Date of Meeting: September 5-6, 1958

Date of Memo: August 21, 1958

Memorandum to Law Revision Commission

Subject: Study No. 34 - Uniform Rule of Evidence:
Substitutes for Subdivisions (15) and (16)
of Rule 63

The Commission considered subdivisions (15) and (16) of Rule 63 at its January, 1958, meeting. The minutes thereof disclose that the two subdivisions were not approved and that "The staff was directed to redraft subdivisions (15) and (16) to embody the substance of Section 1920 of the Code of Civil Procedure and to submit the redraft to the Commission for its consideration . . . . "

SUBDIVISION (15), RULE 63

The staff's understanding is that the Commission's intention is to substitute for Subdivision (15) of Rule 63 a provision which will substantially restate the present California law with respect to the admissibility of official entries, records, reports and documents as evidence of facts they state. Would a provision incorporating "the substance of Section 1920" adequately state this law? We conclude that it would

facts stated or recorded therein

The reasons for these proposed departures from the language of present Section 1920 are as follows:

1. Substitution of "Writings, including maps, charts and the like, made or prepared in the performance of his duty" for "Entries in public or other official books or records"

As is stated above "Entries in public or other official books or records" is a term susceptible of very narrow interpretation. For example, Wigmore defines a "record" as a single volume or file containin a series of homogeneous statements recorded by entries made more or less regularly.[1] The present California law relating to the admissibility of official writings is not so restrictive. In the first place, the language of Section 1926 of the Code of Civil Procedure must be taken into account in this connection:

> 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.

This section omits reference to "public or other official books or records."[2]

A more important reason for departing from the language "Entries in public or other official books or records" is that the California

courts have frequently done so, in effect, in determinging the admissibility of official writings. For example, a district court of appeal admitted a United States Coast and Geodetic Survey chart in one case under Sections 1920 and 1926[3] and other maps and plats have been admitted.[4] A notation on a roster card in a civil service commission file[5] and a bank examiner's report[6] have also been admitted. Moreover, there is no case holding that there must be a statutory requirement that a record be kept to make it admissible and some decisions have admitted records which were fairly clearly not required to be kept.[7] These cases suggest that the broader language proposed above should be substituted for the present language of Section 1920 if the law actually applied by California courts at the present time is to be restated.[8] Two safeguards against unlimited admissibility of written material found in public offices are provided our proposed substitute for Subdivision (15) of Rule 63: (1) the writing must be made or prepared in the performance of duty and (2) it is admissible only to prove the facts stated therein, as distinguished from conclusions or opinions. (See further comment below on the second point.)

2. Substitution of "by a public officer or employee" for "by a public officer of this State."

Two comments may be made concerning this proposal:

A. The proposed substitution recognizes that neither "Entries

in public or other official books or records" nor "Writings, including maps, charts and the like" are apt to be made or prepared personally by a public officer as distinguished from a public employee serving under him. This fact seems to be recognized in part by Code of Civil Procedure Section 1926, quoted above, which makes admissible, inter alia, an entry made under the direction and in the presence of an officer or board of officers. While Section 1926 recognizes that the public officer need not be the scrivener, it literally requires that the "entry" be one made both under his direction and in his presence. Even this restriction has not been uniformly enforced by our courts, however, in determining the admissibility of official writings under Sections 1920 and 1926. There is, for example, no indication in the opinions holding admissible maps and plats that they were prepared either by a "public officer" personally or under the direction and in his presence of such an officer. Nor does either of these limitations seem necessary, given the twin safeguards that the writing be made by a public employee in the performance of his duty and that it be admissible only to prove facts as distinguished from opinions and conclusions.

B. Official writings otherwise admissible are not excluded merely because they were not made by a public officer "of this State." Section 1926 contains no such limitation and none has been applied by our courts in determining the admissibility of official writings, at least insofar as the United States is concerned.[9] Nor does there appear to be any rational basis for distinguishing between writings prepared

by California officers and employees and those prepared by their counterparts in other states or countries.

