#34(L)

Memorandum 63-40

Subject: Study No. 34(L) - URE (Rules 67-72, Authentication and Content of Writings)

You will receive with this memorandum a tentative recommendati- relating to the URE article on authentication and content of writings. We have revised the rules in accordance with the instructions of the Commission as far as Rule 70, subdivision (1)(b). We have made further revisions based upon our own consideration of the consultant's recommendations, the studies and the actions of other groups, such as the New Jersey Supreme Court Committee on Evidence. The Commission has considered the rules only as far as subdivision (1)(b) of Rule 70. The following matte should be considered by the Commission:

Rule 68.

Rule 68 has been revised in accordance with the directions of the Commission. There are, however, a few departures from the directions of the Commission, and the language as altered has not been approved.

The rule has been tabulated for easier reading. In subdivision (4) the words "or certified" have been included although the Commission did not include the words when it considered the matter. They have been included because the cross-reference to subdivision (3) does not make much sense without them. In any event the words in both subdivisions (3) and (4) seem superfluous. Certification is not some obscure procedure known only to

California law. It is merely a word used by Code of Civil Procedure Section 1923 to describe a statement that a copy is a true copy of the original, which statement is signed by the custodian under the seal of his office if he has such a seal. On the other hand, attestation is no more than an affirmation of the genuineness of the attested document signed by the attesting officer. Thus, the words mean precisely the same thing except that the word "certify" requires the affixation of a seal if the officer has one. As the word "attested" is used in both subdivisions (3) and (4) the need for the seal--even though the officer has one--has been eliminated. Since the need for the seal has been eliminated there doesn't seem to be much reason for retaining the reference to certification.

The Commission asked the staff to add the following paragraph to the rule:

> The authority of the officer, his custody of the record, and the genuineness of his signature and the seal of his office, shall be established prima facie by (a) the signature of a person purporting to be that of the officer and (b) the affixation of a seal purporting to be the seal of his office.

So far as the principal provisions of subdivisions (3) and (4) are concerned, the paragraph seems superfluous. (3) and (4) do not require the attesting or certifying person to be proved to be the authorized officer having custody of the record, they merely require that his signature purport to be such. So far as these provisions are concerned, the suggested paragraph seems redundant. The paragraph does have application, however, to the certificate

made by a secretary of an embassy or legation or other foreign service officer. Accordingly, we revised the language so that it applies only to the certificate and makes clear that the certificate, too, proves itself.

Rule 70.

Subdivision (1)(c). The revised language of subdivision (c) is based on the recommendation of Professor Chadbourn. See the Study at the bottom of page 13.

Present California law (C.C.P. § 1938) does not require the notice to produce where the writing is itself a notice or where it has been wrongfully obtained or withheld by the adverse party. The consultant recommends against both of these exceptions and the revised rule has followed the recommendation of the consultant. See the Study at page 14. Should either or both of these exceptions be included in the revised rule?

Subdivision (1)(c) requires both pretrial notice and at trial request. Under existing California law neither of these requirements is applicable to documents in the possession of a defendant in a criminal action. So far as documents in the possession of a defendant are concerned, secondary evidence of the content of the document is admissible upon a prima facie showing that the defendant has the document. If the defendant objects to the secondary evidence on the basis of the Best Evidence Rule it is then proper for the prosecution to request the defendant to produce the document. See the Study at page 14. Professor Chadbourn has recommended that the existing law in this regard be

retained by adding the following subdivision:

> In a criminal action that sufficient evidence has been introduced to warrant a finding that the document is in the possession of the accused or his attorney.

The prejudicial effect of requesting the defendant to produce a document at the trial is obvious. It is similar to that caused by calling the defendant as a witness--as was done in People v. Talle, 111 Cal. App.2d 650(1952). Nonetheless, the staff can see little reason to deprive the defendant of the pretrial notice. The pretrial notice need not require the defendant to produce the document, it can be used merely as a condition precedent to the introduction by the prosecution of secondary evidence of the content of the document. The staff has added subdivision (h) to the revised rule to accomplish this purpose.

Subdivision (d). The consultant reports that the "collateral document" exception was repudiated in an 1858 California case and the issue has not been raised in the appellate decisions since. A reading of that case, Poole v. Gerrard, 9 Cal. 593 (1858), indicates that the argument was made that the document in question was collateral to the issues, but the decision of the court indicates that the document in question was rather closely connected with the issues. The court said (at page 595), "the contents of the written contract between the plaintiffs were most material to the main issue in the case, and these contents could only be known from the writing." Hence, the authority of this case for the proposition that secondary evidence cannot be used when the terms of the writing are not the subject of any important issue in the

case is subject to question.

In any event, there appears to have been no recognition of the doctrine prior to this time. The policy question, therefore, is whether express recognition of the exception should be included in Rule 70. See the discussion on page 15 of the Study.

Subdivisions (e) and (f). The staff has revised subdivision (e) of the URE rule so that it now appears as subdivisions (e) and (f) of the revised rule. This revision was made because the provisions of the existing law--found in Code of Civil Procedure Section 1855, subdivisions (3) and (4)--seem broader than the provisions of the URE. The broader provisions of the existing law have been included in revised subdivisions (e) and (f). See the explanation in the comment to the rule.

Subdivision (g). Existing law--Code of Civil Procedure Section 1855, subdivision (5)--has an exception for numerous documents. Subdivision (g) is based on the provisions of existing law. There is no comparable provision in the URE. Should this subdivision be added to Rule 70? The Committee that considered the URE in Utah added a similar exception to its version of Rule 70. The New Jersey version of Rule 70, in subdivision (1)(g), also has a similar exception.

The Admissions Exception. In many states an exception to the Best Evidence Rule exists when the secondary evidence being offered is is an admission of the adverse party. Professor Chadbourn indicates that the scant authority that does exist in this State

rejects the exception. He does not recommend its inclusion in the URE. New Jersey's version of this rule includes the exception. See subdivision (1)(h) of the New Jersey Rule 70. Should such an exception be created by the addition of a similar subdivision to Rule 70?

