

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

*relating to*

**The Uniform Rules of Evidence**

**Article IX. Authentication and Content of Writings**

January 1964

CALIFORNIA LAW REVISION COMMISSION

School of Law  
Stanford University  
Stanford, California

### **NOTE**

This pamphlet begins on page 101. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes.

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SCHOOL OF LAW  
STANFORD UNIVERSITY  
STANFORD, CALIFORNIA



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December 1963

To HIS EXCELLENCY, EDMUND G. BROWN  
Governor of California  
and to the Legislature of California

The California Law Revision Commission was directed 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



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# 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.<sup>1</sup> In 1956 the Legislature 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 dealing with the introduction of evidence in written form and proof of the content of writings.<sup>2</sup> 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.

This article of the URE would supersede a number of provisions relating to documentary evidence that are found in several places in the California codes. Some of the existing code sections are inaccurate, for they do not reflect many exceptions and qualifications to the statutory rules that have been developed in the cases. And, 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.<sup>3</sup>

<sup>1</sup> 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.

<sup>2</sup> 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."

<sup>3</sup> The final recommendation of the Commission will indicate the appropriate code section numbers to be assigned to the rules as revised by the Commission.

## 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*. New rules proposed by the Commission are shown in *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 131. 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.

### • Rule 67. Authentication Required

**RULE 67.** Authentication of a writing is required before it may be received in evidence. *Authentication of a writing is required before 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 a document, if authentic, would be likely to be found, it is sufficiently authenticated.~~

#### 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 §§ 2129-2135 (3d ed. 1940).

Because they are rarely subject to question, some kinds of documents are permitted to be introduced into evidence without the introduction of foundational evidence of their authenticity. The requisite foundation is supplied by a presumption or by some other rule of law. See, *e.g.*, CODE CIV. PROC. §§ 1918, 1963(15), (35). And, in some instances, the law attaches a presumption of authenticity to documents authenticated in a particular manner. See, *e.g.*, CODE CIV. PROC. § 1963(34)—the California “ancient documents” rule. Where a presumption applies, the trier of fact is required to find the document is authentic unless a contrary showing is made.

Rules 67 through 69 set forth the rules governing this process of authentication. Rule 67 states the general requirement of authentication—either by sufficient evidence to warrant a finding of authenticity or by a rule of law. Rules 67.5 through 69 set forth certain rules of law that may be relied on to authenticate certain kinds of writings. The operation and effect of these rules is explained in the comments appended to them.

**Rule 67.** The first sentence 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 sanctioned by law (for example, Rule 68), is required before the document may be received in evidence. Although the rule stated in this sentence is well settled, there is no explicit statement of it in the existing California statutes. The “writing” referred to in the first sentence is any writing offered in evidence; it may be either an original or a copy, and it must be authenticated before it may be received in evidence.

The second sentence of the revised rule requires 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 contents under the circumstances permitted by Revised Rule 70. This is declarative of existing California law. *Spottiswood v. Weir*, 80 Cal. 448, 22 Pac. 289 (1889); *Smith v. Brannan*, 13 Cal. 107, 115 (1859); *Forman v. Goldberg*, 42 Cal. App.2d 308, 316, 108 P.2d 983, 988 (1941). See CODE CIV. PROC. § 1937. 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),<sup>4</sup> the authenticated copy 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),<sup>5</sup> 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 deleted 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 Proposed Rule 67.5 so that Revised Rule 67 will state merely the general requirement of authentication.

### Rule 67.5. Authentication of Ancient Writings

**RULE 67.5.** *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.*

### Comment

Proposed 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 Proposed Rule 67.5 is similar to the statement of the rule in subdivision 34 of Code of

<sup>4</sup> 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:

(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.

<sup>5</sup> 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:

(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.

Civil Procedure Section 1963; but there are two major differences: First, the requirement in the existing California statute of a showing that the writing has been acted upon as genuine by persons with an interest in the matter does not appear 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; 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 Proposed 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 genuineness 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 it 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 admissibility 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 suspicion 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. Because Proposed Rule 67.5 will permit the introduction of evidence of many ancient writings about which there is no real doubt concerning their authenticity, its approval is recommended.

### **Rule 67.7. Official Seals and Signatures; Presumption of Authenticity**

**RULE 67.7.** (1) *A seal is presumed to be genuine and authorized if it purports to be the seal of:*

(a) *The United States or of a department, agency, or officer of the United States.*

(b) *A public entity, or a department, agency, or officer of a public entity, in any state, territory, or possession of the United States.*

(c) *A nation or sovereign, or a department, agency, or officer of a nation or sovereign, recognized by the executive power of the United States.*

(d) *A governmental subdivision of a nation recognized by the executive power of the United States.*

(e) *A court of admiralty or maritime jurisdiction.*

(f) *A notary public.*

(2) *A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of:*

(a) *A public officer or employee of the United States.*

(b) *A public officer or employee of any public entity in any state, territory, or possession of the United States.*

(c) *A notary public.*

(3) *A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of the sovereign or a principal officer of a nation, or a principal officer of a governmental subdivision of a nation, recognized by the executive power of the United States and the writing to which the signature is affixed is accompanied by a statement declaring that the person who affixed his signature thereto is such sovereign or principal officer. The 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 nation, authenticated by the seal of his office.*

(4) *The presumptions established by this section require the trier of fact to find the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumptions established by this section.*

### **Comment**

Proposed Rule 67.7 has been added. It eliminates the need for formal proof of the genuineness of certain official seals and signatures when such proof would otherwise be required by the general requirement of authentication. Proposed Rule 67.7 supplements Rule 68. Rule 68 dispenses with certain formalities of proof of the authenticity of copies of writings in official custody if certain signatures and seals are attached to the copy. Proposed Rule 67.7 similarly provides that certain officially executed original documents, too, are self-authenticating.

Under existing law, formal proof of many of the signatures and seals mentioned in Proposed Rule 67.7 is not required because such signa-

tures and seals are the subject of judicial notice. Subdivisions 5, 6, 7, and 8 of CODE CIV. PROC. § 1875. And the parties may not dispute a matter that has been judicially noticed. CODE CIV. PROC. § 2102. But, judicial notice should be confined to matters concerning which there can be no reasonable dispute. The authenticity of documents purporting to be official documents should not be determined conclusively by the judge when there is serious dispute as to such authenticity. Hence, Proposed Rule 67.7 provides that the official seals and signatures mentioned shall be presumed genuine and authorized until evidence is introduced sufficient to sustain a finding that they are not genuine or authorized. When there is such evidence disputing the authenticity of an official seal or signature, the trier of fact is required to determine the question of authenticity without regard to any presumption created by this section.

This procedure will dispense with the necessity for proof of authenticity when there is no real dispute as to such authenticity, but it will assure the parties the right to contest the authenticity of official documents when there is a real dispute as to such authenticity.

### Rule 68. Authentication of Copies of Records

RULE 68. A ~~writing purporting to be a purported copy of an official record~~ *a writing in the custody of a public officer or employee, or of an entry therein, meets the requirement of authentication as a copy of such writing or entry if* ~~(a) the judge finds that :~~

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

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

~~(c)~~ (3) The office in which the ~~record~~ *writing* is kept is within ~~this state~~ *the United States or any state, territory, or possession thereof* and the ~~writing~~ *copy* is attested or certified as a correct copy of the ~~record~~ *writing* or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the ~~record~~ *writing*; or

~~(d)~~ (4) ~~if~~ The office in which the *writing* is kept is not within the ~~state,~~ *United States or any state, territory, or possession thereof* and the ~~writing~~ *copy* is attested or certified as required in ~~clause~~ *subdivision* ~~(e)~~ (3) and is accompanied by a ~~certificate~~ *statement* declaring that ~~such~~ *the person who attested or certified the copy as a correct copy is the officer, or a deputy of the officer, who has the custody of the record writing. 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~~ *an* officer in the foreign service of the United States stationed in the ~~foreign state or country~~ *nation* in which the ~~record writing~~ *record* is kept, and authenticated by 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 writings in official custody found within the United States and another applicable to all writings in official custody found outside the United States.

The preliminary language has been revised to make it 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 original writing itself. As pointed out in the Comment to Revised Rule 67, however, the authentication of a copy of an official record under Revised Rule 68 may supply at the same time sufficient evidence to authenticate the official record as the official record. In some cases, a party 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, for example, Rule 63(19) <sup>6</sup> 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

<sup>6</sup> The text of this rule is quoted in note 5, *supra* at 110.

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 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 a writing in official custody 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 document would be admissible if the copyist testified directly that it was a correct copy. The subdivision is thus but a special application of the third sentence of Revised 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 writings in official custody is concerned.

**Subdivisions (3) and (4)—generally.** Subdivisions (3) and (4) set forth the rules for admitting attested or certified copies of writings in official custody. 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 "certified copy" is defined in Section 1923 of the Code of Civil Procedure, which provides that a certified copy must state that it is a correct copy of the original, must be signed by the certifying officer, and must be 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 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 writings in official custody 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 writings, 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.

In one respect, the proposed authentication procedure for foreign documents 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.

### Rule 69. Certificate of Lack of Record

**RULE 69.** A writing ~~admissible under exception (17)(b) of Rule 63~~ *reciting diligent search and failure to find a record in a specified office, made by the public officer or employee who is the official custodian of the records in that office,* is authenticated in the same manner as is provided in ~~clause (e) 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.

The revision merely substitutes a reference to the kind of writing mentioned in Revised Rule 63(17) (b) for the cross-reference contained in URE Rule 69.