3. Omission of "or by another person in the performance of a duty specially enjoined by law"

The meaning of this language is not entirely clear and it has never been authoritatively interpreted by our courts. One possibility is that these words make admissible entries made by public employees in the performance of official duty; if so, they are made unnecessary by the addition of the words "employee" in proposed Subdivision (15). Another possibility is that this language makes admissible certain types of quasi-official reports or writings prepared by persons who are neither public officers nor public employees; if so, this subject is covered by our proposed substitute for Subdivision (16) of Rule 63, infra.

4. Substitution of "to prove the facts stated or recorded therein" for "prima facie evidence of the facts stated therein"

Two comments are in order here:

A. Under the various subdivisions of Rule 63 extrajudicial utterances or writings are made admissible to prove matters which they state or record. Under none of them is the weight to be given the evidence thus admitted specified. Consistently with this general

approach Subdivision (15) should be drafted to make official writings admissible to prove facts rather than as "prima facie evidence" thereof, which would appear to create a presumption that the fact exists.

B. The critical language here is "the facts stated or recorded therein." It seems clear that the principal problem with any exception to the hearsay rule which makes official writings admissible is the danger of thus bringing before the trier of fact a public officer's or employee's conclusions with respect to an ultimate fact -- e.g., a fire marshall's statement as to the cause of a fire, a police officer's report as to whether someone was driving unlawfully, etc.[10] On the other hand, there is much less ground for objection to making admissible a report recording the fact that an act was done or that a physical fact was observed by a public officer in the course of performing his duty, when the report itself is one made in the regular course of official duty.

It must be acknowledged, of course, that the difference between a "fact" and a "conclusion" or an "opinion" is not always readily apparent and that difficult questions and even inconsistent rulings are apt to arise under the language proposed. But if it is made clear from the language used in drafting a substitute for Subdivision (15) and from the Law Revision Commission's official comment thereon that this distinction is intended to be taken it seems reasonably likely that most courts dealing with specific questions will reach essentially sound and fair decisions. Certainly no more discretion is committed to the judge here than in many other of the Rules in general

or many other Subdivisions of Rule 63 in particular.

Relationship of Code of Civil Procedure Section 1919 and Sections 1953e to 1953h (Uniform Business Records as Evidence Act) to proposed substitute for Subdivision (15)

In considering the present California law with respect to the admissibility of official writings mention should be made of Code of Civil Procedure Section 1918(6) and Sections 1953e to 1953h (the Uniform Business Records as Evidence Act.)

Subsection 6 of Section 1918 provides:

1918. Manner of proving other official documents. Other official documents may be proved, as follows:

* * *

(6) Documents of any other class in this State, by the original or by a copy, certified by the legal keeper thereof...

This provision does not appear on its face to determine the admissibility of documents but only to provide for their authentication. Most of the cases which cite this section appear to have so regarded it.[11] While there is loose language in a few opinions which would appear to support the view that Section 1918(6) provides for the admissibility as well as the authentication of government documents,[12] its true relationship to Section 1920 appears to have been accurately states People v. Alves[13] as follows:

> Had [the document] set forth a properly certified copy of the record it would at least have satisfied the method of proving entries in an "official document" ("by a copy, certified by the

legal keeper thereof") sanctioned by subdivision 6 of section 1918 of the Code of Civil Procedure. The original "entries" thus in evidence would then be "prima facie evidence of the facts stated" therein (Code Civ. Proc., §§ 1920 and 1926); hence, prima facie evidence of the fact of service upon the defendant.

We have assumed, therefore, in drafting a substitute for Subdivision (15) that Section 1918 is not a part of the California law relating to the admissibility of official writings.