Subdivisions (2) and (3). Rule 70 does not recognize a Next Best Evidence Rule when an exception exists to the Best Evidence Rule. The final paragraph of Code of Civil Procedure Section 1855 does recognize a Next Best Evidence Rule insofar as official records and documents are concerned. Section 1855 also provides that in other cases "either a copy or oral evidence of the contents" is admissible. Despite the language of this section, there are cases in California which hold that a copy must be produced in preference to oral testimony if a copy is available. These cases have not considered the implications of Section 1855. See the Study at pages 17-19. Professor Chadbourn recommends against a general adoption of the Next Best Evidence Rule. For the New Jersey version of the Next Best Evidence Rule see subdivision (2) of New Jersey Rule 70. Professor Chadbourn does recommend, however, that the Next Best Evidence Rule be applied to documents and records in official custody. Subdivisions (2) and (3) of the revised rule carry out these recommendations.

The comment on subdivision (3) gives the reasons usually given for the rejection of the Next Best Evidence Rule. See 4 Wigmore (3d ed. 1940) 530-532. A private document usually does not reveal whether any copies of the document are extant. Hence,

it is a hardship upon the proponent of the evidence to force him to account for all copies before he can introduce oral testimony. Similar considerations do not apply to documents in public custody. Certified copies of those are readily available and hence can be required. That is the reason those jurisdictions rejecting the Next Best Evidence Rule generally insist upon it insofar as documents in public custody are concerned. See 4 Wigmore at 535.

Wigmore suggests a compromise solution:

> Let the proponent of recollection-testimony be required, before using it, to show that he has not within in his control copies; if he has not, then he may offer recollection-testimony; and the opponent may then, if there is any real dispute on his part as to the contents, put in a copy if one is available. This rule procures the benefit of a copy without putting an undue burden upon the proponent; for if a copy is available at all, elsewhere than in the proponents own control, it is fitter that the opponent should have the risk and the trouble of procuring it.
>
> The rule then, briefly, would be: The party offering to prove the contents of an unavailable original document, must offer a copy, if he has one in his control, in preference to recollection-testimony. [4 Wigmore 532.]

Should the rule as revised be approved, should the Next Best Evidence Rule be adopted generally, or should the Wigmore compromise be adopted?

Subdivision (4). This subdivision is designed to meet a problem that apparently has not arisen in the appellate decisions in California. Does the Commission approve of this subdivision? See the discussion in the Study at pages 19 and 20.

Rule 71.

Rule 71 is apparently declarative of existing law as contained in Section 1940 of the Code of Civil Procedure. The

rule has been revised to substitute the use of the term "subscribing witness" for the term "attester". The revision has been made because the term "subscribing witness" is defined in existing law--Section 1935 of the Code of Civil Procedure--while the word "attester" is undefined in existing law.

Rule 72.

Rule 72 states the substance of the Uniform Photographic Copies of Business and Public Records as Evidence Act. For comparison, the existing California version of the Uniform Act is quoted in the portion of the tentative recommendation dealing with amendments and repeals of existing statutes.

Amendments and Repeals of Existing Statutes.

The tentative recommendation suggests the repeal and amendment of several existing code sections relating to topics covered in Rules 67 through 72. A number of statutes relating to the same subject matter are not mentioned because the staff concluded that no adjustment or repeal is required. The Commission should consider not only the amendments and repeals suggested in the tentative recommendation but also whether any other adjustments and repeals are desirable. Set forth below are a number of statutes that relate to the topics covered in Rules 67-72 and which are not mentioned in the tentative recommendation.

C.C.P. §§ 1919a and 1919b. These sections are long and are not quoted here. They set forth a procedure for the authentication of church records. As no special procedure is provided in the URE,

these sections should be retained.

C.C.P. § 1927.5 provides:

> Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this State, derived from the Spanish or Mexican Governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-6, are receivable as prima facie evidence in all the courts of this State with like force and effect as the originals and without proving the execution of such originals.

There are a number of sections of this sort in the codes providing special exceptions to the Best Evidence Rule. No effort has been made to collect them. Their effect will continue because Rule 70 provides that the Best Evidence Rule applies "except as otherwise provided by statute." Therefore, this section and any other sections giving copies the effect of originals should not be modified.

C.C.P. § 1928.3 provides

> For the purposes of this article any finding, report, or record, or duly certified copy thereof, purporting to have been signed by an officer or employee of the United States described in this article shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing such report or record shall prima facie be deemed to have acted within the scope of his authroity. If a copy purports to have been certified by a person authorized by law to certify it, such certified copy shall be prima facie evidence of his authority so to certify.

There are a number of sections similar to this scattered through the codes relating to the authentication of particular records or documents. No search has been made for such similar sections. There seems to be no reason to modify these special provisions or to repeal them. In some cases Rule 68 will supersede

the sections and in other cases it will not. Their effect will continue by virtue of the provisions of Rule 67 which provides that "authentication may be by any evidence sufficient to sustain a finding of its authenticity or by any other means provided by law."

C.C.P. §§ 1940-1945. The text of these sections appears on pages 22 and 23 of the Study. Professor Chadbourn points out that Rule 67 makes these code sections superfluous. He indicates, however, that it may be desirable to have on the books "statutory specifics which apply the general proposition of Rule 67, second sentence, as do the foregoing sections." He recommends the retention of these sections.

C.C.P. § 1947 provides:

> COPIES OF ENTRIES ALSO ALLOWED. 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.

In our hearsay recommendation we said that this section relates to both hearsay and the Best Evidence Rule. "Insofar as it relates to hearsay, it is superseded by the business records exception contained in Rule 63(13). The ultimate disposition of this section will be indicated in the Commission's recommendation on Rule 70--the URE Best Evidence Rule."

The rule provides a special exception to the Best Evidence Rule and its provisions are continued in effect by the words "except as otherwise provided by statute" that have been inserted in Rule 70. Since the rule will not be superseded by Rule 70, we recommend its retention.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Meeting

STATE OF CALIFORNIA

C A L I F O R N I A L A W
R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION AND A STUDY

relating to

The Uniform Rules of Evidence

Article IX. Authentication and Content of Writings

March 1964

California Law Revision Commission
School of Law
Stanford University
Stanford, California

LETTER OF TRANSMITTAL

To His Excellency Edmund G. Brown
Governor of California
and to the Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits a preliminary report containing its tentative recommendation concerning Article IX (Authentication and Content of Writings) of the Uniform Rules of Evidence and the research study relating thereto prepared by its research consultant, Professor James H. Chadbourn, formerly of the U.C.L.A. Law School, now of the Harvard Law School. Only the tentative recommendation (as distinguished from the research study) expresses the views of the Commission.