Rule 69 is needed if there is to be a hearsay exception such as that provided in Revised Rule 63(17)(b). See the Comment to Revised Rule 63(17) in the tentative recommendation of the Commission relating to hearsay evidence in 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 329-330 (1963).

### Rule 70. Documentary Originals As the Best Evidence

RULE 70. (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 employee ; ; 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).*

~~Evidence offered by the opponent tending to prove (a) that the asserted writing never existed, or (b) that a writing produced at the trial is the asserted writing, or (c) that the secondary evidence does not correctly reflect the content of the asserted writings, 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.~~

### 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 of 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 in California, 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, 446-447 (1858).

**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 the Study, *infra* at 151, 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 the Study, *infra* at 152, 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 courts 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. Powell*, 71 Cal. App. 500, 236 Pac. 311 (1925); *People v. Chapman*, 55 Cal. App. 192, 203 Pac. 126 (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, supra*. 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. Rial*, 23 Cal. App. 713, 139 Pac. 661 (1914). The possible prejudice to a defendant that may be caused by a request in the presence of the 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 upon the defendant's failure to produce it. 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. See McCORMICK, EVIDENCE § 200 (1954). However, an early California case rejected it in dictum and the issue apparently has not been raised on appeal since then. *Poole v. Gerrard*, 9 Cal. 593 (1858); see the Study, *infra* at 154. 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 Code of Civil Procedure Section 1855. The URE rule, in subdivision (1)(e), limits the exception to official records and recorded documents affecting property; but 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 the Study, *infra* at 156, 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, 265 Pac. 184, 187 (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 explicitly states 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. 4 WIGMORE, EVIDENCE §§ 1266-1268 (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.

The second sentence of subdivision (2) as proposed in the URE has been deleted. It concerns a problem that apparently has not arisen in the California cases. It was intended to provide assurance that the judge's rulings on objections under the best evidence rule would not remove from the trier of fact the right to determine the authenticity of the original document or the copy offered in evidence. The sentence is unnecessary because Revised Rule 67 makes it clear that the judge does not finally determine questions of authenticity. Revised Rule 67 requires the judge to admit a copy of a writing upon evidence sufficient to warrant a finding of the authenticity of the the copy and of the original.

### Rule 71. Proof of Witnessed Writings

~~RULE 71. 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. 4 WIGMORE, EVIDENCE § 1289 (3d ed. 1940).

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 Writings

**RULE 72.** ~~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) <sup>7</sup> 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 enlargement 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 makes it 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 revised rule omits the requirement, contained in both the URE rule and Section 1953i of the Code of Civil Procedure, that the original writing be a business record. As long as the original writing is admissible under any exception to the hearsay rule, its trustworthiness is sufficiently assured, and the requirement that the photographic copy be made in the regular course of business sufficiently assures the trustworthiness of the copy. And, if the original is admissible not as an exception to the hearsay rule, but as evidence of an ultimate fact in

<sup>7</sup> Revised Rule 63(13) defines "a business" as "every kind of business, governmental activity, profession, occupation, calling or operation of institutions, whether carried on for profit or not."

the case (*e.g.*, a will or a contract), a photographic copy, the trustworthiness of which is sufficiently assured by the fact that it was made in the regular course of business, should be as admissible as the original.

The phrase "when duly authenticated" has been deleted as unnecessary; under Revised 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.

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 than the existing law.

References to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

### Code of Civil Procedure

**Section 153** should be revised to read:

153. Except as otherwise expressly provided by law, the seal of a court need not be affixed to any proceeding therein, or to any document, except:

1. To a writ;
2. To a summons;
3. To a warrant of arrest;
4. To the certificate of probate of a will or of the appointment of an executor, administrator, or guardian;
5. ~~To the authentication of a copy of a record or other proceeding of a court, or of an officer thereof, or of a copy of a document on file in the office of the clerk or judge.~~

The deleted language, which relates to the authentication of copies of judicial records, is superseded by Revised Rule 68.

**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 Revised Rule 70.

**Section 1870(14)** provides :

1870. **FACTS WHICH MAY BE PROVED ON TRIAL.** 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 Revised Rule 70.

**Section 1875** provides in part :

1875. Courts take judicial notice of the following :

\* \* \* \* \*

5. The seals of all the courts of this State and of the United States;

6. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this State and of the United States;

7. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States;

8. The seals of courts of admiralty and maritime jurisdiction, and of notaries public;

\* \* \* \* \*

The references to official seals and signatures should be removed from these subdivisions. They are superseded by Proposed Rule 67.7. See the Comment to that rule. The ultimate disposition to be made of these subdivisions is the subject of a separate study and recommendation on judicial notice.

**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 Evidence) of the Uniform Rules of Evidence. See 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 346 (1963). The deleted language pertains not only to hearsay, but also to authentication and best evidence. It is superseded by Revised 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 Evidence) of the Uniform Rules of Evidence. *Ibid.* 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 Revised 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 Revised Rule 68, this and other evidence of authenticity not mentioned explicitly in Revised 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 copy is a correct copy of the writing 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 Evidence) of the Uniform Rules of Evidence. See 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 348 (1963). The section pertains not only to hearsay, but also to authentication and best evidence. It is superseded by the provisions of Revised 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 Revised 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 fail 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 Revised Rule 70.

**Section 1940** provides:

1940. Any writing may be proved either:

One—By any one who saw the writing executed; or,

Two—By evidence of the genuineness of the handwriting of the maker; or,

Three—By a subscribing witness.

This section should be repealed. It is superseded by Revised Rule 71.

**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 the 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 Evidence) of the Uniform Rules of Evidence. 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 350 (1963). The deleted language pertains not only to hearsay, but also to authentication and best evidence. It is superseded by Revised 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 Revised Rule 72.

### **Business and Professions Code**

**Section 5012** should be revised to read :

5012. The board shall have a seal ~~which shall be judicially noticed.~~

The deleted language is superseded by Proposed Rule 67.7. See the the Comment to that rule.

### **Corporations Code**

**Section 6602** should be revised to read :

6602. In any action or proceeding, the court shall take judicial notice without proof in court of the Constitution and statutes

applying to foreign corporations, and any interpretation thereof, ~~the seals of State and state officials and notaries public,~~ and of the official acts affecting corporations of the legislative, executive, and judicial departments of the State or place under the laws of which the corporation purports to be incorporated.

The deleted language is superseded by Proposed Rule 67.7. See the Comment to that rule. The ultimate disposition to be made of the remainder of the section is the subject of a separate study and recommendation on judicial notice.

**Section 25310** should be revised to read :

25310. The commissioner shall adopt a seal bearing the inscription: "Commissioner of Corporations, State of California." The seal shall be affixed to all writs, orders, permits, and certificates issued by him, and to such other instruments as he directs. ~~All courts shall take judicial notice of this seal.~~

The deleted language is superseded by Proposed Rule 67.7. See the Comment to that rule.

### Public Utilities Code

**Section 306** should be revised to read :

306. The office of the commission shall be in the City and County of San Francisco. The office shall always be open, legal holidays and nonjudicial days excepted. The commission shall hold its sessions at least once in each calendar month in the City and County of San Francisco. The commission may also meet at such other times and in such other places as may be expedient and necessary for the proper performance of its duties, and for that purpose may rent quarters or offices. Except for the commission's deliberative conferences, the sessions and meetings of the commission shall be open and public and all persons shall be permitted to attend.

The commission shall have a seal, bearing the inscription "Public Utilities Commission State of California." The seal shall be affixed to all writs and authentications of copies of records and to such other instruments as the commission shall direct. ~~All courts shall take judicial notice of the seal.~~

The commission may procure all necessary books, maps, charts, stationery, instruments, office furniture, apparatus, and appliances.

The deleted language is superseded by Proposed Rule 67.7. See the Comment to that rule.

# A STUDY RELATING TO THE AUTHENTICATION ARTICLE OF THE UNIFORM RULES OF EVIDENCE \*

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\* This study was made at the request of the California Law Revision Commission by Professor James H. Chadbourn, formerly of the U.C.L.A. Law School, now of the Harvard Law School. The opinions, conclusions, and recommendations contained herein are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the Law Revision Commission.

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## INTRODUCTION

The California Law Revision Commission has been authorized to make a study to determine whether the law of evidence in this State 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.<sup>1</sup>

The present study, made at the request of the Law Revision Commission, considers whether California should adopt the provisions of the Uniform Rules of Evidence relating to authentication and content of writings—*i.e.*, Rules 67-72 and other related provisions of the Uniform Rules. The study indicates what changes would be made in the California law of evidence if the authentication provisions of the Uniform Rules of Evidence were adopted and also subjects those provisions to an objective analysis designed to test their utility and desirability. In some instances, modifications of the provisions of the Uniform Rules are suggested.

This study should be considered in connection with a similar study already published dealing with the adoption in California of the Uniform Rules of Evidence relating to hearsay.<sup>2</sup>

<sup>1</sup> Cal. Stats. 1956, Res. Ch. 42, p. 263.

<sup>2</sup> See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)*, 4 CAL. LAW REVISION COMM'N REP., REC. & STUDIES 301 (1963).



## RULE 67—AUTHENTICATION REQUIRED; ANCIENT DOCUMENTS

Rule 67 provides as follows:

RULE 67. *Authentication Required; Ancient Documents.* Authentication of a writing is required before it 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 a document, if authentic, would be likely to be found, it is sufficiently authenticated.

### First Sentence

This sentence states the well-accepted proposition<sup>1</sup> that "authentication of a writing is required before it may be received in evidence."

