

4/4/60

Memorandum No. 38(1960)

Subject: Uniform Rules of Evidence -- Hearsay Evidence Division

This memorandum concerns Rule 63(31) -- Medical, historical, scientific and other treatises.

Professor Chadbourn discusses this exception to the hearsay rule in the attached memorandum. He approves Exception (31) with the following amendment:

(31) A published treatise, periodical or pamphlet on a subject of history, medicine or other science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.

The Northern Section of the State Bar Committee, at its December 8, 1959, meeting, decided to disapprove subdivision (31) and to substitute for it the present language of C.C.P. § 1936 which provides as follows:

Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest.

The Southern Section of the State Bar Committee, at its January 1960 meeting, concluded that the language of C.C.P. § 1936 would be too confining and that learned treatises should be admissible if they are sufficiently authoritative. However, it was conceded that subdivision (31) of the URE draft is dangerous, because it apparently would make learned treatises admissible if "a witness expert in the subject" testifies that the treatise is a reliable authority. It probably is possible to get some such testimony with respect to almost any treatise. The conclusion was reached, however, that this

difficulty could be obviated by striking the phrase "if the judge takes judicial notice, or a witness expert in the subject testifies" and substituting therefor the phrase "if the trial judge finds." This would have the effect of placing admissibility within the control of the trial judge. The Southern Section was of the opinion, therefore, that subdivision (31) should be approved is amended to read as follows:

(31) A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the ~~[judge-takes-judicial-notice, or-a-witness-expert-in-the-subject-testifies,]~~ trial judge finds that the treatise, periodical or pamphlet is a reliable authority on the subject.

With respect to the above amendment, note that it fails to include Chadbourn's suggested addition of "medicine or other" before the word "science." A perhaps better phrasing of Chadbourn's suggested amendment would be "science, including but not limited to medicine, or art." In addition, the use of the phrase "trial" judge is inconsistent with other provisions of the U.R.E. where only the word "judge" is used and obviously means the trial judge.

Respectfully submitted,

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Executive Secretary