#34(L) 2/27/64

First Supplement to Memorandum 64-8

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article III. Presumptions)

C.C.P. § 1963-34.

34. That a document or writing more than 30 years old is genuine, when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained;

Class: Thayer presumption.

The Commission has previously approved Rule 67.5, which reads:

> A writing is sufficiently authenticated to be received in evidence if the judge finds that it:
>
> (1) Is at least 30 years old at the time it is offered;
>
> (2) Is in such condition as to create no suspicion concerning its authenticity; and
>
> (3) Was, at the time of its discovery, in a place in which such writing, if authentic, would be likely to be found.

Rule 67.5 seems to be, in effect, a statutory inference. It provides that the above circumstantial evidence is sufficient to sustain a finding of authenticity. The conclusion of authenticity is not compelled, however.

Section 1963-34 is a presumption. Hence, if the conditions specified in the subdivision are found to exist, the trier of fact is required, not merely permitted, to find the writing is authentic.

The language of the two versions of the ancient documents rule reveals these differences: The California ancient documents rule requires proof that the document has been generally acted upon as genuine by persons having an interest in the matter; but no similar requirement is in Rule 67.5. Rule 67.5 requires proof that the document is in such condition

as to create no suspicion concerning its authenticity; no similar requirement appears in Section 1963-34.

The study on authentication states that the requirement of subdivision 34, that the document "has been . . . generally acted upon as genuine", requires a showing of the possession of property by those persons who would be entitled to possession if the document were genuine. Wigmore states that the requirement of possession was derived from the fact that showing the authenticity of a deed did not give it legal effect. Either delivery had to be shown or, in the absence of delivery, seisin had to be shown. As in the usual case, possession had to be shown as well as the age and custody of the document, some cases began to treat the showing of possession as one of the requisites of a showing of authenticity. 7 Wigmore, Evidence 588. It is this latter view that is codified in Section 1963.

Although the ancient documents rule codified in Section 1963 may be too strict if it is regarded solely as a rule relating to the sufficiency of evidence, there is some logic in treating the rule as a rule of presumption when a showing of possession is required. Says Wigmore:

> That this rule about ancient documents is not merely a rule of sufficiency, but also a rule of presumption (ante, § 2135) is often implied in judicial language, and has sometimes been distinctly decided. There seems no reason against giving it this additional quality, at any rate wherever the requirement of possession (ante, § 2241 [sic; § 2141?]) is exacted. [7 Wigmore, Evidence 605.]

The California cases have, within recent years, departed from both the language and the theory of the ancient documents rule as expressed in Section 1963. These cases have overlooked the fact that a distinction must be made between determining the authenticity (the authorship) of a particular statement offered as hearsay and determining whether the requisites

of a hearsay exception have been met. They have also failed to exact proof of possession, applying the doctrine to nondispositive instruments.

Originally, these distinctions were clearly appreciated by the California courts. Thus, in Gwin v. Calegaris, 139 Cal. 384 (1903), the plaintiff was seeking rescission of a contract for the sale of land on the ground that defendant did not have a good record title as required in the contract. Defendant relied upon a grant from the Alcalde of San Francisco that did not identify the particular parcel granted. Later deeds in the chain of title, however, contained recitals supplying the deficiency in the original grant; and it was conceded that the defendant's predecessors had held possession of the property in question. Defendant's assertion that the recitals showed a record title was met by:

> The long line of deeds and other instruments from Ridley down to defendant indicates nothing more than that these people were dealing with this property, claiming to own it. The rule as to ancient documents, as we understand it, does not import any verity to the recitals contained in these instruments. The documents themselves are presumed to be genuine, and the rule has no further effect. [139 Cal. at 389.]

In Mercantile Trust Co. v. All Persons, 183 Cal. 369 (1920), the question was the admissibility of an abstract of title to prove a particular lease under a statute permitting privately made abstracts to be used to prove the contents of official records that were destroyed in the San Francisco fire and earthquake. The objection was that there was no evidence that possession of the property was taken under the lease described in the abstract. The objection was dismissed with the comment:

> The rule suggested by the objection is one applicable to ancient documents. It has no reference to a record which of itself proves the instrument or to secondary evidence of that record. [183 Cal. at 380.]

The limitation of the ancient documents rule to questions of authenticity and the requirement that possession be shown to qualify the document under that rule began to be eroded in Kirkpatrick v. Tapo Oil Co., 144 Cal. App.2d 404, 301 P.2d 274 (1946). That case involved a dispute between S's heirs and C's heirs over the ownership of certain shares of stock in the oil company. S originally owned the shares. C's heirs claimed that S had transferred the shares to C.

C's heirs offered in evidence a ledger kept by C of his own private and business affairs. The trial court admitted it as evidence of C's ownership because it was an ancient document and it contained recitals of such ownership. On appeal, S's heirs claimed that the ledger did not qualify as an ancient document because there was no evidence that anyone took possession of any property pursuant to it--it was not a dispositive instrument. The court dismissed the objection on the ground that the point was not properly made below--the objection in the trial court was "incompetent, irrelevant, and immaterial".