It does not, however, cover the situation where secondary evidence of the writing is introduced, as allowed by Rule 70.<sup>2</sup> The sentence should, therefore, be changed to read (new matter in italics):

Authentication of a writing is required before it *or secondary evidence of its terms* may be received in evidence.

### Second Sentence

The second sentence indicates an intention to make clear that (1) only prima facie evidence of authenticity is required, and (2) not even this is required when existing law is satisfied by less than this.<sup>3</sup>

### Third Sentence

This sentence involves the widely accepted ancient documents principle—that a document may be authenticated by reference to its age together with certain accompanying circumstances.<sup>4</sup> There is general agreement that the requisite age is 30 years or more.<sup>5</sup> There is disagreement, however, as to what the requisite accompanying circumstances are. In this connection the three following questions arise: (1) Must the document come from a natural custody?<sup>6</sup> (2) Must the document be unsuspecting in appearance?<sup>7</sup> (3) In the case of property instruments, must the parties (or their predecessors) who would be entitled to possession if the instrument is genuine have been in possession?<sup>8</sup>

<sup>1</sup> See McCORMICK, EVIDENCE § 185 (1954) [hereinafter cited as McCORMICK].

<sup>2</sup> See discussion of Rule 70 in the text, *infra* at 143-161.

<sup>3</sup> As, for example, under CAL. CODE CIV. PROC. §§ 1948 and 1951, providing for authentication by apparent certificate of acknowledgment.

<sup>4</sup> 7 WIGMORE, EVIDENCE § 2137 (3d. ed. 1940) [hereinafter cited as WIGMORE]; McCORMICK § 190.

<sup>5</sup> 7 WIGMORE § 2138.

<sup>6</sup> See 7 WIGMORE § 2139.

<sup>7</sup> See 7 WIGMORE § 2140.

<sup>8</sup> See 7 WIGMORE § 2141.

What is the California answer to these three questions? Code of Civil Procedure Section 1963(34) states the following disputable presumption:

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; . . .

This seems to require (in addition to age) natural custody and possession.<sup>9</sup> It does not, however, specifically require unsuspecting appearance.

By way of contrast Rule 67, third sentence, provides as follows:

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 a document, if authentic, would be likely to be found, it is sufficiently authenticated.

This seems to require unsuspecting appearance and natural custody, but *not* possession.

It is believed that Rule 67 is preferable to Section 1963(34). In the first place, it would seem that the application of the doctrine should depend (as Rule 67 makes it depend) upon a document bearing an honest face, innocent of apparent tampering, suspicious interlineations, strike-outs and the like.<sup>10</sup> It would also seem that the application of the doctrine should *not* depend upon possession (and under Rule 67 it would not so depend). Wigmore's argument against the possession requirement, as set forth in the following passage, supports this view:<sup>11</sup>

The *policy* of thus requiring possession as a fourth circumstance (additional to age, appearance, and custody), and the probative importance of that circumstance, may be indicated by putting a question: If this document can be shown to have been in existence for thirty years, and therefore presumably to have been known to the parties benefiting by its provisions, why have they not acted upon its provisions during all this time, either by taking possession of the land granted or at least by bringing suit to dispossess the usurpers if any?

The argument from the implied answer to this question has been the chief persuasive one for those judges who have attempted to establish the rule upon a basis of reason:

\* \* \* \* \*

But there is a weakness in this argument. In the first place, it is in its nature an argument in rebuttal; it ought to come from the opponent of the deed. An inference is sought to be drawn from non-possession by the claimant; and it would therefore seem to be more

<sup>9</sup> The language "generally acted upon as genuine by persons having an interest in the question" probably is meant to enact the requirement of possession. As Wigmore points out, this requirement has been the subject of a long controversy. See 7 WIGMORE § 2141. It seems likely that the draftsmen of Section 1963(34) had this controversy in mind.

<sup>10</sup> See 7 WIGMORE § 2140.

<sup>11</sup> 7 WIGMORE § 2141.

properly a part of the opponent's case to show that non-possession as the foundation for his inference. This is especially true where (as often happens) no evidence one way or the other as to the possession is available; for then the burden of not being able to prove would fall justly on the opponent. In the next place, the inference is not always a legitimate one; the deed or will may have been in existence but its contents unknown to the beneficiaries under it; or circumstances may have prevented their acting upon it; or some other explanation may be available. Instead of making possession, therefore, an invariable requirement, it would seem better to lay down no fixed rule, but to let the circumstances of each case indicate whether there is any additional corroboration of genuineness:

\* \* \* \* \*

This result, accepted by the greater number of Courts, seems to avoid rigid technicality, while amply protecting against fraud.

#### **Recommendation**

It is recommended that Rule 67 be amended as above advised and be approved as so amended.

## RULE 68—AUTHENTICATION OF COPIES OF RECORDS

Rule 68 provides as follows:

**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 if (a) the judge finds that the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept; or (b) evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry; or (c) the office in which the record is kept is within this state and the writing is attested 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) if the office is not within the state, the writing is attested as required in clause (c) and is accompanied by a certificate that such officer 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 may be made 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.

Clause (a) of Rule 68 is discussed first, then clauses (c) and (d), and finally clause (b).

### Rule 68(a)

The only authentication requirement imposed by Rule 68(a) is that the publication *purport* "to be published by authority of the nation, state or subdivision thereof in which the record is kept." Given the requisite purport or appearance, nothing more is required, for the publication "proves itself." It is "self-authenticating." This is in accord with California law and practice insofar as proof by published copy of *certain* official records is concerned.<sup>1</sup> Therefore, it is believed to be desir-

<sup>1</sup> CAL. CODE CIV. PROC. § 1918 provides, in part:

[O]fficial documents may be proved, as follows:

1. Acts of the executive of this state . . . and of the United States . . . may . . . 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

able to extend this principle of proof by published copy—as clause (a) of Rule 68 does—to cover *any* “official record” or “entry therein” (provided, of course, the original would be admissible).

### Rule 68(c) and 68(d)

Suppose a paper purports to be an attested or certified copy of an official record in this State and is purportedly made by the legal custodian of the original. Under clause (c) of Rule 68, the purport of the paper is sufficient authentication (*i.e.*, the paper “proves itself”). Note that while clause (c) of Rule 68 requires that the writing be “attested as a correct copy,” it does not require that the writing bear the seal of the ostensible custodian. Currently, California admits properly certified copies of official in-state records,<sup>2</sup> but requires a seal “if there be any.”<sup>3</sup>

Under clause (d) of Rule 68, if the original is an out-of-state official record, a paper—though it purports to be a copy purportedly made by the official custodian—is not sufficiently authenticated by its mere purport. The additional requirement is a certificate that the person attesting the copy “has the custody of the record.” If the office in which the record is kept is within the United States, its territories or insular possessions, such “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

journals of those bodies . . . or by published statutes or resolutions, or by copies . . . 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. . . .
5. Acts of a county or municipal corporation of this state, . . . by a printed book published by the authority of such county or corporation.

It is worth noting that Rule 68(a) is phrased in terms of a writing which “purports to be published by authority.” (Emphasis added.) On the other hand, Code of Civil Procedure Section 1918 is phrased in terms of “documents printed by” authority. The difference is without significance. Code of Civil Procedure Section 1963(35) provides the following presumption: “That a printed and published book, purporting to be printed or published by public authority, was so printed or published.”

In connection with the discussion of Rules 68 and 69, see *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)*, 4 CAL. LAW REVISION COMM’N, REP., REC. & STUDIES 301, 528-530 (1963).

<sup>2</sup> CAL. CODE CIV. PROC. §§ 1893, 1905, 1918(6), 1919. Note that Rule 68(c) is in terms of a writing “attested as a correct copy . . . by a person purporting to be an officer . . . having . . . custody.” (Emphasis added.) On the other hand, the references in the California statutes are to “certified copies” or to copies “certified by the legal keeper.” What the California legislation means, however, is a *purported* certificate by a *purported* legal custodian. Otherwise the apparent certificate would not be self-authenticating and extrinsic evidence would be required as a foundation for the purported certificate. The inconveniences of requiring such extrinsic evidence were pointed out in the early California case of *Mott v. Smith*, 16 Cal. 533, 553 (1860). Since that time, there seems to have been no doubt that the purport of the apparent certificate is a sufficient foundation for admitting the document as *prima facie* genuine. *Galvin v. Palmer*, 113 Cal. 46, 45 Pac. 172 (1895); *People v. Howard*, 72 Cal. App. 561, 237 Pac. 780 (1925); *Rosenberg v. J. C. Penney Co.*, 30 Cal. App.2d 609, 86 P.2d 696 (1939). See also 5 WIGMORE § 1679.

The certificate which thus authenticates itself likewise authenticates the original. 7 WIGMORE § 2158.

In cases under Section 1918(7) of the Code of Civil Procedure, the third certificate is self-authenticating, thereby authenticating the first two certificates and the original. 5 WIGMORE § 1679.

<sup>3</sup> CAL. CODE CIV. PROC. § 1923. As to what constitutes sufficient attestation of certification, see *In re Smith*, 33 Cal.2d 797, 205 P.2d 662 (1949) (word “Attest” accompanied by signature and seal held sufficient). And see UNIFORM RULE 68 Comment.

seal of his office." If the office in which the record is kept is in a foreign state or country, this certificate "may be made 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."

