Leave intact.

§ 1878. "A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit."

COMMENT: Under this definition if a dying declaration made under oath is admitted the decedent is a "witness." So, too, a deponent whose statement is received is a "witness." Likewise a person who testifies on a former occasion and whose testimony then is admitted now is probably a "witness" (i.e., so to speak, a former witness is a present witness.) This definition and concept of witness seems to include not only a person whose sworn statement at the hearing is received but also any person whose pre-trial sworn statement is now received. Under URE usage persons of the former class are usually referred to as witnesses (e.g., Rule 20); those of the latter class are usually referred to as declarants (e.g., Rule 65) and such persons are called declarants notwithstanding the fact that their declarations were under oath (as in 63 (3).) There is thus the possibility of semantic confusion if we retain § 1878. For example: 63 (3) dealing with testimony in another action and depositions taken in another action (thus covering sworn statements) contains the expression "if the declarant is unavailable as a witness." Under the § 1878 definition of witness "declarant" in this contest would be a "witness" and the quoted expression would mean if the witness is unavailable as a witness.

Recommendation: Repeal § 1878.

§§ 1879 - 1880. Competency of witnesses. No hearsay problems. No change.

§ 1881. Privileges. No hearsay problems. No change.

§§ 1883 - 1884. Judge as witness. Juror as witness. Interpreter as witness. No hearsay problems. No change

§ 1887. "Writings are of two kinds:
1. Public; and,
2. Private."

§ 1888. "Public writings are:
1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this State, of the United States, of a sister State, or of a foreign country;
2. Public records, kept in this State, of private writings."

§ 1889. All other writings are private."

COMMENT: URE rule 1 (13) defines "Writing" as follows:

" 'Writing' means handwriting, typewriting, printing, photostating, photographing and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof."

Various of the URE hearsay exceptions refer to writings using the term of course in the enlarged sense of Rule 1 (13) (e.g., 63 (13) & (17).) Presumably one of the features of our Hearsay Bill will be the 1 (13) definition of writing. We have, however, not yet faced up to the problem of whether we want to define writing so broadly for all purposes. For example, we have not

yet considered whether we want to regard writing so broadly for purposes of the Best Evidence Rule (§ 1855; URE Rule 70.) I see no reason, however, why we could not propose the 1 (13) definition as the definition for the purpose and only for the purpose of the Hearsay Bill. I do not think that this would conflict with §§ 1887 - 1889 and believe therefore that these sections could be left intact.

> § 1892. "Every citizen has a right to inspect and take a copy of any public writing of this State, except as otherwise expressly provided by statute."

COMMENT: No hearsay problems. No change.

> § 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."

COMMENT: Last clause superseded by 63 (17). Repeal last clause.

> § 1894. "Public writings are divided into four classes:
> 1. Laws;
> 2. Judicial records;
> 3. Other official documents;
> 4. Public records, kept in this State, of private writings."

COMMENT: No hearsay problems. No change.

§§ 1895 - 1899. Definitions of various kinds of laws.

No hearsay problems. No change.

§ 1901. See infra Public Records.

§ 1903. Certain recitals in statutes conclusive. No hearsay problems. No change.

§ 1904. Judicial record defined. No hearsay problems. No change.

§ 1905. See infra Public Records.

§ 1906. See infra Public Records.

§ 1907. See infra Public Records.

§§ 1908 - 1917. Various provisions in re res judicata. No hearsay problems. No change.

Public Records (§ 1893, second clause, § 1901 (as amended 1957), § 1905, § 1906, § 1907, § 1918, § 1919, § 1921, § 1922, § 1923, § 1924.)

COMMENT: All of these sections deal with proof of official records by certified copy, In my opinion they are all superseded by 63 (17), 64 and 68. I recommend therefore that all of these sections be repealed.

§§ 1919a - 1919b.

COMMENT: These sections set up an elaborate system for proof by certified copy of the contents of church records. Rule 63 (17) does not seem to apply because church records are not "official" records and 63 (17) applies to proof by certified copy only of

official records.

I think, therefore, that 1919a and b gives us a means of proof not supplied by the URE and that these sections should be retained by adopting my proposed new exception to 63. See under §§ 1848 - 1849.

> § 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."

> § 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."

COMMENT: Whether these should be repealed or modified and if the latter, how modified, depends upon the as yet unresolved question of what will be our Exceptions (15) and (16) in our Hearsay Bill.

> § 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."