S's heirs then claimed the court should not have used the document as evidence of the truth of its content. As no objection on the ground of hearsay was made below, the court might have disposed of the argument on the same ground that it disposed of the argument based on lack of possession. But the court characterized the quotation from Gwin v. Calegaris, quoted above, as a dictum and said:

> This dictum is not a correct statement of the law. Ancient documents would have no effect or potency as evidence unless they served to import verity to the facts written therein. The true rule is that an ancient document is admitted in evidence as proof of the facts recited therein, provided the writer would have been competent to testify as to such facts. (32 C.J.S. 662, § 745; anno.: 6 A.L.R. 1437, 1444.) [144 Cal. App.2d at 411.]

The analysis is faulty. Ancient documents would have much effect and potency as evidence even if the rule were limited to one of authentication. For example, if the question were the validity of a particular deed in a chain of title, the ancient documents rule could supply the needed evidence of authenticity without proof of the maker's signature. Similarly, if the issue were a question of pedigree, and a statement in an ancient will were offered as a declaration of pedigree, the authenticity of the will--and, hence, the requisite showing that the declarant was a member of the family--could be shown under the ancient documents rule; but the pedigree declaration would be coming in under the pedigree exception to the hearsay rule.

Finally, in Estate of Nidever, 181 Cal. App.2d 367, 5 Cal. Rptr. 343 (1960), the court apparently dispensed with the requirement of possession altogether. There, C died intestate. The heirs of A, a sister, claimed all of the estate. CB, a half-brother, claimed half of the estate. A's heirs claimed that CB was illegitimate and not entitled to inherit. CB was the child of a second marriage of C's father, C and A were children of the first marriage. The second marriage occurred prior to the divorce of the parties to the first marriage; but under the applicable law, CB would still be legitimate if either party to the second marriage believed in good faith that it was a valid marriage.

To show the validity of the second marriage, or at least the good faith belief in the validity of the second marriage, an application for a widow's pension filed by the second wife was introduced. Because of its self-serving character, it could not qualify as a pedigree declaration, for it could not meet the ante litem motem requirement. The court held the document

admissible as an ancient document and said that the ante litem motem requirement does not apply to ancient documents. Thus, for all practical purposes, the court repealed the ante litem motem requirement for ancient pedigree statements (it would be difficult to find an ancient pedigree declaration not in writing). The court's language would permit any self-serving hearsay statement to be admitted upon a showing that it is 30 years old. No mention is made in the opinion of the requirement of possession. The opinion does not indicate whether the document was ever acted upon as genuine by anyone.

The Commission has remedied the holdings of these cases insofar as they deal with hearsay by adding subdivision (29.1) to Rule 63, which requires that the statement offered as hearsay be acted upon as true.

So far as authenticity only is concerned, where possession of the property has been in accordance with an ancient dispositive instrument, we believe that the presumption of authenticity should be retained. The presumption tends to preserve the stability of titles and it relieves a party from making proof of authenticity when evidence is apt to be minimal or entirely lacking. Since the presumption seems to be based ir large part upon the lack of evidence, we think that where evidence is available, the presumption should disappear. Hence, we recommend the Thayer classification. This is consistent with the Commission action on subdivisions 11 and 12, which made Thayer presumptions of the presumptions of ownership that flow from possession.

Finally, to overcome whatever effect the Tapo Oil and Nidever cases have had, we recommend that the presumption be modified to apply specifically to dispositive instruments. It should, of course, arise only upon proof of possession consistent with the terms of the instrument.

C.C.P. § 1936.

35. That a printed and published book, purporting to be printed or published by public authority, was so printed or published;

36. That a printed and published book, purporting to contain reports of cases adjudged in the tribunals of the State or country where the book is published, contains correct reports of such cases.

Class: Thayer presumptions

The presumptions of authenticity of official writings (Rule 67.7) that were created by the Commission were made Thayer presumptions. The purpose of these presumptions (subdivisions 35 and 36) is the same as those created by Rule 67.7: To make such writings self-authenticating. Hence, we recommend the Thayer classification.

Apparently, neither subdivision has been cited in an appellate decision since the enactment of the section in 1872. This could be either because the presumptions have never been relied on or because the presumptions are so sensible and easy to apply that no question concerning their use has seemed worth raising on appeal.

We believe the presumptions serve a valuable purpose in dispensing with unnecessary proof of authentication; hence, we recommend their retention as Thayer presumptions.

C.C.P. § 1963-40

That property owned at the time of death by a person who had been divorced from his or her spouse more than four years prior thereto was not community property acquired during marriage with such divorced spouse, but is his or her separate property.

Class: Morgan presumption.

This section was added to the code in 1955. Since its enactment the presumption has never been mentioned in a California case. Further, there does not seem to have been a reported case involving any particularly troublesome fact situation which provoked the adoption of the new section.