Is a certificate *apparently* complying with these conditions self-authenticating? The references here to "judge," "public officer," "seal" and "certificate" omit the qualifying adjective "purported." Nevertheless the terms should be read as thus qualified. Clause (d) of URE Rule 68 is based upon Model Code Rule 517(1)(c)(i). The latter referred to "a person purporting to be a judge" or "purporting to be a public officer," whereas in constructing Rule 68(d) the Commissioners on Uniform State Laws probably regarded the qualifications expressly stated in Model Code Rule 517 as necessarily implicit and omitted explicit qualification for the sake of simplicity of statement. When we consider their explanation of the underlying purpose as stated in the Comment to Rule 68, which is to simplify "the methods of proving the authenticity of copies of official records," there can be little doubt that the Commissioners on Uniform State Laws intend the ostensible certificate to be self-authenticating.

In some respects, clause (d) of Rule 68 is more liberal than present California practice; in other respects, it is more strict. As to out-of-state documents specified in subdivisions (1), (2), (3) and (9) of California Code of Civil Procedure Section 1918, California accepts the purported certificate of the official custodian without requiring more.<sup>4</sup> As to out-of-state documents specified in subdivision (7) of Section 1918, California requires more than the purported certificate of the custodian *and* more than Rule 68(d) requires. There must be not only the certificate of the custodian, but also a certificate of "the secretary of state, judge of the supreme, superior, or county court, or mayor" that "the copy is duly certified by the officer having the legal custody of the original."<sup>5</sup> Rule 68(d) recognizes that persons other than these are competent to execute the requisite certificate of the custodian's custody. As to a document located in a foreign country, Section 1918(8) of the California Code of Civil Procedure requires a certificate of the custodian, a certificate by an appropriate official of the country *and* a certificate by a representative in United States foreign service authenticating the signature of the appropriate official of the country. Thus, California requires three certificates, whereas Rule 68(d) requires only two.<sup>6</sup>

<sup>4</sup> See CAL. CODE CIV. PROC. § 1918(1) (certified copies by Secretary of State to prove the acts of executive); CAL. CODE CIV. PROC. § 1918(2) (certified copies by clerks to prove proceedings of congress); CAL. CODE CIV. PROC. § 1918(3) (similar to above as to acts of executive or proceedings of legislature of sister state); CAL. CODE CIV. PROC. § 1918(9) (documents in the departments of the United States government provable by certificate of the legal custodian); CAL. CODE CIV. PROC. § 1905 (judicial record of the United States provable by copy certified by legal custodian).

<sup>5</sup> CAL. CODE CIV. PROC. § 1918(7). Proof of the judicial record of a sister state by copy requires a certificate by the clerk and a certificate by "the Chief Judge or presiding magistrate." CAL. CODE CIV. PROC. § 1905. As to proof of out-of-state record of the justice of the peace court, see CAL. CODE CIV. PROC. §§ 1921-1922.

<sup>6</sup> CAL. CODE CIV. PROC. § 1918(8). Proof of foreign judicial record of a sister state by copy requires three certificates (by the clerk, by the judge, by the representative in United States foreign service). CAL. CODE CIV. PROC. § 1906. Section 1901 could be read as eliminating the necessity for third certificate.

In summarizing this comparison and evaluating the respective merits of Section 1918 and Rule 68(d), it can be said that each is better than the other to the extent that it requires *fewer* certificates or makes it easier to obtain the requisite certificates. From this viewpoint, Rule 68(d) is preferable to Sections 1918(7)<sup>7</sup> and 1918(8),<sup>8</sup> whereas the other subdivisions of Section 1918 are preferable to Rule 68(d).<sup>9</sup> Under these circumstances, the best solution would be to amend Rule 68(d) to incorporate therein the best features of Section 1918.<sup>10</sup>

Since the portions of Section 1918 which are preferable to Rule 68 refer, for the most part,<sup>11</sup> to *federal* records, clause (c) of Rule 68 should be amended by adding the phrase "or is an office of the United States government whether within or without this state" after the phrase "the office in which the record is kept is within this state." Clause (d) of Rule 68 should be amended by adding the phrase "or is not an office of the United States government" after the phrase "if the office is not within the state."

### Rule 68(b)

This clause considers the use of evidence extrinsic to the writing itself for the purpose of authentication. In other words, the writing here is not self-authenticating (as it is under clauses (a) and (c) of Rule 68). But given sufficient evidence to warrant a finding that the writing is a correct copy, the copy is then admissible.

Today a copy made by a private person must be verified by a witness who can testify from knowledge as to the contents of the original document.<sup>12</sup> This means one who made the copy,<sup>13</sup> or one who compared it with the original<sup>14</sup> or one who read the original while another read the copy (or vice versa)<sup>15</sup> or possibly one who, though he has never before seen the copy, has a photographic memory of the contents of the original so that he can testify to the accuracy of the copy from his present recollection of the original.<sup>16</sup> To the extent that the "evidence sufficient to warrant a finding that the writing is a correct copy" in the sense of Rule 68(b) is evidence of the kind just described, it is obvious that Rule 68(b) does not change the law prevailing today. However, the recent study relating to hearsay evidence indicates that 68(b) combined with Rule 63(17) does provide a new exception to the hearsay rule.<sup>17</sup>

### Recommendation

It is recommended that Rule 68 be amended as advised above and be approved as so amended.

<sup>7</sup> And to CAL. CODE CIV. PROC. § 1905.

<sup>8</sup> And to CAL. CODE CIV. PROC. § 1906.

<sup>9</sup> As to proof of United States judicial records, Code of Civil Procedure Section 1905 is preferable to Uniform Rule 68(d).

<sup>10</sup> Wigmore has high praise for Code of Civil Procedure Section 1918, and uses it as the basis for a proposed Model Act. See 5 WIGMORE §§ 1638a and 1680b.

<sup>11</sup> See CAL. CODE CIV. PROC. § 1918(3), having reference to proof of the "acts of the executive, or the proceedings of the legislature of a sister state," which permits proof by only an unpublished certified copy. As such, it is preferable to Rule 68(d). However, proof of these matters could normally be by published copy under Rule 68(a).

<sup>12</sup> 4 WIGMORE §§ 1273, 1277-1281.

<sup>13</sup> *Id.* at § 1278.

<sup>14</sup> *Id.* at § 1280.

<sup>15</sup> *Id.* at § 1279.

<sup>16</sup> *Id.* at § 1280(2). See also *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)*, 4 CAL. LAW REVISION COMM'N REP., REC. & STUDIES 301, 522 (1963).

<sup>17</sup> See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)*, *supra* note 16.

## RULE 69—CERTIFICATE OF LACK OF RECORD

Rule 69 provides as follows :

RULE 69. *Certificate of Lack of Record.* A writing admissible under exception (17)(b) of Rule 63 is authenticated in the same manner as is provided in clause (c) or (d) of Rule 68.

Accordingly, such writing would either “prove itself” under Rule 68(c) or would require an additional certificate under Rule 68(d) which would “prove itself” and thus achieve admissibility.

### Recommendation

Rule 69 is recommended for approval as drafted.

## RULE 70—DOCUMENTARY ORIGINALS AS THE BEST EVIDENCE

### Introduction

Rule 70 provides as follows:

**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, unless the judge finds (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 procurable by the proponent, or (c) that the opponent, at a time when the writing was under his control has been notified, expressly or by implication from the pleadings, that it would be needed at the hearing, and on request at the hearing has failed to produce it, 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 record, or is a writing affecting property authorized to be recorded and actually recorded in the public records as described in Rule 63, exception (19).

(2) If the judge makes one of the findings specified in the preceding paragraph, secondary evidence of the content of the writing is admissible. Evidence offered by the opponent tending to prove (a) that the asserted writing never existed, or (b) that a writing produced at the trial is the asserted writing, or (c) that the secondary evidence does not correctly reflect the content of the asserted writings, 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.

Three sections of the Code of Civil Procedure contain provisions similar to those of Rule 70. These three sections are:

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.

1937. 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. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail 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.

Both Rule 70 and the above provisions of the Code of Civil Procedure are constructed in terms of a general rule and exceptions thereto. Below, the general rule as stated in Rule 70 is compared with the rule as stated in Section 1855. Then the exceptions to Rule 70 are compared with the California exceptions.

## General Rule

### Scope of the Rule

The general rule as stated in Rule 70 is identical in substance with that stated in Section 1855 and is almost identical in form. Rule 70 states: "As tending to prove the content of a writing, no evidence other than the writing itself is admissible . . ."; whereas Section 1855 states, "There can be no evidence of the contents of a writing, other than the writing itself . . ."

The rule thus stated is known as the Best Evidence Rule.<sup>1</sup> The rule may operate to preclude oral evidence of the contents of such writings as a bill of sale,<sup>2</sup> company safety rules,<sup>3</sup> a letter,<sup>4</sup> a written contract,<sup>5</sup> a tentative agreement in writing,<sup>6</sup> a telegram<sup>7</sup> and a book of original entry.<sup>8</sup>

<sup>1</sup> "[S]ection 1855 of the Code of Civil Procedure [is] known as the best evidence rule. . . ." *Akopoff v. Mesropian*, 96 Cal. App. 123, 273 Pac. 604 (1929).

The Best Evidence Rule is, of course, different in terms and in principle from the Parol Evidence Rule. This difference is expounded in *Lawrence v. Premier Indem. Assur. Co.*, 180 Cal. 688, 697, 182 Pac. 431, 435 (1919), and *Dollar v. International Banking Corp.*, 13 Cal. App. 331, 343, 109 Pac. 499, 504 (1910).

<sup>2</sup> *Crary v. Campbell*, 24 Cal. 634 (1864).

<sup>3</sup> *Wilson v. Atchison, T. & S.F. Ry. Co.*, 6 Cal. App.2d 735, 45 P.2d 372 (1935).