This report is one in a series of reports being prepared by the Commission on the Uniform Rules of Evidence, each report covering a different article of the Uniform Rules.

In preparing this report the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence.

This preliminary report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

Respectfully submitted,

HERMAN F. SELVIN
Chairman

January 1964

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE UNIFORM RULES OF EVIDENCE

Article IX. Authentication and Content of Writings

BACKGROUND

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 Commission on Article IX of the Uniform Rules of Evidence, consisting of Rules 67 through 72 relating to authentication and content of writings, is set forth herein.

Article IX of the URE contains a group of rules that deal with certain problems that arise when evidence is sought to be introduced in the form of writings.[2] Rules 67 through 69 are concerned with authentication of writings, Rule 70 provides when the contents of a document may be shown by evidence other than the original, Rule 71 is concerned with the proof of attested writings, and Rule 72 states the circumstances under which photographic copies of business and public records may be admitted in evidence.

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[1] A 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 30 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

[2] URE Rule 1 defines "writing" to mean "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."

This article of the URE gathers a number of rules relating to documentary evidence that are found in several places in the California codes. The existing code sections do not reflect many exceptions and qualifications of these rules that have been developed in the cases. In some instances, the code sections impose procedures that are cumbersome and out of harmony with modern conditions.

The Commission, therefore, tentatively recommends that URE Article IX, revised as hereinafter indicated, be enacted as the law in California.[3]

REVISION OF URE ARTICLE IX

In the material which follows, the text of each rule proposed by the Commissioners on Uniform State Laws is set forth and the amendments tentatively recommended by the Commission are shown in strikeout and italics. Each rule is followed by a comment setting forth the major considerations that influenced the recommendation of the Commission and explaining those revisions that are not purely formal or otherwise self-explanatory.

For a detailed analysis of the various rules and the California law relating to authentication and content of writings, see the research study beginning on page 000. This study was prepared by the Commission's research consultant, Professor James H. Chadbourn, formerly of the U.C.L.A. Law School, now of the Harvard Law School.

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

RULE 67. AUTHENTICATION REQUIRED [~~:--ANCIENT-DOCUMENTS~~]

Authentication of the original or a copy of a writing is required before it or secondary evidence of its content may be received in evidence. Authentication may be by evidence sufficient to sustain a finding of its authenticity or by any other means provided by law. [~~If-the-judge-finds that-a-writing-(a)-is-at-least-thirty-years-old-at-the-time-it-is-offered, and-(b)-is-in-such-condition-as-to-create-no-suspicion-concerning-its authenticity,-and-(c)-at-the-time-of-its-discovery-was-in-a-place-in-which such-document,-if-authentic,-would-be-likely-to-be-found,-it-is-sufficiently authenticated.~~]

A contention by the opponent that the writing is not authentic is not an issue of fact for determination by the judge, nor is a finding by the judge that the writing is admissible to be deemed a finding that the writing is authentic. Evidence offered by the opponent that the writing is not authentic is to be submitted solely to the trier of fact, which shall determine the issue.

COMMENT

Purpose and effect of authentication. Before any tangible object may be admitted into evidence, the party seeking to introduce the object must make a preliminary showing that the object is in some way relevant to the issues to be decided in the action. When the object sought to be introduced is a writing, this preliminary showing always entails some proof that the writing is genuine--that is, it is the document that the proponent claims it is; hence, the showing is usually referred to as "authentication" of the writing. When the showing has been made, the judge may admit the writing into evidence for consideration by the trier of fact.

But, the fact that the judge permits the admission of the evidence does not necessarily establish the authenticity of the writing. All that the judge has determined is that there has been a sufficient showing of the authenticity of the writing to permit the trier of fact to find that it is authentic; and, if the trier of fact does not believe the evidence of authenticity, it may find that the document is not authentic despite the fact that the judge has determined that it was "authenticated." See 7 Wigmore, Evidence (3d ed. 1940) 564-581.

Rules 67 through 69 set forth the rules governing this process of authentication. When a document has been authenticated within the meaning of these rules, it may be admitted into evidence. The effect of such evidence when introduced is determined by other rules of law. In some cases, the law creates a presumption of authenticity for certain documents authenticated in a particular manner. See, for example, subdivision 34 of Code of Civil Procedure Section 1963. That is, the trier of fact is required to find the document is authentic unless a contrary showing is made. But this presumptive effect is created by other rules of law, not the rules relating to authentication. These rules are concerned only with the showing that must be made as a foundation for the admission of a writing into evidence.

Rule 67--first paragraph. The first paragraph of Revised Rule 67 states the general rule that a showing of the authenticity of a document, either by evidence sufficient to sustain a finding of authenticity or by any other means sactioned by law, is required before the document may be received in evidence. Although the rule stated in this paragraph is well settled there is no explicit statement of it in the existing California statutes.

The words "the original or a copy of" have been added to make clear that the "writing" referred to may be either an original or a copy. The addition of the words "or secondary evidence of its content" require that a writing be authenticated even when it is not offered in evidence but is sought to be proved by a copy or by testimony as to its content under the circumstances permitted by Rule 70. Under this rule, if a person offers in evidence a copy of a writing, he must make a sufficient foundational showing of the genuineness of both the original and the copy.