Code of Civil Procedure Sections 1963e to 1963h embody the Uniform Business Records as Evidence Act, enacted in 1941. The California courts have held that governmental records meeting the foundational requirements of this "business records" exception to the hearsay rule are admissible under the Act.[14] Since the Commission has decided to recommend that a restatement of Sections 193e to 1963h be adopted as a substitute for Subdivision (13) of Rule 63, we have thought it unnecessary to take these sections into account in drafting Subdivision (15), which provides for the admissibility of official writings. This will mean, of course, that in the future as at present a document from a government file may be admissible under either the business records exception to the hearsay rule (Subdivision (13) of Rule 63) or the official writings exception (Subdivision (15)) or both. However, it would seem to be preferable to draft the exceptions to Rule 63 in this way rather than to undertake to exclude government records from Subdivision (13) and then, in order to restate all of the present law relating to the admissibility of official documents, incorporate in Subdivision (15) the substantial equivalent of the business records rule for application to such documents. If this view is deemed persuasive, it may be desirable to make it clear that this is what is

being done by revising Subdivision (6) of Rule 62 which defines the application of Subdivision (13) of Rule 63 to read as follows:

(6) "A business" as used in exception (13) shall include every kind of business, profession, occupation, calling, governmental activity or operation of institutions, whether carried on for profit or not.

SUBDIVISION (16), RULE 63

The Commission's directive to the staff relating to Subdivision (16) was, in substance, to draft a substitute therefor which restates existing law.

Professor Chadbourn interpreted Subdivision (16) to apply to reports required to be filed in public offices by private citizens, giving as examples birth, marriage and death certificates made and filed by doctors, ministers, and undertakers. (See Memorandum on Subdivision (15) and (16), pp. 8-9) The official comment of the Commissioners on Uniform State Laws suggests that this is a proper interpretation; it states, however, that the exception is not confined to these particular examples but applies to all reports filed by private persons "...whose business or profession requires action in matters usually made the subject of vital statistics and health regulations, and who are under a duty to make and file reports of specified acts, events or conditions."

On its face, however, Subdivision (16) appears to be broader than either the Commissioners' comment or Professor Chadbourn's memorandum

suggests in at least two respects: (1) it is broad enough to embrace various reports filed by public officers and employees, thus overlapping Subdivision (15) in part, for many reports by such persons would come within the literal language of Subdivision (16): "report or finding of fact...[when] the maker was authorized by statute to perform, to the exclusion of other persons, the functions reflected in the writing, and was required by statute to file in a designated public office a written report relating to the performance of such functions..." (2) there is nothing in the language of Subdivision (16) which confines its application to reports which relate to "vital statistics" as is suggested by the Commissioner's comments.

However this may be, it seems clear that any provision which is substituted for Subdivision (16) should be limited to reports filed by private citizens since the admissibility of writings prepared by public officers and employees is covered by our proposed substitute for Subdivision (15), supra. Professor Chadbourn reports that if Subdivision (16) as it appears in the Uniform Rules of Evidence were adopted in this State it would make admissible only those records which are presently admissible under Health and Safety Code Section 10577 which provides:

> 10577. Any birth, fetal death, death or marriage record which was registered within a period of one year from the date of the event under the provisions of this division, or any copy of such record or part thereof, properly certified by the State Registrar, local registrar, or county recorder, is prima facie evidence in all courts and places of the facts stated therein.

Section 10577 appears to be the only existing provision of California law making reports filed in public offices by private citizens admissible

in evidence.* It would appear, therefore, that the Commission's instruction to the staff can best be carried out by substituting for Subdivision (16) of the Uniform Rules of Evidence the following provision which incorporates the language of Section 10577 with such modifications as are necessary to conform it to the general format of Rule 63 and its several subdivisions:

> (16) Subject to Rule 64, any birth, fetal death, death or marriage record which was registered, pursuant to the provisions of Division 9 of the Health and Safety Code, within a period of one year from the date of the event ~~under the provisions of this division~~ or any copy of such record or part thereof, properly certified by the State Registrar, local registrar, or county recorder, ~~is prima facie evidence in all courts and places of~~ to prove the facts stated therein.

* In our discussion of Subdivision (15), supra, we noted that the words "or by another person in the performance of a duty specially enjoined by law" in C.C.P. § 1920 may bring some reports made by private citizens within the purview of that Section. So far as we have been able to find this language has not been interpreted or applied by any California court. It seems doubtful, however, that it does apply to private citizen's reports of the type here under consideration, Section 1920 would make admissible reports not included within Health and Safety Code § 10577.