<sup>4</sup> *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166 (1912); *Byrne v. Byrne*, 113 Cal. 294, 45 Pac. 536 (1896).

<sup>5</sup> *Ross v. Sweeters*, 119 Cal. App. 716, 7 P.2d 334 (1932).

<sup>6</sup> *McCormick Saeltzer Co. v. Grizzly Creek Lumber Co.*, 74 Cal. App. 278, 240 Pac. 32 (1925).

<sup>7</sup> *Brownlee v. Reiner*, 147 Cal. 641, 82 Pac. 324 (1905).

<sup>8</sup> *Campbell v. Rice*, 22 Cal. App. 734, 136 Pac. 512 (1913).

The statement in the text is, of course, based upon the assumption that no exception to the general rule is applicable and upon the further assumption that

The Best Evidence Rule does not, however, require the best evidence on all the issues in a case. Rather, it requires such evidence on only one such issue; namely, the contents of a writing.<sup>9</sup> Thus, if the content of a writing is established by the writing itself, the Best Evidence Rule is satisfied. If the purpose of establishing the writing is to base inferences upon it and thus to use it as circumstantial evidence of some such proposition as, say, ownership or guilt, it is no objection to the writing that as such circumstantial evidence it is weak and inferior proof of the proposition.<sup>10</sup> The Best Evidence Rule is satisfied when the writing is introduced. There is no further requirement that the writing be the best evidence of the proposition it is offered to prove.

### Policy of the Rule

The policy of the rule is well stated in the following Comment on Model Code Rule 602 (on which Rule 70 is based) :

Slight differences in written words or other symbols may make vast differences in meaning; there is great danger of inaccurate observation of such symbols, especially if they are substantially similar to the eye. Consequently there is opportunity for fraud and likelihood of mistake in proof of the content of a writing unless the writing itself is produced. Hence it should be produced if available.<sup>11</sup>

### What Is a Writing?

Rule 1(13) defines the term "writing" as follows :

"Writing" means handwriting, typewriting, printing, 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.

It follows, of course, that Rule 70 applies to all of the media stated in Rule 1(13).

Code of Civil Procedure Section 17 provides that "writing includes printing and typewriting." It follows, of course, that Sections 1855, 1937 and 1938 apply (as does Rule 70) to handwriting, typewriting and printing. Do these sections, however, also apply (as does Rule 70) to other media, such as photographs and sound recordings? Recent California cases have assumed that they do. Thus photographs<sup>12</sup> and

the oral evidence is properly objected to. Ordinarily, a general objection is insufficient. See *Rewrick v. Goldstone*, 48 Cal. 554 (1874).

The oral evidence is possessed of probative force and may, therefore, be considered when admitted without objection. *Sublett v. Henry's Turk & Taylor Lunch*, 21 Cal.2d 273, 131 P.2d 369 (1942); *Myran v. Smith*, 117 Cal. App. 355, 4 P.2d 219 (1931); *Gille v. Anderson*, 34 Cal. App. 237, 167 Pac. 193 (1917).

<sup>9</sup> McCORMICK §§ 195-196.

<sup>10</sup> See *First Nat'l Bank v. De Moulin*, 56 Cal. App. 313, 320, 205 Pac. 92, 95 (1922).

<sup>11</sup> AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE 300 (1942). See also McCORMICK § 197 and *Bagley v. McMickle*, 9 Cal. 430, 446 (1858).

<sup>12</sup> *Heinz v. Heinz*, 73 Cal. App.2d 61, 165 P.2d 967 (1946) (divorce; testimony of witness that he saw pictures and prints in a New York studio portraying defendant in the nude held admissible because the "law is established in California that when a document is beyond the territory of this state it is a lost document so as to permit the introduction of secondary evidence of its content."). This, it seems, clearly puts proof of a photograph on a par with proof of a document.

tape recordings<sup>13</sup> have been treated as falling within the ambit of the Best Evidence Rule. Although this extends the concept of writing beyond the scope of such concept as defined in Section 17, such an extension seems desirable.<sup>14</sup> Exactitude and precision are no less important for words recorded on tape than for words handwritten, typed or printed on paper. Accuracy as to what a photograph portrays may be as important as accuracy respecting words on paper or record or tape.

It seems, therefore, that both California and the Uniform Rules adopt a broad view of what constitutes a writing for purposes of the Best Evidence Rule. It seems, further, that such broad view is in harmony with the policy which underlies Rule 70.

### What Is Evidence of "the Content of a Writing"?

The Best Evidence Rule is applicable only to an offer of proof which tenders evidence of the content of a writing. To take a simple illustration: D pays P in cash the amount of a debt. P gives D a written receipt. Now D's statement, "I paid the debt off in cash," is not a statement of the contents of a writing. It is rather a statement of a fact which happens to be recorded in a writing. The statement, however, makes no reference to either the existence or the terms of the writing.<sup>15</sup> On the other hand, D's statement that "P gave me a written receipt acknowledging payment of the debt" is, of course, a statement referring both to the writing and to the contents thereof. In this form, the statement thus falls within the scope of the Best Evidence Rule. In many situations the distinction is by no means clear, as may be seen by reading some cases involving the application of the distinction.<sup>16</sup>

Adoption of Rule 70 would not, of course, eliminate the need to make the distinction, nor would such adoption affect in any way the present precedents on what is and what is not evidence of the contents of a writing.

### Original Writings in Duplicate or Multiplicate

A writing may exist in two or more forms, each form being equal in all respects to the other form or forms. In that event, each is as much original as the other or others. That is, all are duplicate or multiplicate

<sup>13</sup> *People v. King*, 101 Cal. App.2d 500, 225 P.2d 950 (1950) (statement recorded on tape, then on disc, then tape erased. Held, the "disc recordings were secondary evidence and, under the circumstances here, they should not have been received in evidence.").

Query: even if the tape was a "document" in the sense of the Best Evidence Rule, was this not a case of destruction of the original document in which secondary evidence was therefore admissible under CAL. CODE CIV. PROC. § 1855(1)?

<sup>14</sup> Compare, however, McCormick's objection that a broad concept of writings for purposes of the Best Evidence Rule may "encourage a more inflexible rather than a discretionary practice about the use of reproductions of wire and tape recordings, motion pictures, and other new forms of 'writings.'" MCCORMICK § 199 n. 5.

<sup>15</sup> MCCORMICK § 198, n. 5.

<sup>16</sup> *Morison v. Weik*, 19 Cal. App. 139, 124 Pac. 369 (1912) (action to set aside purported deed from P to D on ground D forged P's name thereto. D's evidence that P signed held not evidence of the contents of the instrument); *People v. Ferrara*, 31 Cal. App. 1, 159 Pac. 621 (1916) (witness' testimony that he saw defendant sign hotel register with false name admitted over objection that the register was the best evidence of its contents).

See also *People v. Ramos*, 3 Cal.2d 269, 44 P.2d 301 (1935); *Schurtz v. Kerkow*, 85 Cal. 277, 24 Pac. 609 (1890); *Whitaker v. Mitchell*, 58 Cal. 362, (1881); *Vickter v. Pan Pac. Sales Corp.*, 108 Cal. App.2d 601, 239 P.2d 463 (1952); *Galbavy v. Clevelin Realty Corp.*, 58 Cal. App.2d 903, 136 P.2d 134 (1943); *Feder v. Bryson*, 111 Cal. App. 448, 295 Pac. 546 (1931); *Crinella v. Northwestern Pac. R.R.*, 85 Cal. App. 440, 259 Pac. 774 (1927); *Goatman v. Fuller*, 50 Cal. App. 403, 195 Pac. 256 (1920); *Pugh v. Bell*, 21 Cal. App. 530, 132 Pac. 286 (1913).

originals.<sup>17</sup> This doctrine is recognized in California.<sup>18</sup> It would continue to be recognized under the Uniform Rules.

### Photographic Reproductions

Presently, there are several provisions of the Code of Civil Procedure which extend the above principle, under certain conditions, to photographic reproductions of documents. That is, when the conditions are met, the photograph is equated with the original. The provisions are as follows:

1920b. A print, whether enlarged or not, from any photographic film, including any photographic plate, microphotographic film, or photostatic negative, of any original record, document, instrument, plan, book or paper may be used in all instances that the original record, document, instrument, plan, book or paper might have been used, and shall have the full force and effect of said original for all purposes; provided, that at the time of the taking of said photographic film, microphotographic, photostatic or similar reproduction, the person or officer under whose direction and control the same was taken, attached thereto, or to the sealed container in which the same was placed and has been kept, or incorporated in said photographic film, microphotographic, photostatic or similar reproduction, a certification complying with the provisions of Section 1923 of this code and stating the date on which, and the fact that, the same was so taken under his direction and control.

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.

<sup>17</sup> McCORMICK § 205.

<sup>18</sup> Pratt v. Phelps, 23 Cal. App. 755, 139 Pac. 906 (1914) (carbon copy duplicate original); Edmunds v. Atchison, T. & S.F. Ry., 174 Cal. 246, 162 Pac. 1033 (1917) (same); Humes v. Humes, 56 Cal. App.2d 126, 133 P.2d 39 (1942) (same). *But cf.* Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381 (1885) (letter-press copy not duplicate original). However, a letter-press copy may, with proper foundation, be admitted as secondary evidence. See Ulm v. Prather, 49 Cal. App. 141, 192 Pac. 878 (1920).

1953L. Nothing in this article shall affect the admissibility of any evidence permitted by Sections 1920a and 1920b of this code.

Adoption of Rule 70 would not necessarily affect any of these provisions.