In some instances, however, authentication of a copy will provide the necessary evidence to authenticate the original document at the same time. For example: If a copy of a recorded deed is offered in evidence, Revised Rule 67 requires that the copy be authenticated--proved to be a copy of the official record. It also requires that the official record be authenticated--proved to be the official record--because the official record is a writing of which secondary evidence as to its content is being offered. Finally, Revised Rule 67 requires the original deed itself to be authenticated--proved to have been executed by its purported maker--for it, too, is a writing of which secondary evidence as to its content is being offered. The copy offered in evidence may be authenticated by the attestation or certification of the official custodian of the record under Revised Rule 68. Under Revised Rule 63(17),[4] the authenticated copy

[4]Rule 63(17) as revised by the Commission provides:

> 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:
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> * * * * * * * * *
>
> (17)(a) If meeting the requirements of authentication under Rule 68, to prove the content of a writing in the custody of a public officer or employee, a writing purporting to be a copy thereof.
>
> (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 public officer or employee who is the official custodian of the records in that office reciting diligent search and failure to find such record.

is evidence of the content of the official record itself, and necessarily, therefore, it is evidence that there is an official record which is that being proved by the copy; thus, the authenticated copy supplies the necessary authenticating evidence for the official record. Under Revised Rule 63(19),[5] the official record is admissible hearsay evidence of the content of the original deed and of its execution by the person by whom it purports to have been executed; hence, the official record is the requisite authenticating evidence of the original deed. Thus, the duly certified or attested copy of the record meets the requirement of authentication for the copy itself, the official record and the original deed.

The third sentence of URE Rule 67 states the so-called "ancient documents rule." This rule provides one means by which writings may be authenticated. It has been removed from Revised Rule 67 and restated in Revised Rule 67.5 so that Revised Rule 67 will state merely the general requirement of authentication.

Rule 67--second paragraph. The second paragraph has been added to

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[5]Rule 63(19) as revised by the Commission provides:

> 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:
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> * * * * * * * * *
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> (19) 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) A statute authorized such a document to be recorded in that office.

Revised Rule 67 to indicate more precisely the functions of the judge and jury on questions of authentication. The judge's function is merely to determine whether there is sufficient evidence of authenticity to support a finding by the trier of fact that the writing is authentic. Contrary evidence--that the writing is not authentic--raises a conflict to be resolved by the trier of fact. The judge does not resolve the conflict on the preliminary question of admissibility.

RULE 67.5. AUTHENTICATION OF ANCIENT WRITINGS

A writing is sufficiently authenticated to be received in evidence if the judge finds that it:

(a) Is at least 30 years old at the time it is offered;

(b) Is in such condition as to create no suspicion concerning its authenticity; and

(c) Was, at the time of its discovery, in a place in which such writing, if authentic, would be likely to be found.

COMMENT

Revised Rule 67.5 consists of the third sentence of URE Rule 67 revised slightly for the purpose of stating its provisions as a separate rule.

The statement of the ancient documents rule in Revised Rule 67.5 is similar to the statement of the rule in subdivision 34 of Code of Civil Procedure Section 1963; but there are two major differences: First, the existing California statute requires a showing that the writing has been acted upon as genuine by persons with an interest in the matter. No similar requirement appears in the above rule. Second, the above rule requires that the appearance of the writing be such as to create no suspicion concerning its authenticity; and no similar requirement appears in the existing statute.

These differences reflect a difference in the basic nature of the rules. The ancient documents rule stated in Revised Rule 67.5 is a rule of authentication only. It merely provides the minimum showing that must be made before the document may be received in evidence and the trier of fact is permitted to find that it is genuine. The existing California statute, however, provides a presumption of genuinesness when the requisite showing has been

made. Under the California rule, the trier of fact is required--not merely permitted--to find that the writing is genuine when the matters specified in the statute have been shown unless credible evidence that is is not genuine is also introduced.

Although the requirement that the writing be acted upon as genuine is a reasonable requirement as a foundation for a presumption of genuineness, it is an unreasonably strict requirement to impose as a condition for admissiblity only. Many ancient writings are not dispositive in nature; hence, interested parties will neither have acted nor failed to act upon the writing as if it were genuine. In many instances, evidence will be lacking as to whether a writing has been acted upon as genuine. In such an instance, the writing should nonetheless be admitted if it is produced from the custody of those who would be likely to have the writing if it were genuine and its appearance gives rise to no suspicions concerning its authenticity. The opponent of the evidence is not precluded by the rule from showing that those concerned with the writing acted in a manner tending to indicate that it is not genuine, nor is he precluded from showing lack of genuineness in any other manner. But under the rule, the question is one for the trier of fact; it is not a question to be determined by the judge when he rules upon admissibility. As the Revised Rule 67.5 will permit evidence to be introduced of many ancient writings concerning the authenticity of which there is no real doubt, its approval is recommended.

RULE 68. AUTHENTICATION OF COPIES OF RECORDS

A writing purporting to be a copy of an official record, or of an entry therein, meets the requirement of authentication as a copy of such record or entry if [(a)] the judge finds that:

(1) The writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept; or

[(b)] (2) Evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry; or

[(c)] (3) The office in which the record is kept is within [this state] the United States or any state, territory, district or possession thereof and the writing is attested or certified 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)] (4) [If] The office in which the record is kept is not within the [state] United States or any state, territory, district or possession thereof and the writing is attested or certified as required in [clause] paragraph [(c)] (3) and is accompanied by a [certificate] statement declaring that [such] the person who attested or certified the writing as a correct copy is the officer, or a deputy of the officer, who 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] statement

may be made only 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. The genuineness of the statement shall be prima facie established by the signature of a person purporting to be an officer authorized by this rule to make the statement and the affixation of a seal purporting to be the seal of his office.

COMMENT

Under existing law, a copy of certain official records may be authenticated for the purpose of introduction into evidence by showing that it was published by official authority or by showing that certain requisite seals and signatures appear on the copy. The rules are complex and detailed and appear for the most part in Article 2 (beginning with Section 1892) of Chapter 3, Title 2, Part 4 of the Code of Civil Procedure.

Revised Rule 68 substitutes for these rules a uniform rule that can be applied to all official documents found within the United States and another applicable to all official documents found outside the United States.

The preliminary language has been revised to make clear that this rule sets forth the method of authenticating only the copy offered in evidence; this rule does not provide the procedure for authenticating the official record itself. Under Revised Rule 63(17),[6] however, the authenticated copy is evidence of the content of the official record, and

[6] See note 4 supra.

necessarily, therefore, is evidence that there is an official record and it is that being proved by the copy. Thus, authentication of the copy under Rule 68 supplies at the same time sufficient evidence to authenticate the official record as the official record. In some cases, the person may be seeking to prove not only that there is an official record that corresponds to the copy offered in evidence, but also that the official record was signed by certain persons or that the official record is a correct copy of another document signed by certain persons. In such instances, introduction of the authenticated copy of the official record may not supply the requisite authentication, for merely offering evidence that there is an official record and that it corresponds to the copy offered does not necessarily supply evidence that the official record is all that the proponent claims it is--a document signed by certain persons or a correct copy of another document signed by certain persons. In the case of a recorded deed, Rule 63(19)[7] makes the official record itself evidence of the content and due execution of the original deed; hence, no further evidence would be necessary to authenticate the original deed. But in the absence of some presumption, hearsay exception, or other rule of law giving the official record the effect of supplying the further authentication required, the proponent would be required to offer some further authenticating evidence.