FOOTNOTES

1. [Need Wigmore citation]

2. It should be noted, however, that Section 1926 seems to have had little independent function. Only one case has been found which cited it without mention of Section 1920: Boyer v Gelhaus, 19 Cal. App. 320, 325, 125 Pac. 916, 918 (1st Dist. 1912). Sections 1920 and 1926 are often cited together; thus, nearly half of the decisions which have cited Section 1920 have also cited Section 1926: People ex rel. Bd. of State Harbor Comm'rs v. Fairfield, 90 Cal. 186, 27 Pac. 199 (1891); Swamp Land Dist. No. 307 v. Gwynn, 70 Cal. 566, 12 Pac. 462 (1886); People v. Alves, 123 Cal. App. 2d 735, 267 P. 2d 858 (1st Dist. 1954); Reisman v. Los Angeles City School Dist., 123 Cal. App. 2d 493, 267 P. 2d 36 (2d Dist. 1954); Pruett v. Burr, 118 Cal. App. 2d 188, 257 P. 2d 690 (4th Dist. 1953); La Prade v. Deparment of Water and Power, 146 P. 2d 487, 492 (D.C.A. 2d Dist. 1944); Galbreath v. Dingley, 43 Cal. App. 2d 330, 110 P. 2d 697 (4th Dist. 1941); Lusardi v. Prukop, 116 Cal. App. 506, 2 P. 2d 870 (1st Dist. 1931); McFayden v. Town of Calistoga, 74 Cal. App. 378, 240 Pac. 523 (3d Dist. 1925); Oakland v. Wheeler, 34 Cal. App. 442, 168 Pac. 23 (1st Dist. 1917); Westerman v. Cleland, 12 Cal. App. 63, 106 Pac. 606 (3d Dist 1909); People ex rel. Hardacre v. Davidson, 2 Cal. App. 100, 83 Pac. 161 (3d Dist. 1905). In none of these cases was any attempt made to distinguish between the two sections.

3. Oakland v. Wheeler, 34 Cal. App. 442, 168 Pac. 23 (1st Dist. 1917).

4. Southern Pac. Land Co. v. Meserve, 186 Cal. 157, 198 Pac. 1055 (1921) (old survey map from government records: no citation to relevant sections); Burk v. Howe, 171 Cal. 242, 152 Pac. 434 (1915) (government map: no citation to relevant sections); Robinson v. Forrest, 29 Cal. 317 (1865) (plat of survey of township, used to show location of lines only); Gates v. Kieff, 7 Cal. 124 (1857) (map made by county surveyor and deputy). But a map not officially made was excluded. Rose v. Davis, 11 Cal. 133 (1858).

5. Nilsson v. State Personnel Board, 25 Cal. App. 2d 699, 78 P. 2d 467 (3d Dist. 1938) (sec. 1920).

6. Richardson v. Michel, 45 Cal. App. 2d 188, 113 P. 2d 916 (4th Dist. 1941) (report termed sufficiently connected up"; no citation to relevant sections).

7. Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156 (1903) (apparently goes off on agency theory of ratification and estoppel; no cite to relevant sections).

8. It must be acknowledged, however, that there are some more restrictive decisions on the books. Thus courts have excluded memoranda from a state agency to private person, Pruett v. Burr, 118 Cal. App. 2d 188, 257 P. 2d 690 (4th Dist. 1953) (held "not public records" under C. C. P. §§ 1918, 1920, 1926, 1953f), letters, Los Angeles v. Watterson, 8 Cal. App. 2d 331, 48 P. 2d 87 (4th Dist. 1935) (insufficient foundation; no citation to relevant sections), and medical reports not deemed to be "of public record", Fritz v. Metropolitan Life Ins. Co., 50 Cal. App. 2d 570,

123 P. 2d 622 (2d Dist. 1942) (report by government doctors to Federal Veterans' Bureau; no citation to relevant sections).