Such provisions could be continued in force, and this would seem to be desirable.

#### Conclusion as to General Rule

It seems that the general statement of the Best Evidence Rule as formulated by Rule 70 is in harmony with the general statement of the rule in Code of Civil Procedure Section 1855.

### Exceptions to Rule 70

The general rule requires the writing itself as evidence of its terms. The exceptions permit *other* evidence (so-called secondary evidence) of the contents of the writing.<sup>1</sup> Below, some preliminary matters are considered, and then each of the five Rule 70 exceptions is reviewed, comparing it with its California counterpart.

#### Authentication

In the several exceptional circumstances stated in Rule 70(1)(a)-(e), secondary evidence may be received to establish the terms of a writing. The proponent of such secondary evidence must, of course, lay a foundation bringing his offer of proof within one of the situations described in Rule 70(1)(a)-(e). In addition, the proponent must authenticate the original writing by making a prima facie showing that the original is in fact what it purports to be. In other words, although the proponent may, under Rule 70, be excused from producing and offering the original document in evidence, he is not excused from complying with the normal rules respecting authentication.

This is law today,<sup>2</sup> and there is no doubt that it is the intent of the Uniform Rules that this should continue to be the law. Nevertheless, Rule 67—the general authentication rule—is phrased in a way which disguises this intent. The general requirement of authentication is there stated:

Authentication of a writing is required before *it* may be received in evidence. [Emphasis added.]

This provision speaks in terms only of the necessity to authenticate the writing when the writing itself is offered in evidence. The provision should, it is submitted, be revised to include the situation in which secondary evidence of the writing is offered. This could be accomplished by the following amendment (new matter in italics): .

Authentication of a writing is required before *it or secondary evidence of its terms* may be received in evidence.

<sup>1</sup> This assumes, of course, that the secondary evidence is unobjectionable on other grounds, such as hearsay, privilege, etc.

<sup>2</sup> *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. 176 (1886); *People v. Hust*, 49 Cal. 653 (1857); *Eaton v. Brock*, 124 Cal. App.2d 10, 268 P.2d 53 (1954); *Forman v. Goldberg*, 42 Cal. App.2d 308, 108 P.2d 983 (1941). See also the authentication requirement stated in CAL. CODE CIV. PROC. § 1937.

### If Secondary Evidence Is Admissible, May Proponent Elect to Introduce the Original?

At first blush, the above inquiry seems rather ridiculous. Prima facie, it seems somewhat absurd to suggest that secondary evidence *might* be preferred to primary evidence. Nevertheless, the problem arises and therefore merits at least brief discussion.

Code of Civil Procedure Section 1855 reads in part as follows:

There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases: . . .

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. . . .

In the cases mentioned in subdivisions three and four, a copy of the original, or of the record, must be produced; . . .

Suppose a certificate is filed with the county clerk. Plaintiff obtains the certificate from the clerk and offers it in evidence. Defendant objects, grounding his objection on that part of Section 1855 which states that "in the cases mentioned in subdivisions three . . . a copy of the original . . . must be produced." Literally, this supports the defendant's objection and precludes introduction in evidence of the original document. Surely, however, it was not the intent of the Legislature to forbid use of the original. Rather, the intent was to permit the plaintiff to use the copy, but not to preclude him from using the original. This is implicit in the holding in *Hazard, Gould & Co. v. Rosenberg*,<sup>3</sup> permitting evidence of the original over the objection that only a certified copy is admissible.

Suppose that a deed is recorded. Plaintiff offers the deed in evidence. Defendant objects, grounding his objection on that part of Section 1855 which reads as follows: "In the cases mentioned in subdivisions . . . four, a copy of the original, or of the record, must be produced." Again, the language of the section, if taken literally, supports the defendant's objection. However, such literal construction of Section 1855 would seem to bring it in conflict with Section 1951, which provides as follows:

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 the like effect as the original instrument, without further proof.

The plaintiff could therefore offer: (1) the original deed, or (2) the original record of the deed, or (3) a certified copy of the record. The plaintiff could offer any of these three items, none of which is preferred to any of the others, notwithstanding the language of Section 1855, which literally precludes the use of item one (and possibly of

<sup>3</sup> 177 Cal. 295, 170 Pac. 612 (1918).

item two). It is thus apparent that the last paragraph of Section 1855 is construed nonliterally so as to harmonize with provisions such as Section 1951 and the other sections cited in the appended note.<sup>4</sup>

#### The Exception in Rule 70(1)(a)

Under this exception, secondary evidence of the content of the writing is admissible if the judge finds "that the writing is lost or has been destroyed without fraudulent intent on the part of the proponent."

Under Section 1855(1), such evidence is admissible "when the original has been lost or destroyed."

Rule 70(1)(a) expressly requires that the destruction be nonfraudulent. Although Section 1855(1) does not explicitly state this requirement, it has been read into the provision.<sup>5</sup>

It seems, therefore, that Rule 70(1)(a) and Section 1855(1) as construed are identical in substance. Each, of course, requires difficult determinations as to when a document is lost and when destruction is nonfraudulent. Presently we have a substantial body of precedents applying Section 1855(1) in these respects.<sup>6</sup> Such precedents would be germane in applying Rule 70(1)(a) if the same were adopted in this State.

#### The Exception in Rule 70(1)(b)

Under this exception, secondary evidence is admissible if the judge finds "that the writing is outside the reach of the court's process and not procurable by the proponent."

Suppose that a plaintiff needs to prove the terms of a document not of a kind stated in Rule 70(1)(d) or (e). Suppose further that the document is and allegedly has been in the hands of a third person who could be ordered to produce the document by subpoena duces tecum issued by the court in which the action is pending. This is not

<sup>4</sup> CAL. CODE CIV. PROC. § 1918 which makes the originals of various kinds of public documents admissible; CAL. CODE CIV. PROC. §§ 1905-1906 which make the originals of various kinds of judicial records admissible.

<sup>5</sup> Bagley v. McMickle, 9 Cal. 430, 446 (1853), in which the court states:

It is not a matter of course to allow secondary evidence of the contents of an instrument in suit upon proof of its destruction. If the destruction was the result of accident, or was without the agency or consent of the owner, such evidence is generally admissible. But, if the destruction was voluntarily and deliberately made, by the owner, or with his assent, as in the present case, the admissibility of the evidence will depend upon the cause or motive of the party in effecting or assenting to the destruction. The object of the rule of law which requires the production of the best evidence of which the facts sought to be established are susceptible, is the prevention of fraud; for, if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises, that the better evidence is withheld for fraudulent purposes which its production would expose and defeat. When it appears that this better evidence has been voluntarily and deliberately destroyed, the same presumption arises, and unless met and overcome by a full explanation of the circumstances, it becomes conclusive of a fraudulent design, and all secondary or inferior evidence is rejected. If, however, the destruction was made upon an erroneous impression of its effect, under circumstances free from suspicion of intended fraud, the secondary evidence is admissible. The cause or motive of the destruction is then the controlling fact which must determine the admissibility of this evidence in such cases.

See also the cases cited in note 6 *infra*.

<sup>6</sup> The leading case is Kenniff v. Caulfield, 140 Cal. 34, 41-42, 73 Pac. 803, 805 (1903), in which the court spoke as follows:

The general rule concerning proof of a lost instrument is, that reasonable search shall be made for it in the place where it was last known to have been, and, if such search does not discover it, then inquiry should be made of persons most likely to have its custody, or who have some reason to know of its whereabouts.

The party must show that he has in good faith, and to a reasonable degree, made an effort to discover the instrument, and to that end has ex-

a lost or destroyed document under Rule 70(1)(a), nor a document beyond the reach of the court's process under Rule 70(1)(b), nor a document once in possession of the defendant who was notified to produce it under Rule 70(1)(c). By stipulation the document is not under Rule 70(1)(d) or (e). It follows that the general rule is applicable to proof of the document, and plaintiff must therefore procure the original, if need be by the use of a subpoena.<sup>7</sup> Possibly, the same is true under Section 1855 of the Code of Civil Procedure, but this is far from clear.<sup>8</sup>

What if the document is located out of the State? Under Rule 70(1)(b), this would excuse nonproduction by the plaintiff only upon a showing by him that the document was "not procurable" by him. Thus, it would seem that if the out-of-state document is subject to the plaintiff's direction or control, he must procure it; in any other event, he must make reasonable informal attempts to procure it. California law appears to be in conflict with Rule 70(1)(b), if the above interpretation of the rule is correct. Currently, an out-of-state document is treated as a lost document, provable as such under Section 1855(1).<sup>9</sup> This is so even when it appears that, because the document is subject

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hausted all sources of information and means of discovery which were open to him, and which in the nature of the case were possible. No fixed rule as to the necessary proof to establish loss, or what constitutes reasonable search, can be formulated. The terms 'reasonable search' and 'in good faith,' applied to proof of lost instruments, must be construed and defined under the facts in each particular case; there is no inflexible definition under which they can be applied to all cases. The sole object of such proof is, to raise a reasonable presumption, merely that the instrument is lost, and this is a preliminary inquiry addressed to the discretion of the judge. On this subject it is said: "The rigor of the common law . . . has been relaxed in this respect, and non-production of instruments is now excused for reasons more general and less specific, and upon grounds more broad and liberal than were formerly admitted. If any suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made into the reasons for its non-production. But where there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original—in fact, courts in such cases are extremely liberal. And as far as the sufficiency of the proof so offered is concerned, the rule in questions of this character is, that the trial judge is to determine the sufficiency of the proof. Under the facts and circumstances developed in the case, if they are sufficient to reasonably satisfy the mind of the court that the original is lost, and that it cannot be found after search made at the proper place, that is all that is necessary, and the sufficiency of the proof of the search being in general left to the discretion of the trial judge, this court will not review its rulings in that respect, unless the proof is manifestly insufficient to have warranted the secondary evidence."