Subdivision (1). Subdivision (1) provides that a writing purporting to be published by official authority is sufficiently authenticated. Under Section 1918 of the Code of Civil Procedure, the acts and proceedings of the executive and legislature of any state, the United States or a foreign government may be proved by documents and journals published by official authority. Subdivision (1) in effect makes applicable these provisions of Section 1918

[7]See note 5 supra.

to all classes of official documents. This extension of the means of proving official documents is recommended, for it will facilitate the proof of many official documents the authenticity of which is presumed (subdivision 35, Code of Civil Procedure Section 1963) and is seldom subject to question.

Subdivision (2). Subdivision (2) merely provides that a copy of an official record may be authenticated by the admission of evidence sufficient to sustain a finding that it is a correct copy. Under this subdivision, a copy made by anyone of an official record would be admissible if the copyist testified directly that it was a correct copy. The subdivision is thus but a special application of the second sentence of Rule 67. Existing statutes recognize the rule in some specific situations (see, for example, subdivision 1 of Code of Civil Procedure Section 1907). It is included in Rule 68 in order to make the provisions of the rule complete insofar as the authentication of copies of official records is concerned.

Subdivisions (3) and (4) generally. Subdivisions (3) and (4) set forth the rules for admitting attested or certified copies of official records. The URE provisions relating to documents found within the State require "attestation" by a person purporting to be the legal custodian. Documents found outside the State require such attestation and, in addition, a certificate attesting that the person attesting the copy is in fact the custodian of the original record. The word "attest" is seldom found in existing California statutes. A person who "attests" a document merely affirms it to be true or genuine by his signature. Existing California statutes require documents to be "certified". The term is defined in Section 1923 of the Code of Civil Procedure as a statement that the certified copy is a correct copy of the original signed by the certifying officer under his seal of office if he has one. Thus, the only difference between the words is that the statutory definition of "certified" requires the use of a seal if the authenticating officer has one while "attested"

does not. The rule has been revised to include the use of the statutorily defined word "certified" as it is the more familiar term in California practice.

Subdivision (3). In some respects, existing California procedures for authenticating copies of official documents are simpler than those recommended in the URE and in other respects they are more complex. Under existing law, copies of many records of the United States government and of the governments of sister states may be authenticated simply by the signature of the custodian under his official seal if any. For example, see Sections 1901, 1905 and 1918, subdivisions 1, 2, 3 and 9, of the Code of Civil Procedure, and Section 6600 of the Corporations Code. Under the URE, such copies would be required to be attested by the custodian, and that the attesting officer is the custodian would be required to be attested by the certificate of another officer. The existing procedures have worked well in practice and there appears to be no reason for introducing additional complexity into the California law in this regard. Therefore, under the revised rule, the simple provisions of subdivision (3)--which require merely attestation or certification by the custodian--have been made applicable to copies of all official records found within the United States or its possessions. The more complex procedures required by the URE for out-of-state documents have been limited to documents found in foreign countries.

Subdivision (4). Because subdivision (4) has been limited to foreign records, much of the language of the URE rule has been eliminated as superfluous. The procedure specified in the revised rule for authenticating a copy of a foreign document is generally simpler than the procedures available under existing statutes. Under existing statutes, it is usually necessary to obtain the certificate of the custodian, a certificate from

another official that the document has been certified by the legal custodian and, finally, a certificate from a foreign service officer of the United States. See, for example, subdivision 8 of Code of Civil Procedure Section 1918. Under the revised rule, the signature of the legal custodian is required and, in addition, the signature of a foreign service officer of the United States under the seal of his office. Revised Rule 68(4) will substitute one simplified procedure for authenticating foreign records for the complex procedures set forth in several long and complicated sections.

In one respect, the proposed authentication procedure will be somewhat more complex than that required by existing law. Under Section 1901 of the Code of Civil Procedure a copy of a public writing of any state or country may be authenticated by the attestation or certificate of the custodian under the state or national seal. See also subdivision 4 of Code of Civil Procedure Section 1918. The revised rule does not recognize the national seal of a foreign country as sufficient authentication unless the certificate of a United States foreign service officer is also obtained. However, the revision is desirable so that the authenticity of copies of foreign documents may be established by one reasonably simple and uniform procedure.

The last sentence of subdivision (4) has been added to clarify the URE rule. The policy underlying this rule and the existing statutes is that documents certified to be copies of official records should "prove themselves", that is, it should be unnecessary to call the custodian himself as a witness to give evidence as to the authenticity of the document and it should be unnecessary to call witnesses to establish the authority of the authenticating

officers. Subdivisions (3) and (4) express this policy by providing that a copy is authenticated by a signature purporting to be that of an authorized officer. The last sentence has been included to make clear that the required statement, too, will "prove itself." Of course, the opposing party may attack the authenticity of the statement or the copy itself by other evidence, and in such a case, the trier of fact must resolve the conflict in the evidence.

RULE 69. CERTIFICATE OF LACK OF RECORD

A writing admissible under [~~exception (17)(b)~~] paragraph (b) of subdivision (17) of Rule 63 is authenticated in the same manner as is provided in [~~clause (c) or (d)~~] subdivision (3) or (4) of Rule 68.

COMMENT

This rule provides that a writing executed by the legal custodian of the official records in a certain office, reciting diligent search and failure to find a particular record, may be authenticated in the manner provided in Rule 68. Under Rule 63(17) as revised by the Commission, the statement would be admissible as evidence of the absence of the record from that office as an exception to the hearsay rule.

Rule 69 is needed if there is to be a hearsay exception such as that provided in Rule 63(17)(b). See the comment to Rule 63(17) in the tentative recommendation of the Commission relating to hearsay evidence, pp. 329-30.