COMMENT: A "photographic copy" described in § 1920a would under 63 (17) and 1 (13) be "a writing purporting to be a copy of an official record." Rules 1 (13), 63 (17), 64 and 68 therefore seem to supersede § 1920a and it should be repealed.

§ 1920b. "A print, whether enlarged or not, from any photographic film, including any photographic plate, microphotographic film, or photostatic negative, of any original record, document, instrument, plan, book or paper may be used in all instances that the original record, document, instrument, plan, book or paper might have been used, and shall have the full force and effect of said original for all purposes; provided, that at the time of the taking of said photographic film, microphotographic, photostatic or similar reproduction, the person or officer under whose direction and control the same was taken, attached thereto, or to the sealed container in which the same was placed and has been kept, or incorporated in said photographic film, microphotographic photostatic or similar reproduction, a certification complying with the provisions of Section 1923 of this code and stating the date on which, and the fact that, the same was so taken under his direction and control.

COMMENT: This is much broader than 63 (17). That does cover certified photographic copies (see above under § 1920a) but only such copies of official records. § 1920b, however, extends to certified photographic copies of any record, document or paper. I find no similar extension in any of the URE provisions. As I read § 1920b it operates to equate the photographic copy therein specified with the original for all purposes, i.e., for purposes of the hearsay rule and also for purposes of the Best Evidence Rule.

CONCLUSION: § 1920b is a highly desirable provision, not incorporated in any of the URE provisions. It should be retained intact and would be so retained under the new exception to Rule 63 proposed under §§ 1848 - 1849.

§ 1925. Certain certificates prima facie evidence of title. No change.

§ 1927. Certain statements in certain patents prima facie evidence of truth thereof.

A special hearsay exception possibly not covered by URE. Recommendation: retain by adopting new exception to 63. See discussion under §§ 1848 -1849.

§ 1928. Sheriff's deed prima facie evidence property conveyed to grantee.

Doubt whether URE 63 (19) covers this. Recommendation: retain by adopting new exception to 63. See discussion under §§ 1848 - 1849.

§§ 1928.1 - 1928.4. These sections make admissible certain federal records or certified copies thereof respecting the status of certain persons as dead, alive, prisoner of war, interned, etc.

COMMENT: These sections would probably be rendered unnecessary if 63 (15) (c) as originally drafted and 63 (17) were adopted. But we don't know yet what our version of 63 (15) will be and therefore cannot say at this point what, if any, effect it will have on these sections.

§ 1929. "Private writings are either:

1. Sealed; or,
2. Unsealed."

§ 1930. "A seal is a particular sign, made to attest, in the most formal manner, the execution

of an instrument."

§ 1931. "A public seal in this State is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon the paper, or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by the scroll of a pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign, made in a sister state or foreign country, and there recognized as a seal, must be so regarded in this State."

COMMENT: 63 (17) incorporates the conditions stated in 68. 68 (c) contains references to the "seal" of a court and to the "seal" of an office. The URE contain no definition of "seal." The definitions of §§ 1929 - 1931 seem to define the term in the sense in which the URE use it. These sections should, therefore, be retained.

§ 1932. "There shall be no difference hereafter, in this State, between sealed and unsealed writings. A writing under seal may therefore be changed, or altogether discharged by a writing not under seal."

COMMENT: No change.

§ 1933. "The execution of an instrument is the subscribing and delivering it, with or without affixing a seal."

COMMENT: 63 (19) refers to the "execution and delivery" [italics added] of certain instruments. Under the § 1933 definition of "execution" the expression in 63 (19) is redundant. This seems

harmless to me. If anything is to be done about it, the best solution would seem to be to strike "and delivery" from 63 (19) rather than amending § 1933.

> § 1934. "An agreement, in writing, without a seal, for the compromise or settlement of a debt, is as obligatory as if a seal were affixed."

COMMENT: No change.

> § 1935. "A subscribing witness is one who sees a writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness."

COMMENT: No change.

> § 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."

COMMENT: What amendment, if any, is required here depends on what finally becomes of 63 (30) and (31).

> § 1937. "The original writing must be produced and proved, except as provided in Sections 1855 and 1919. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or by a recital of its contents in some authentic document, or by the recollection of a witness, as provided in Section 1855."

COMMENT: ". . . its contents may be proved by a copy . . ." The "copy" referred to in this italicized quote from § 1937

would be hearsay under Rule 63. 63 (17) would make such copy admissible only if the original was an official record. 63 (1) would make such copy admissible only if made by a witness. The underscored provision may admit such copy under other circumstances and may therefore be broader than the URE. To determine whether this is so would require investigation of decisions interpreting the underscored provision. However, it seems most unlikely that such investigation would reveal that the provision is in any way narrower than the URE. Assuming therefore that our Hearsay Bill contains the exception continuing in force any other law making any hearsay admissible, (proposed above under §§ 1848 - 1849) there would be no inconsistency between § 1937 and our Bill and the § 1937 should be left intact.