See also *Wolf v. Donahue*, 206 Cal. 213, 273 Pac. 547 (1929); *Woods v. Jensen*, 130 Cal. 200, 62 Pac. 473 (1900); *Folsom's Executors v. Scott*, 6 Cal. 460 (1856); *Hausen v. Goldman*, 124 Cal. App.2d 25, 267 P.2d 852 (1954); *People v. Guasti*, 110 Cal. App.2d 456, 243 P.2d 59 (1952); *Cotton v. Hudson*, 42 Cal. App.2d 812, 110 P.2d 70 (1941); *White v. White*, 39 Cal. App.2d 57, 102 P.2d 432 (1940); *Brown v. Gow*, 128 Cal. App. 671, 18 P.2d 377 (1933); *McKey v. MacIntosh*, 45 Cal. App. 628, 188 Pac. 310 (1920); *Furman v. Craine*, 18 Cal. App. 41, 121 Pac. 1007 (1912); *California Nat'l Bank v. Weldon*, 14 Cal. App. 765, 113 Pac. 334 (1910); *Hedstrom v. Union Trust Co.*, 7 Cal. App. 278, 94 Pac. 386 (1908); *King v. Samuel*, 7 Cal. App. 55, 93 Pac. 391 (1907).

<sup>7</sup> If the subpoena is disobeyed, that would seem to be a sufficient basis to admit the secondary evidence. See *McCORMICK* § 202, n. 2.

<sup>8</sup> *Mutual Bldg. & Loan Ass'n v. Corum*, 18 Cal. App.2d 212, 214, 60 P.2d 316, 317 (1936), seems to suggest the necessity to resort to a subpoena. However, *Mahanay v. Lynde*, 48 Cal. App.2d 79, 119 P.2d 430 (1941), may be read as suggesting otherwise. *McCORMICK* § 202, n. 4.

*People v. Powell*, 71 Cal. App. 500, 236 Pac. 311 (1925), holds that if the person in custody of the document could refuse to obey a subpoena duces tecum because of the privilege against self-incrimination, then secondary evidence is admissible, the document being treated as a "lost" document under CAL. CODE CIV. PROC. § 1855(1). This would seem to imply that in general resort to a subpoena is necessary.

<sup>9</sup> *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786 (1893); *Gordon v. Searing*, 8 Cal. 49 (1857); *Heinz v. Heinz*, 73 Cal. App.2d 61, 165 P.2d 967 (1946); *Koenig v. Steinbach*, 119 Cal. App. 425, 6 P.2d 525 (1931); *Rogers Lamb Co. v. Coast Securities Co.*, 58 Cal. App. 744, 209 Pac. 246 (1922); *Mackroth v. Sladky*, 27 Cal. App. 112, 148 Pac. 978 (1915).

to a plaintiff's direction and control<sup>10</sup> or because of other circumstances, a plaintiff might have procured the document by informal means.<sup>11</sup>

As between the Rule 70(1)(b) view as to out-of-state documents and the contrary California view, the former is favored because it seems to be more in harmony with the policy that underlies the Best Evidence Rule.<sup>12</sup>

What if the document is an in-state document but is beyond the reach of the process of the court in which the action is pending? Suppose, for example, the action is in the Los Angeles Superior Court and the document and the possessor thereof are in San Francisco. Must the plaintiff procure the document by way of taking the possessor's deposition pursuant to a subpoena duces tecum issued by the San Francisco Superior Court? It does not seem that this is the intent of Rule 70(1)(b). In other words, the expression "procurable by the proponent" in Rule 70(1)(b) apparently means procurable by means other than process.

#### The Exception in Rule 70(1)(c)

**In General.** Under the Rule 70(1)(c) exception, secondary evidence of the writing is admissible if the judge finds "that the opponent, at a time when the writing was under his control has been notified, expressly or by implication from the pleadings, that it would be needed at the hearing, and on request at the hearing has failed to produce it."

Under Code of Civil Procedure Section 1855(2), secondary evidence of the writing is admissible "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."<sup>13</sup> Section 1938 of the Code of Civil Procedure, quoted in the appended footnote, is to the same effect.<sup>14</sup>

There seem to be no substantive differences between Rule 70(1)(c) and our present provisions. However, Rule 70(1)(c) seems to be clumsily, if not misleadingly, stated. It is recommended that Rule 70(1)(c) be redrafted to read as follows:

that, at a time when the writing was under the control of the opponent, the opponent has been expressly or impliedly notified, by the pleadings or otherwise, that the writing would be needed at the hearing and, on request at the hearing, the opponent has failed to produce such writing.

**Notices and Documents Wrongfully Obtained or Withheld.** Both Sections 1855(2) and 1938 of the Code of Civil Procedure require that the proponent give the opponent notice to produce a document in the possession of the opponent. However, Section 1938 relieves the proponent

<sup>10</sup> See *Koenig v. Steinbach*, 119 Cal. App. 425, 6 P.2d 525 (1931).

<sup>11</sup> See *Mackroth v. Sladky*, 27 Cal. App. 112, 148 Pac. 978 (1915).

<sup>12</sup> See *McCormick* § 202.

<sup>13</sup> See *Harloe v. Lambie*, 132 Cal. 133, 64 Pac. 88 (1901) (notice sufficient where defendant did not object to reasonableness thereof); *Jones v. Jones*, 38 Cal. 584 (1869) (defendant notified; disclaims knowledge of document; secondary evidence admissible); *Burke v. Table Mountain Water Co. & Laforge*, 12 Cal. 403 (1859) (notice on day of trial sufficient under facts); *McAllister v. Lightburn*, 126 Cal. App. 6, 14 P.2d 133 (1932) (notice sufficient under facts).

<sup>14</sup> CAL. CODE CIV. PROC. § 1938 provides ". . . If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail 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."

of this requirement in the two following situations: "where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party."

McCormick speaks as follows with reference to these two situations:

Some exceptions, under which notice is unnecessary before using secondary evidence of a writing in the adversary's possession, have been recognized. The first is well-sustained in reason. It dispenses with the need for notice when the adversary has wrongfully obtained or fraudulently suppressed the writing. The others seem more questionable. There is a traditional exception that no notice is required to produce a writing which is itself a notice. This is understandable in respect to giving notice to produce a notice to produce, which would lead to an endless succession of notices, but there seems little justification for extending the exception, as the cases do, to notices generally.<sup>15</sup>

Rule 70 does not contain explicit provisions respecting either of the two situations above discussed. However, since McCormick's position on proof of notices seems sound, the only significant question is whether Rule 70(1)(c) should be amended to provide explicitly for documents wrongfully obtained or withheld by the adversary. It would seem that in many cases of wrongful obtaining or withholding by the adversary, the pleadings will give the requisite pretrial notice. (For example, in an action to replevy the document or for damages for the conversion of the document). In such cases, there is manifestly no need to relieve the proponent of the requirement of pretrial notice. Where the pleadings do not give such notice (which will be the rare rather than usual case), there would be no hardship in requiring proponent to give it. Therefore, no amendment to Rule 70(1)(c) is recommended.

**Accused in Criminal Action.** Rule 70(1)(c) requires pretrial notice and at-trial request. There is no question of the validity and propriety of the requirement in civil actions. There is, however, a problem in criminal actions.

If the accused is in possession of the original of an incriminating document and the prosecution possesses a copy, may the prosecution properly give the accused the pretrial notice and the at-trial request prescribed by Rule 70(1)(c)? If not, is the prosecution then bound by the general rule and thus deprived of its secondary evidence?

The present law is that "the prosecution may give secondary evidence of the contents of an incriminating document whenever it appears *prima facie* that it is in the possession of the accused."<sup>16</sup> The rationale is that the document is "lost."<sup>17</sup> Moreover, it is improper for the prosecution to request accused at the trial to produce the document.<sup>18</sup>

<sup>15</sup> MCCORMICK § 203. For a case admitting secondary evidence of a notice without accounting for the original, see *Gethin v. Walker*, 59 Cal. 502 (1881).

<sup>16</sup> *People v. Chapman*, 55 Cal. App. 192, 200, 203 Pac. 126, 130 (1921).

<sup>17</sup> *People v. Jackson*, 24 Cal. App.2d 182, 198-199, 74 P.2d 1035, 1094 (1937).

<sup>18</sup> *People v. Chapman*, 55 Cal. App. 192, 200, 203 Pac. 126, 130 (1921).

If, however, defendant has prompted the request by objecting to secondary evidence, the error may not be prejudicial and reversible error. *People v. Rial*, 23 Cal. App. 713, 139 Pac. 661 (1914).

Query: Is it improper for the prosecution to give *pretrial* notice? See MCCORMICK § 202.

The special rule above as to proof by secondary evidence of the terms of a document possessed by the accused has been evolved under Section 1855, which, however, contains no explicit provisions in reference to the situation. Probably this rule would be continued in operation if we adopted Rule 70, though that rule (like Section 1855) contains no explicit provisions covering the situation. It seems desirable, however, to eliminate any doubt about the matter. Therefore, it is recommended that Rule 70(1) be amended to add exception (f) as follows:

(f) 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 Exception in Rule 70(1)(d)

Under this exception, secondary evidence of the writing is admissible if the judge finds "that the writing is not closely related to the controlling issues and it would be inexpedient to require its production."