RULE 70. DOCUMENTARY ORIGINALS AS THE BEST EVIDENCE

(1) As tending to prove the content of a writing, no evidence other than the writing itself is admissible, except as otherwise provided [~~in these rules~~] by statute, unless the judge finds that:

(a) [~~that~~] The writing is lost or has been destroyed without fraudulent intent on the part of the proponent [~~,~~] ; or

(b) [~~that~~] The writing [~~is outside the reach of the court's process and not~~] was not reasonably procurable by the proponent by use of the court's process or by other available means [~~,~~] ; or

(c) [~~that the opponent,~~] At a time when the writing was under [~~his~~] the control [~~has been~~] of the opponent, the opponent was expressly or impliedly notified, [~~expressly or by implication from~~] by the pleadings or otherwise, that [~~it~~] the writing would be needed at the hearing, and on request at the hearing the opponent has failed to produce [~~it,~~] such writing; but in a criminal action or proceeding, the request at the hearing for the defendant to produce the writing may not be made in the presence of the jury; or

(d) [~~that~~] The writing is not closely related to the controlling issues and it would be inexpedient to require its production [~~,~~] ; or

(e) [~~that~~] The writing is [~~an official~~] a record or other writing in the custody of a public officer [~~,~~] ; or

(f) The writing has been [~~is a writing affecting property authorized to be recorded and actually~~] recorded in the public records [~~as described in Rule 63, exception (19),~~] and the record or an attested or a certified copy thereof is made evidence of the writing by statute; or

(g) The writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole, but the judge, in his discretion, may require that such accounts or other writings be produced for inspection by the adverse party.

(2) (a) Subject to paragraphs (b) and (c), [~~If~~] if the judge makes one of the findings specified in [~~the preceding paragraph~~] subdivision (1), oral or written secondary evidence of the content of the writing is admissible.

(b) If the writing is one described in paragraph (a), (b), (c), or (d) of subdivision (1), oral testimony of the content of the writing is inadmissible unless the judge finds either (i) that the proponent does not have in his possession or under his control a copy of the writing or (ii) that the writing is also one described by paragraph (g) of subdivision (1).

(c) If the writing is one described in paragraph (e) or (f) of subdivision (1), oral testimony of the content of the writing is inadmissible unless the judge finds either (i), that the proponent does not have in his possession a copy of the writing and could not in the exercise of reasonable diligence have obtained a copy or (ii) that the writing is also one described by paragraph (g) of subdivision (1).

(3) [~~Evidence offered~~] A contention by the opponent [~~tending to prove~~] (a) that the asserted writing never existed, or (b) that [a] another writing produced at the trial is the asserted writing, or (c) that the secondary evidence does not correctly reflect the content of the asserted writing[s], is [~~irrelevant and inadmissible upon the question of admissibility of the secondary evidence but is relevant and admissible upon the issues of the existence and content of the asserted writing to be determined by the trier of fact.~~] not an issue of fact for determination by the judge under subdivision (1) of this rule, nor is a finding by the judge that secondary evidence is admissible to be deemed a finding as to any one of these issues of fact. Evidence relevant to such an issue is to be submitted at the hearing solely to the trier of fact, which shall determine the issue.

COMMENT

This rule states the "best evidence rule" which is found in existing California law in Sections 1855, 1937 and 1938 of the Code of Civil Procedure. The rule is that, unless certain exceptional conditions exist,

the content of a writing must be proved by the original writing and not by testimony as to its content or a copy of the writing. The rule is designed to minimize the possibilities for misinterpretation of documents by requiring the production of the documents themselves if available.

The URE statement of the best evidence rule is an improvement over the existing statutory treatment of the rule, for the rule is now stated in several scattered sections.

The rule has been revised so that its rule applies "except as otherwise provided by statute." Several statutes, such as Sections 1920b and 1947 of the Code of Civil Procedure, make copies of particular records admissible to the same extent as the originals would be; the revision makes clear that these statutes will have continued validity.

Subdivision (1)(a). Subdivision (1)(a) states an exception to the best evidence rule now found in Section 1855 of the Code of Civil Procedure. Subdivision (1)(a) requires that the loss or destruction of the writing have been without fraudulent intent on the part of the proponent of the evidence. Although no similar requirement appears in Section 1855, the cases construing this section have nonetheless imposed the requirement. Bagley v. McMickle, 9 Cal. 430, 446 (1858). Hence, subdivision (1)(a) is declarative of existing law.

Subdivision (1)(b). The exception stated in subdivision (1)(b) is not stated in the existing California statutes. However, documents not subject to production through use of the court's process have been treated as "lost" documents and secondary evidence has been admitted under the provisions of subdivision 1 of Section 1855. See cases collected in Study, p. 13, note 9. Because such documents have been treated as lost, the cases have admitted secondary evidence even when the original has been procurable by the proponent of the evidence. See Study, p. 13, notes 10 and 11. Subdivision (1)(b) will change the rule of these cases and will make

secondary evidence inadmissible if the proponent has any reasonable means available to procure the document, even though it is beyond the reach of the court's process. The subdivision has been revised to make clear that the exception applies when the document cannot be produced by the use of process even though the document may not be "outside the reach" of such process--as, for example, when the document is protected by a privilege.

Subdivision (1)(c). Subdivision (1)(c) states an exception now found in subdivision 2 of Section 1855 and Section 1938 of the Code of Civil Procedure. Under existing law, notice to produce the writing is unnecessary where the writing is itself a notice or where it has been wrongfully obtained or withheld by the adverse party. There is no apparent reason for not requiring a notice to produce in these cases, too. In most instances, the pleadings will give the requisite pretrial notice, and in those cases where they do not, little hardship is imposed upon the proponent by requiring notice.

The California cases have held that, in a criminal case, pretrial notice to the defendant is unnecessary and at-trial request for the document is improper. People v. Chapman, 55 Cal. App. 192 (1921). Secondary evidence of the content of a document is admissible if a prima facie showing is made that the document is in the possession of the defendant. People v. Chapman, 55 Cal. App. 192 (1921). If the defendant objects to the introduction of secondary evidence of such a document, the prosecution apparently may then request the defendant to produce it. People v. Jackson, 24 Cal. App.2d 182 (1937). The possible prejudice to a defendant that may be caused by a request in the presence of jury for the production of a writing is readily apparent; but, even if the impropriety of such a request is conceded, there appears to be no

reason to deprive the defendant completely of his right to a pretrial notice and at-trial request for production of the original. The notice and request do not require the defendant to produce the document, they merely authorize the proponent to introduce secondary evidence of the document. Revised subdivision (1)(c) preserves the defendant's rights but avoids the possible prejudice to him by requiring the at-trial request to be made out of the presence of the jury.