My analysis and conclusion in re the provision of § 1937 authorizing proof of the terms of a writing "by a recital of its contents in some authentic document" are similar to the analysis and conclusion stated in the preceding paragraph.

> § 1938. "If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party."

COMMENT: What is said above under § 1937 is applicable here insofar as this section provides for proof "as in case of its loss." I recommend, therefore, that § 1938, like § 1937, remain intact.

§ 1939. "Though a writing called for by one party is produced by the other, and is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the case."

COMMENT: No change.

§ 1940. "Any writing may be proved either:

1. By anyone who saw the writing executed; or,
2. By evidence of the genuineness of the handwriting of the maker; or,
3. By a subscribing witness."

§ 1941. "If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence."

§ 1942. "Where, however, evidence is given that the party against whom the writing is offered has at any time admitted its execution no other evidence of the execution need be given, when the instrument is one mentioned in Section 1945, or one produced from the custody of the adverse party, and has been acted upon by him as genuine."

§ 1943. "The handwriting of a person may be proved by anyone who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting."

§ 1944. "Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered or proved to be genuine to the satisfaction of the judge."

§ 1945. "Where a writing is more than thirty years old, the comparisons may be made with writings purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact."

COMMENT: These sections deal with authentication which is the subject of URE 67. I do not think that 67 would be included in our Hearsay Bill. Therefore, I think §§ 1940-1945 should remain intact.

> § 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."

COMMENT: § 1946 (1) is superseded by 63 (10) and should be repealed. § 1946 (2) is superseded by 63 (13) and should be repealed. Query as to § 1946 (3). What will be the relation between it and our version of 63 (16)?

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

COMMENT: Superseded by 63 (13). Repeal.

> § 1948. "Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of such acknowledgement or proof is prima facie evidence of the execution of the writing, in the same manner as if it were a conveyance of real property."

> § 1950. "The record of a conveyance of real property

or any other record, a transcript of which is admissible in evidence, must not be removed from the office where it is kept, except upon the order of a court, in cases where the inspection of the record is shown to be essential to the just determination of the cause or proceeding pending, or where the court is held in the same building with such office."

§ 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.

COMMENT: For purpose of comment I consider these §§ in inverse order.

First compare § 1951 with 63 (17) (a) and (19) which reads as follows:

(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,..."

(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 statute authorized such a document to be recorded in that office;"

Comparison reveals that whereas § 1951 deals with the admissibility of (1) the original instrument itself, and (2)

the original record of the instrument, and (3) a certified copy of the record, 63 (19) deals only with the original record (i.e., item (2) above) and (17) (a) deals only with a certified copy of the record (i.e., item (3) above). I find nothing in the URE covering item (1) above.

Comparison reveals further that whereas 63 (19) and 63 (17)(a) are subject to Rule 64, there is no comparable notice requirement in § 1951. A further point by way of comparison is that whereas § 1951 (probably) refers only to in-state records, 63 (19) clearly refers to both in-state and out-of-state records.

Turning now to § 1950 and comparing it with 63 (19) I find that § 1950 imposes restrictions upon the use of the record not found in 63 (19).

Turning finally to § 1948, I find nothing in the URE covering the matters provided for in this section.

I think it would be unwise to repeal §§ 1948 - 1951, for this would do away with the provisions therein contained for admitting the original instrument without supplying any URE substitute and would likewise do away with the provision (§ 1950) safeguarding use of the original record without supplying any URE substitute. On the other hand if we leave §§ 1950 - 1951 as is and also enact 63 (17) (a) and (19) there will be an overlap as respects admission of the record or copy of the record and as to this overlap (17) (a) and (19) will be subject to 64 whereas § 1951 will not be so subject and § 1950 will contain restrictions as to the use of the original record not appearing in 63 (19).

It seems to me that the best way to correlate §§ 1948 - 1951 with (17) (a) and (19) is as follows: First, amend §§ 1948 and 1951 to make all proof stated therein subject to Rule 64. (It seems to me that the notice requirement of 64 is, in reason, so applicable.) Second, amend 63 (19) to make it applicable only to out-of-state records. Otherwise make no changes in either §§ 1948 - 1951 or in (17) (a) and (19).

