#34(L) 9/2/64

Memorandum 64-67

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--Division 11--Writings)

We have received no comments on this division.

We have redrafted the best evidence rule article (§§ 1500-1510) to break the former long sections into several short sections as suggested at the last meeting. This necessitated some change in format. The sections are now similar to the hearsay rule and exceptions.

One problem of major significance remains. It was discussed at length at the last meeting; but unfortunately all of the problems were not resolved. The problem involves Section 1419, the ancient documents rule. The problem with the section grows out of its relationship to Section 403.

Section 1419 provides that the judge must admit evidence being offered under the ancient documents rule if there is evidence sufficient to sustain a finding of proper custody, unsuspicious appearance, and 30 years' age. Section 403 spells out the procedures for admitting evidence when the preliminary fact need be shown merely by evidence sufficient to sustain a finding. Subdivision (c) provides that the judge may, "and on request shall, instruct the jury to determine the existence of the preliminary fact and to disregard the proffered evidence unless the jury finds that the preliminary fact exists."

Apparently, then, Section 403 requires the judge to submit the factual issues of age, custody, and appearance to the jury; and if the jury determines that, for example, the document is not 30 years old, the jury must "disregard the proffered evidence"--the document.

The reason Section 403(c) requires that the preliminary fact be submitted to the jury and that the jury be instructed to disregard the evidence if they do not find the preliminary fact is: Section 403 deals with those kinds of preliminary facts that inherently must be decided by the jury if they are properly to give credence to the proffered evidence. For example, an admission may be believed because a party made it. It has no relevance if someone else made the statement. A statement admitting liability has no relevance to A's liability if B made the statement. It is relevant only if A made the statement. The statement may have some independent relevance, too; but that is not the reason it is admitted. It is admitted as A's statement. Hence, the jury properly should be charged in such a situation that they should disregard the statement if they do not believe that A made it. Insofar as its independent relevance is concerned, it is inadmissible hearsay.

This principle underlying Section 403(c) works wherever we have used the "evidence sufficient to sustain a finding" formula. All of such evidence should be disregarded by the jury if they do not believe the preliminary fact. But this principle does not apply to Section 1419 and the Commission did not intend this principle to apply.

Section 1410 is intended to make clear that the Section 403(c) principle does not apply. But Section 1410 seems inadequate for this purpose. It is analogous to the hearsay rule that prohibits hearsay except as provided by law. We believe that, under the hearsay rule, the courts will not seize on the broad wording of the exception to change or omit conditions of admissibility that we have specified in particular exceptions, because our specific exceptions have "occupied the field" in regard to the matters mentioned. Similarly, Section 1410 may be interpreted to mean that the article in which it appears does not specify all of the kinds of circumstantial evidence that may be used to authenticate a writing;

but where a section in the article spells out in some detail particular conditions of authentication, it has "occupied the field" in that area and no lesser showing will be sufficient.

The only other section in the article that seems subject to the criticism that it may exclude evidence of a document where there is sufficient evidence to sustain a finding of authenticity is Section 1414(b). Section 1414(b) requires a showing both that the document came from the adverse party's custody and that he acted upon it as authentic. In some cases, custody alone might be sufficient to sustain a finding of authenticity. In other cases, the fact that the adverse party acted upon a document as authentic might be sufficient--it is sort of an admission by conduct comparable to the express admission provision in Section 1414(a). The problem in Section 1414 could be resolved by splitting subdivision (b) into disjunctive provisions. Splitting the section is justified by the following paragraphs from 7 Wigmore, Evidence 632 (3d ed. 1940):

> Where one party calls upon the opponent . . . to produce documents made and possessed by the latter, and the latter does produce the described documents, this is sufficient evidence of genuineness, by statute in at least one State, --a statute which might well be imitated.
>
> For any kind of document whatever, particularly records and files, their presence in a natural place ought often to be sufficient evidence that the document is one of those regularly kept there.

The statute referred to is Section 103 of the Illinois Civil Practice Act(1933):

> . . . documents produced by the opposite party [in response to discovery procedures prior to trial or upon demand at the trial; cf. Evid. C. § 1503] may be introduced in evidence by the party demanding them without further proof of genuineness.

The problem relating to Section 1419, however, is not so easily resolved. A subdivision might be added stating specifically that a lesser showing may be sufficient, although not necessarily so. Also, a subdivision could be added

stating that, notwithstanding Section 403, all of the conditions of Section 1419 are not to be submitted to the jury if some lesser showing in the particular case is sufficient to sustain a finding of authenticity--the only issues to be submitted to the jury in that event being those facts necessary to show authenticity. Or, Section 1419 could be repealed.

At the last meeting, we suggested that the judge be required to find the conditions have been met. That would mean his determination of the conditions is final and the precise conditions would not be submitted to the jury except as generally embraced within the issue of authenticity. Thus, the conflict with Section 403 would be avoided. This would not preclude the judge from admitting the evidence even if he were not persuaded the conditions had been met if he was shown evidence sufficient to sustain a finding of authenticity.

In view of the strong support for Section 1419, we recommend the addition of a provision to the section stating in substance that a showing falling short of the showing now required in Section 1419 is nonetheless sufficient if it is sufficient to sustain a finding of authenticity. Then, if the judge determined that the evidence of custody and appearance was sufficiently ambiguous that it would not sustain a finding of authenticity, he would properly admit upon evidence sufficient to sustain a finding of 30 years' age and would properly give the jury the Section 403(c) instruction on all of the specified factors.

In any event, the conflict between Sections 403 and 1419 is the major problem left in this division and it should be resolved.

Respectfully submitted,

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