Subdivision (1)(d). Subdivision (1)(d) expresses an exception for writings that are collateral to the principal issues in the case. The exception is well recognized elsewhere, but an early California case rejected it and the issue apparently has not been raised on appeal since then. Poole v. Gerrard, 9 Cal. 593 (1858); see Study at page 15. The exception is desirable, for it precludes hypertechnical insistence on the best evidence rule when production of the writing in question would be impractical and its contents are not closely related to any important issue in the case.

Subdivision (1)(e) and (f). Subdivision (1)(e) and (f) of the revised rule correspond to the exceptions found in subdivisions 3 and 4 of Section 1855. The URE rule, in subdivision (1)(e), limited the exception to official records and recorded documents affecting property. Under existing law, the exception extends to official records or other documents in the custody of a public officer and to any recorded documents that by statute are provable by the record or a certified copy of the record. The broader terms of the existing law have been included in revised subdivision (1)(e) and (f).

Subdivision (1)(g). Subdivision (1)(g) of the revised rule restates an exception found in subdivision 5 of Code of Civil Procedure Section 1855. No comparable exception appears in the URE. The exception obviates the necessity

for producing voluminous records, and it is apparently employed frequently. See cases collected in Study, p. 16, note 8. Hence, Rule 70 has been revised to continue recognition of this exception. The final clause, permitting the judge to require production of the underlying records, is based on a principle that has been recognized in dicta by the California courts. See, for example, People v. Doble, 203 Cal. 510, 515 (1928): "We, of course, are not intending to hold that the books in each case must be actually received in evidence to warrant the introduction of such summary so long as they are available for use of the opposing party . . . ."

Subdivision (2). Under the URE, if a writing falls within one of the exceptions to the best evidence rule, any otherwise admissible secondary evidence of the content of the writing may be used. Under existing law, however, if the original is an official record or document or is a recorded document, proof of the content of the original must be made by a copy of the original or of the record. Code of Civil Procedure Section 1855. Although Section 1855 seems to indicate that either a copy or oral evidence of other kinds of writings is admissible when the original is unavailable, two California cases have held that the proponent must prove the content of such writings by a copy if he has one. Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403 (1890); Murphy v. Nielsen, 132 Cal. App.2d 396, 282 P.2d 126 (1955).

Subdivision (2) has been revised to retain these features of the California best evidence rule. Copies are better evidence of the content of a writing than testimony; hence, when a person seeking to prove such content has a copy of the writing in his possession or control he should be required to produce it. 7 Wigmore, Evidence (3d ed. 1940). And when accurate copies may be readily obtained--as in the case of public writings--he should be required to exercise reasonable diligence to obtain such a copy.

Subdivision (2) requires a showing of reasonable diligence to obtain a copy of the writing in question only when the writing or a record thereof is in official custody. No such showing is required in the case of private writings. Although a proponent of evidence may easily obtain a copy of a document in official custody or show that the document has been destroyed so that none is available, the burden of showing the unavailability of copies of documents in private custody may be extreme. He may have no means of knowing whether any copies have been made or who has custody of them; yet, his right to introduce secondary evidence might be defeated by the opponent's showing that a copy, previously unknown to the proponent, does exist and is within reach of process. If the opponent knows of a copy that is available, he can compel its production and thus protect himself against any misrepresentation of the content of the document made in the proponent's evidence.

Subdivision (3). Subdivision (3) of the revised rule concerns a problem that apparently has not arisen in the California cases. It provides that the judge must admit secondary evidence of the content of a writing if the proponent of such evidence introduces sufficient evidence to warrant a finding that the original writing existed and is described by one of the exceptions listed in subdivision (1). All questions the opponent may raise concerning the writing, or the evidence of the writing--such as that it never existed, that another writing produced at the trial is in fact the writing, or that the proponent's secondary evidence is inaccurate--must be resolved by the trier of fact. The subdivision is recommended because it provides assurance that the judge's rulings on evidence will provide a screen to prevent the introduction of unreliable evidence, but will not prevent the trier of fact from determining the ultimate issues of the case upon any evidence upon which a finding may be based. The language has been revised to use the clearer language contained in the report of the New Jersey Supreme Court Committee on Evidence.

RULE 71. PROOF OF WITNESSED [~~ATTESTED~~] WRITINGS

[~~When the execution of an attested writing is in issue, whether or not attestation is a statutory requisite of its effective execution, no attester is a necessary witness even though all attesters are available unless the statute requiring attestation specifically provides otherwise.~~] Except where the testimony of a subscribing witness is required by statute, the execution of 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.

COMMENT

URE Rule 71 restates the existing California law as contained in Code of Civil Procedure Section 1940. It nullifies a common law rule that permitted only the subscribing witnesses to testify as to the execution of a witnessed writing unless the subscribing witnesses were unavailable.

The clearer language of Section 1940 of the Code of Civil Procedure has been substituted in the revised rule for the language of the URE.

Probate Code Sections 329 and 372 require that the subscribing witnesses of a will be called to prove the execution of the will under certain circumstances. The effect of these provisions and of any other statutes requiring subscribing witnesses to testify will be preserved by the language of the "except" clause at the beginning of the rule.

RULE 72. PHOTOGRAPHIC COPIES TO PROVE CONTENT OF BUSINESS AND PUBLIC RECORDS

[~~The content of any admissible writing made in the regular course of "a business" as defined by Rule 62 or in the regular course of duty of any "public official" as defined by said rule, may be proved by~~] A photostatic, microfilm, microcard, miniature photographic or other photographic copy or reproduction, or [~~by~~] an enlargement thereof, [~~when duly authenticated,~~] of a writing is as admissible as the writing itself if [~~it~~] such copy or reproduction was made and preserved as a part of the records of "a business" as defined by subdivision (13) of Rule 63[6] in the regular course of such business. [~~or official activity to make and preserve such copies or reproductions as a part of the records of such business or office.~~] The introduction of such copy, reproduction or enlargment does not preclude admission of the original writing if it is still in existence.