9. Oakland v. Wheeler, 34 Cal. App. 442, 168 Pac. 23 (1st Dist. 1917) (U. S. Coast and Geodetic Survey Chart admitted)

10. See, excluding such writings, Hoel v. Los Angeles, 136 Cal. App. 2d 295, 288 P. 2d 989 (2d Dist. 1955) (police accident report "essentially hearsay") Harrigan v. Chaperon, 118 Cal. App. 2d 167, 168, 257 P. 2d 716, 717 (1st Dist. 1953) (fire inspector's report which "contains nothing more than a hearsay rumor based on information from an undisclosed source"). See also McGowan v. Los Angeles, 100 Cal. App. 2d 386, 223 P. 2d 862 (2d Dist. 1950) ("blood alcohol determination" excluded for want of adequate foundational evidence linking the report to the person from whom the blood sample was allegedly taken).

But see, admitting official writings not apparently based on personal knowledge, People v. Grundell, 75 Cal. 301, 17 Pac. 214 (1888) (transcript of testimony before a committing magistrate -- sec. 1920); Nilsson v. State Personnel Board, 25 Cal. App. 2d 699, 78 P. 2d 467 (3d Dist. 1938) (notation on civil service roster card); Oakland v. Wheeler, 34 Cal. App. 442, 168 Pac. 23 (1st Dist. 1917) (Coast and Geodetic Survey Chart -- secs. 1920, 1926).

11. In re Smith, 33 Cal. 2d 797, 205 P. 2d 662 (1949); Hazard, Gould and Co v. Rosenberg, 177 Cal. 295, 170 Pac. 612 (1918); Estate of Baker, 176 Cal. 430, 168 Pac. 881 (1917); Wall v. Mines, 130 Cal. 27, 62 Pac. 386 (1900); Galvin v. Palmer, 113 Cal. 46, 45 Pac. 172 (1896); Merced County v. Fleming, 111 Cal. 46, 43

Pac. 392 (1896); County of San Diego v. Seifert, 97 Cal. 594, 32 Pac. 644 (1893); Pruett v. Burr, 118 Cal. App. 2d 188, 257 P. 2d 690 (4th Dist. 1953); People v. Santos, 36 Cal. App. 2d 599, 97 P. 2d 1050 (3d Dist. 1940); People v. Wilson, 100 Cal. App. 397, 280 Pac. 137 (2d Dist. 1929); People v. Kuder, 98 Cal. App. 206, 276 Pac. 578 (2d Dist. 1929).

12. Vallejo & Northern R. R. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238 (1915) (report of state agricultural society, used as basis of an opinion of expert and thus perhaps distinguishable); People v Hagar, 52 Cal. 171 (1877) (letter from register of land office to Yolo County recorder used to prove formation of swamp land district; perhaps distinguishable on the ground that here document itself rather than its content may have borne the evidentiary significance); In re Halamuda, 85 Cal. App. 2d 219, 192 P. 2d 781 (4th Dist. 1948) (report of probation officer used to show parents unfit to have custody of child; perhaps distinguishable in the juvenile hearing context under Welfare and Institutions Code secs. 639, 640).

13. 123 Cal. App. 2d 735, 738, 267 P. 2d 858, 861 (1st Dist. 1954).

14. Nichols v. McCoy, 38 Cal. 2d 447, 240 P. 2d 569 (1952) (results of blood tests entered in coroner's record; court specifically refused to decide whether sec. 1920 would also apply); Jensen v. Traders & General Ins. Co., 141 Cal. App. 2d 162, 296 P. 2d 434 (1st Dist. 1956) (postal receipts as evidence of mailing); Fox v. San Francisco Unified School Dist., 111 Cal. App. 2d 885, 245 P. 2d 603 (1st Dist. 1952) (principal's report on teacher's efficiency); Holder v. Key System,

88 Cal. App. 2d 925, 200 P. 2d 98 (1st Dist. 1948) (letters to and from officers of a public utilities commission): Brown v. County of Los Angeles, 77 Cal. App. 2d 814, 176 P. 2d 753 (2d Dist. 1947) (account of indigents with county).