Although under present California practice pursuant to C.C. § 146 the community property rights of the parties are ordinarily determined at the time of the divorce, by the court or by a separate agreement of the parties, there are several situations which can arise where no determination of community property rights is made at the time of divorce:

The community nature of property may not have been pleaded, relief may not have been prayed for, the divorce may have been out of state, or the property may have been acquired during the interlocutory period and not distributed in the final decree.

If one of the situations enumerated above does in fact exist the presumption might become pertinent where the divorced spouse makes a claim against the estate of the decedent or where the heirs of a predeceased spouse make a claim against the decedent's estate relying on Probate Code Section 228. Under Section 228 if the decedent leaves no spouse or issue and there is property in the decedent's estate which was the community property of the decedent and a predeceased spouse, or property which came

to decedent by gift or devise from the predeceased spouse, one-half of the property goes to certain designated heirs of the predeceased spouse. There appears to be no case involving Section 228 in which there was a divorce prior to the death of either spouse. See 1 Armstrong, Calif. Family Law 770; 43 Cal. L. Rev. 687.

In either of the situations in which the presumption might conceivably arise, the party asserting the community nature of the property would have the initial burden of proof under C.C.P. § 1869. Those commenting on the effect of the new presumption have thus come to the conclusion that since this presumption operates against the party who has the burden of persuasion the new presumption may in some manner "enlarge the burden of proving the community nature of the property". Note 43 Cal. L. Rev. 687, 690-691; Continuing Education of the Bar, Review of Selected 1955 Code Legislation § 60 pp. 134, 137. This conclusion is merely repeated in 4 Witkin, Summary of California Law 2733.

However, it seems more reasonable to assume that the legislature had a more rational purpose than merely placing the burden of proof on one who already has the burden. In a case where one is asserting the community nature of property it is only necessary to prove that the property was acquired during marriage to give rise to the presumption, which has been read into Civ. Code § 164 by the cases, that property acquired during marriage was community property. Estate of Brenneman, 157 Cal. App.2d 474 (1958); Wilson v. Wilson, 76 Cal. App.2d 119, 172 P.2d 568 (1946).

It seems much more reasonable to conclude that the presumption in § 1963-40 was intended to prevent a prior spouse (or the prior spouse's heirs) from relying on the presumption of community property that arises

from proof of acquisition during marriage when a period of four years has elapsed since the termination of the marriage. Thus, in a case arising under Probate Code Section 228, the prior spouse's heirs would have the burden of showing that the property was acquired with community funds or in some other way acquired a community character.

If this is the purpose of the presumption, how should it be classified?

If the presumption of separate property in 1963-40 were classified as a Thayer presumption, once any evidence was introduced that the property was acquired during marriage the separate property presumption would drop out and the presumption that property acquired during marriage is community property would prevail. Section 1963-40 would then have served little or no purpose. To give effect to Section 1963-40, therefore, it appears necessary to place it in the Morgan presumption classification.

The wording of the subdivision makes it somewhat difficult to determine the exact legislative intent. It says the property is presumed not to be "community property acquired during marriage with such divorced spouse." It adds that the property is presumed to be the separate property of the decedent. If the intent was to create only the presumption that it was separate property and not community property the additional words "acquired during marriage" would be meaningless. It is reasonable to interpret this phrase as being aimed at the presumption that "property acquired during marriage is community property". But if so, the presumption that the property is separate seems unreasonable. Surely, the rights of a surviving subsequent spouse should not be prejudiced merely because her husband had divorced a previous spouse more than four years previously.

If we rephrase Section 1963-40 in a manner which would clearly state that the prior spouse cannot rely on the presumption that property acquired during marriage is community, the statute would then make sense. What we should, in essence, be saying is that, when a party dies having been divorced for four years prior thereto, his former spouse must prove the asserted community nature of the property he owns at the time of his death, and she would not discharge her burden of proof by evidence of acquisition during marriage alone. The burden of proving the community property would be on the party asserting the community nature of the property without the benefit of the presumption that property acquired during marriage is community property.

It is therefore suggested that the presumption be made a Morgan presumption, reworded in terms of burden of proof and that it be worded in such a manner as to specifically state that it is intended to prevail over the presumption that property acquired during marriage is community property.

Up until this point it has been assumed that the statute is based upon sound policy reasons. Where the parties have been divorced for a period of time, in this case four years seems an arbitrary but not unreasonable choice, there would seem to be good reason for avoiding any presumption in favor of community property. The cases which would arise are ones in which relatives of a divorced spouse, or the divorced spouse himself, first make their claims long after the divorce occurs. The presumption in favor of community property is intended to benefit parties during the marriage or immediately upon its dissolution.

A further problem of interpretation now existing should be eliminated by a rewording of 1963-40. At the present time it is unclear whether the

presumption applies to say property was separate at death or separate at all times. The difference is significant as to whether it affects Probate Code Section 228. It would seem best to word the 1963-40 presumption in such a manner that the property is presumed to have been separate both during marriage and at the time of death of decedent. This would leave any proof as to community status clearly on anyone who sought to act under Section 228.

Respectfully submitted,

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