COMMENT

This rule continues in effect the provisions of the Uniform Photographic Copies of Business and Public Records as Evidence Act that are now found in Code of Civil Procedure Section 1953i.

The language of Rule 72 has been revised to correspond more closely with the language of the existing code section. Thus, the revised rule no longer provides that the original "may be proved by" the copy, but instead provides that the copy "is as admissible as" the original. Cf. Code of Civil Procedure Section 1953i. The language of the revised rule avoids any implication that there is no need to authenticate the original writing and

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[6]Revised Rule 63(13) defines "a business" as "every kind of business, governmental activity, profession, occupation, calling or operation of institution, whether carried on for profit or not."

makes clear that the rule merely provides an exception to the best evidence rule. The revised language, like the existing section, also makes clear that the photographic copy sought to be introduced must itself have been made in the regular course of business.

The phrase "when duly authenticated" has been deleted as unnecessary; under Rule 67, all writings must be authenticated.

AMENDMENTS AND REPEALS OF EXISTING STATUTES

Set forth below is a list of existing statutes relating to the authentication and content of writings which should be revised or repealed in light of the Commission's tentative recommendation concerning Article IX (Authentication and Content of Writings) of the Uniform Rules of Evidence. The reason for the suggested revision or repeal is given after each section. References in such reasons to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

In many cases where it is hereafter stated that an existing statute is superseded by a provision in the Uniform Rules of Evidence, the provision replacing the existing statute may be somewhat narrower or broader than the existing statute. In these cases, the Commission believes that the proposed provision is a better rule, although in a given case it be broader or narrower than the existing law.

Code of Civil Procedure

Section 1855 provides:

> 1855. There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:
>
> One--When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made.
>
> Two--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.
>
> Three--When the original is a record or other document in the custody of a public officer.
>
> Four--When the original has been recorded, and a certified copy of the record is made evidence by this Code or other statute.

Five--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.

This section should be repealed. It states the present best evidence rule and is superseded by Rule 70.

Section 1870(14) provides:

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

*** *** ***

14. The contents of a writing, when oral evidence thereof is admissible.

This subdivision should be deleted. It deals with the proof of the contents of a writing and is superseded by Rule 70.

Section 1893 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 same revision was recommended in the Commission's tentative recommendation relating to Article VIII (Hearsay) of the Uniform Rules of Evidence. The deleted language pertains not only to hearsay, but also to authentication and best evidence. It is superseded by Rules 68 and 70.

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. Its repeal was also recommended in the Commission's tentative recommendation relating to Article VIII (Hearsay) of the Uniform Rules of Evidence. The section pertains not only to hearsay, but also to authentication and is superseded by Rule 68.

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

> 1905. RECORD, HOW AUTHENTICATED AS EVIDENCE. 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. ORAL EVIDENCE OF A FOREIGN RECORD. 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. Manner of proving other official documents. 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 certificates of the legal custodian thereof.

1919. PUBLIC RECORD OF PRIVATE WRITING EVIDENCE. 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 relate to both authentication of official records and hearsay. Insofar as they relate to hearsay, they are superseded by subdivisions (13), (15), (17) and (19) of Rule 63, as revised by the Commission, pertaining to the admissibility of governmental records and copies thereof to prove the original records or the acts recorded in such records. Insofar as they relate to authentication, they are superseded by the provisions of Rules 67 and 68.

Subdivision 4 of Section 1918 provides for the authentication of a published foreign official journal by evidence that it was commonly received in the foreign country as published by the requisite authority. Although no similar provision appears in Rule 68, this and other evidence of authenticity not mentioned explicitly in Rule 68 may be used to authenticate official writings under the general language of subdivision (2), which provides that the requirement of authentication may be met by "evidence . . . sufficient to warrant a finding that the writing is a correct copy of the record or entry."

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. Its repeal was also recommended in the Commission's tentative recommendation relating to Article VIII (Hearsay) of the Uniform Rules of Evidence. The section pertains not only to hearsay, but also to authentication and best evidence. It is superseded by the provisions of Rules 68 and 70.

Sections 1921 and 1922 provide:

> 1921. JUSTICE'S JUDGMENT IN OTHER STATES, HOW PROVED. 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.
>
> 1922. SAME. There must be attached to the transcript a certificate of the Justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and also a further certificate of the Clerk or prothonotary of the county in which the Justice resided at the time of rendering the judgment, under the seal of the county, or the seal of the Court of Common Pleas or County Court thereof, certifying that the person subscribing the transcript was, at the date of the judgment, a Justice of the Peace in the county, and that the signature is genuine. Such judgment, proceedings, and jurisdiction may also be proved by the Justice himself, on the production of his docket, or by a copy of the judgment, and his oral examination as a witness.

These sections should be repealed. They relate to authentication of the records of justice courts in other states. They are superseded by Rules 67 and 68.

Sections 1937 and 1938 provide:

> 1937. ORIGINAL WRITING TO BE PRODUCED OR ACCOUNTED FOR. 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.
>
> 1938. WHEN IN POSSESSION OF ADVERSE PARTY, NOTICE TO BE GIVEN. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fails 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.

These sections should be repealed. They relate to the best evidence rule and are superseded by Rule 70.

Section 1951 should be revised to read:

> 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 like effect as the original instrument, without further proof.~~].

The same revision was recommended in the Commission's tentative recommendation relating to Article VIII (Hearsay) of the Uniform Rules of Evidence. The deleted language pertains not only to hearsay, but also to authentication and best evidence. It is superseded by Rules 68 and 70.

Sections 1953i through 1953l provide:

> 1953i. If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original.
>
> 1953j. This article shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those states which enact it.
>
> 1953k. This article may be cited as the Uniform Photographic Copies of Business and Public Records as Evidence Act.
>
> 1953l. Nothing in this article shall affect the admissibility of any evidence permitted by Sections 1920a and 1920b of this code.

These sections should be repealed. They comprise the Uniform Photographic Copies of Business and Public Records as Evidence Act and are superseded by Rule 72.