These proposals would keep intact our present system in re in-state records, except for the incorporation of the notice feature of Rule 64 and would give us a new provision (63 (19)) in re out-of-state records. At the same time these proposals would make (17) (a) and §§ 1948 and 1951 consistent to the extent that they overlap. ((17) (a) is, of course, much broader than these two sections insofar as certified copies are concerned in that it covers all such copies of all public records; the sections are more narrow in scope.)

§ 1952. Authorizes order for destruction of exhibits and depositions.

COMMENT: No change.

§§ 1953 - 1953.06. Provide for application in any action or proceeding to substitute copy or order reciting contents of any part of record of the action or proceeding destroyed by fire or calamity.

COMMENT: No change.

§§ 1953e - 1953h. Uniform Business Records as Evidence Act.

COMMENT: Superseded by 63 (13). Repeal.

§§ 1953i - 1953k. The Uniform Photographic Copies of Business and Public Records as Evidence Act.

COMMENT: This Act provides for photographic proof of a writing only when the writing itself would be admissible ("reproduction, when satisfactorily identified, is as admissible in evidence as the original itself.") The Act itself does not, therefore, create any exception to the Hearsay Rule (except that conceivably "satisfactorily identified" may involve hearsay.)

These sections should be left intact. That they are compatible with the URE hearsay provisions is suggested by the fact that URE Rule 72 is the substance of the Uniform Act.

§ 1954. Admissibility of Real Evidence.

COMMENT: No change.

§§ 1957 - 1962. Various provisions in re inferences and presumptions.

COMMENT: No change.

§ 1963. The 40 statutory disputable presumptions.

COMMENT: I find no hearsay problems here. No change.

§ 1967. Indispensable evidence defined.

COMMENT: No change.

§ 1968. Proof requisite for perjury.

COMMENT: No change.

§§ 1971 - 1974. Statute of Frauds.

COMMENT: No change.

§§ 1980.1 - 1980.7. Uniform Act on Blood Tests to Determine Paternity.

COMMENT: No change.

§§ 1981 - 1983. Various provisions in re Burden of Proof.

COMMENT: No change.

§§ 1985 - 1997. Various provisions in re subpoenas.

COMMENT: No change.

§§ 2002 - 2006. Affidavit, Deposition, Oral Examination defined.

COMMENT: No change.

§§ 2009 - 2015. Use of Affidavits.

COMMENT: No change. Continued in force by our 63 (2).

§§ 2016 - 2035. The 1957 Discovery Act.

COMMENT: Query: Should § 2016 (d) be amended to make cross reference to our 63 (3?) ?

Query also: Should 63 (7) be amended to make it subject to § 2033 (b)?

§§ 2042 - 2047. Order of proof; excluding witness while another witness is testifying; direct and cross-examination defined; leading questions.

COMMENT: No change.

> § 2047. "A witness is allowed to refresh 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 the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon 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."

COMMENT: The second sentence is superseded by our 63 (1). Repeal.

§ 2048. Scope of cross-examination.

COMMENT: No change.

> § 2049. "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by

other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in Section 2052."

COMMENT: We want to make sure that the substantive evidence provision of our 63 (1) is given effect. Therefore, it would be well to amend § 2049 by inserting the following after the word "show:" "both as impeaching the witness and as substantive evidence of the facts recited."

§ 2050. Re-examination of witness.

COMMENT: No change.

§ 2051. Various methods of impeaching a witness.

COMMENT: No change.

§ 2052. "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

COMMENT: For reasons stated under § 2049, suggest adding before first semi-colon: "and such statements shall be received as substance evidence."

§ 2053. Evidence of good character.

COMMENT: No change.

§ 2054. Inspection of writings.

COMMENT: No change.

§ 2055. Calling adversary as if under cross-examination.

COMMENT: No change.

§ 2056. Non-responsive answers.

COMMENT: No change.

§ 2061. Instructing jury on effect of evidence.

COMMENT: No change.

§§ 2064 - 2070. Rights and Duties of Witnesses.

COMMENT: No change.

§§ 2074 - 2079. Evidence in particular cases.

COMMENT: No change.

§§ 2093 - 2097. Administration of Oaths and Affirmations.

COMMENT: No change.

§ 2101. "All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this Code."

§ 2102. "All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes

and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this Code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it."

COMMENT: Whether we change § 2102 depends upon what, if anything, is done with my proposed amendment to URE Rule 8.

§ 2103. Code provisions re evidence in jury trials apply to trial by court or referee.

COMMENT: No change.

Respectfully submitted,

Professor James H. Chadbourn