This seems to be a modern phrasing of the more or less venerable principle that secondary evidence is admissible to prove the contents of a writing without accounting for the original when such writing is a so-called collateral document. In view of the convenient vagueness of the term "collateral," it is likely that this principle was developed in order to introduce some flexibility, loosening the strict enforcement of the Best Evidence Rule by giving discretion to the trial judge to dispense with its requirements by labeling a document collateral.

The early California case of *Poole v. Gerrard*,<sup>19</sup> criticizes the doctrine and rejects it rather decisively. The point apparently has not been raised again since that time. It seems probable, therefore, that in adopting Rule 70(1)(d), new law would be created in this jurisdiction. This would be a desirable change because it would grant the trial judge discretion to alleviate the rigors of the Best Evidence Rule. The possibility of reversal for abuse of discretion is believed to be an adequate safeguard against extreme rulings violative of the fundamental policy of the Best Evidence Rule.

McCormick makes a compelling case in favor of this exception:

At nearly every turn in human affairs some writing—a letter, a bill of sale, a newspaper, a deed—plays a part. Consequently any narration by a witness is likely to include many references to transactions consisting partly of written communications or other writings. A witness to a confession, for example, identifies the date as being the day after the crime because he read of the crime in the newspaper that day, or a witness may state that he was unable to procure a certain article because it was patented. It is apparent that it is impracticable to forbid such references except upon condition that the writings (e.g. the newspaper, and the patent) be produced in court. Consequently, it is clear that where the effect of a writing is summarily or generally stated by the witness, without purporting to give its contents in detail, and the terms of the writing are unlikely to be disputed, or are not the subject of any important issue in the case, then such writing is regarded as a "collateral" one, and the witness' state-

<sup>19</sup> 9 Cal. 593 (1853).

ment of its effect without producing the writing itself, is permissible. This exception is a necessary concession to the need for expedition of trials and clearness of narration, which outweighs, in the case of such merely incidental references to documents, the need for perfect exactitude in the presentation to the court of the contents of the document.

It is manifest, however, that this test of "collateralness" is an exceedingly vague one, not dependent upon a technical analysis of the formal issues made on the pleadings, but rather upon the probability of substantial room for controversy as to the very terms of the writing. If no such dispute seems probable, then the trial judge should have power to relax the rule requiring the document to be produced and allow its net effect to be summarily stated. Here as elsewhere in the application of this purely administrative rule, the trial judge's discretion should be reviewed only for grave abuse.<sup>20</sup>

### The Exception in Rule 70(1)(e)

Under this exception, secondary evidence is admissible if the judge finds "that the writing is an official record, or is a writing affecting property authorized to be recorded and actually recorded in the public records as described in Rule 63, exception (19)."<sup>1</sup>

Under the official record part of this exception, secondary evidence is admissible to establish the terms of such documents as judicial records, gubernatorial proclamations, etc. Under the other part of the exception, secondary evidence is admissible to establish the terms of an instrument affecting property provided the instrument is authorized by statute to be recorded and is so recorded.

Comparable provisions concerning secondary evidence of official records and secondary evidence of instruments affecting property are found in Code of Civil Procedure Section 1855(3) and (4). These subdivisions make secondary evidence admissible "when the original is a record or other document in the custody of a public officer" or "when the original has been recorded, and a certified copy of the record is made evidence by this Code or other statute." Thus, the contents of a properly recorded deed<sup>2</sup> may be proved by a certified copy of the record, without the necessity of having to excuse nonproduction of the original.<sup>3</sup> So also the contents of a document in the custody of a public officer may be proved by some forms of secondary evidence, such as certified copies<sup>4</sup> or, in some cases, printed copies.<sup>5</sup>

<sup>20</sup> MCCORMICK § 200.

<sup>1</sup> Rule 63(19) makes the following admissible: ". . . Subject to Rule 64 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) an applicable statute authorized such a document to be recorded in that office;"

<sup>2</sup> See *Saecker v. Cohn*, 180 Cal. 151, 179 Pac. 890 (1919), as to proof of an improperly recorded instrument.

<sup>3</sup> *Dahler v. Bridge*, 163 Cal. 160, 164, 124 Pac. 995, 996 (1912); *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647 (1891). CAL. CODE CIV. PROC. § 1951.

Prior to the 1889 amendment of Section 1951, nonproduction of the original must be excused. See West's Annot. Cal. Codes, CAL. CODE CIV. PROC. § 1951, Historical Note. See also *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386 (1889).

<sup>4</sup> *E.g.*, CAL. CODE CIV. PROC. § 1918(6).

<sup>5</sup> *E.g.*, CAL. CODE CIV. PROC. § 1918(1)-(5).

Note that Section 1855(3) refers to "a record or other document in the custody of a public officer." (Emphasis added.) On the other hand, the parallel reference in Rule 70(1)(e) is merely to an "official record." The meaning intended by the Rule 70(1)(e) reference probably is the same as that stated by Section 1855(3). To avoid the possibility of doubt, however, it is recommended that Rule 70(1)(e) be amended by striking "an official record" and substituting "a record or other document in the custody of a public officer." This would make it clear that Rule 70(1)(e) is not intended to restrict the scope of the exception presently stated in Section 1855(3).

### Numerous Documents

Under Code of Civil Procedure Section 1855(5), secondary evidence is admissible "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."

Under this subdivision, a bank cashier may testify in a prosecution for passing a fictitious check that defendant had no funds or credit with the bank on which the check was drawn.<sup>6</sup> Manifestly, this is a sensible alternative to introducing the bank's books in evidence. It is necessary, however, that the books would have been admissible, if offered.<sup>7</sup>

Section 1855(5) is frequently employed.<sup>8</sup> It seems to be a most useful shortcut, and Rule 70(1) should be amended to include it.

### The Admissions Exception

Suppose that a plaintiff needs to establish the terms of a document. Without laying any foundation respecting the whereabouts of the document, he proceeds in any one of the three following ways:

1. He calls the defendant under Section 2055 of the Code of Civil Procedure and inquires as to the terms of the document.
2. He authenticates and offers a letter of the defendant in which the defendant states what the terms of the document are.
3. He offers a witness to testify that the witness had heard the defendant make an oral statement in which the defendant asserted that the terms of the document were such and such.

Under each of the three foregoing suppositions, the plaintiff offers evidence of the defendant's *admission* as to the terms of the document. Is the circumstance that the secondary evidence which is offered is an

<sup>6</sup> *People v. Weaver*, 96 Cal. App. 1, 274 Pac. 361 (1928).

<sup>7</sup> *Eaton v. Brock*, 124 Cal. App.2d 10, 268 P.2d 53 (1954).

<sup>8</sup> *Johnstone v. Morris*, 210 Cal. 580, 292 Pac. 970 (1930); *Shields v. Rancho Buena Ventura*, 187 Cal. 569, 203 Pac. 114 (1921); *Globe Mfg. Co. v. Harvey*, 185 Cal. 255, 196 Pac. 261 (1921); *Pacific Paving Co. v. Gallett*, 137 Cal. 174, 69 Pac. 985 (1902); *People v. Dole*, 122 Cal. 486, 55 Pac. 581 (1898); *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410 (1898); *People v. Wheeler*, 109 Cal. App.2d 714, 241 P.2d 276 (1952); *People v. Gormley*, 64 Cal. App.2d 336, 148 P.2d 687 (1944); *Skidmore v. County of Tuolumne*, 35 Cal. App.2d 525, 96 P.2d 173 (1939); *Mayer v. Hazzard*, 10 Cal. App.2d 1, 51 P.2d 189 (1935); *People v. Roth*, 137 Cal. App. 592, 31 P.2d 813 (1934); *Brown v. Ball*, 123 Cal. App. 758, 12 P.2d 28 (1932); *People v. Anderson*, 120 Cal. App. 661, 8 P.2d 155 (1932); *Freeman v. Donohoe*, 65 Cal.App. 65, 223 Pac. 431 (1923); *McPherson v. Milling Co.*, 44 Cal. App. 491, 186 Pac. 803 (1919); *People v. Kawano*, 38 Cal. App. 612, 177 Pac. 174 (1918); *Kinney v. Maryland Cas. Co.*, 15 Cal. App. 571, 115 Pac. 456 (1911).

admission an acceptable excuse for not producing or accounting for the original?

The authorities are divided on this question. Some cases equate evidence of an admission with the original document as evidence. Others are *contra*.<sup>9</sup> One early California case falls into the latter group in rejecting the testimony of a witness as to the defendant's admission respecting the terms of a document.<sup>10</sup>

There is nothing in Rule 70 which seems to be a recognition of the admissions exception to the Best Evidence Rule. It seems likely that the exception is intentionally omitted. This was so in Model Code Rule 602, and the Uniform Rules seem to follow in this respect the pattern of the Model Code. The Comment on Model Code Rule 602 states:

The decisions disagree concerning the application of the [Best Evidence Rule] doctrine where the secondary evidence consists of admissions of the adversary. The [Model Code] Rule is applicable to all sorts of secondary evidence and makes no exceptions for admissions.

In view of the dubious validity<sup>11</sup> of the admissions exception, amending Rule 70 to incorporate such exception is *not* recommended.

### The Second- or Next-Best Evidence Rule

As indicated above, both Rule 70 and Section 1855 make secondary evidence to establish the terms of a writing admissible in certain exceptional situations. Given one of these exceptional situations, is the proponent free to propound any kind of secondary evidence he may elect or is he forced to produce one kind of secondary evidence in preference to another (or to excuse nonproduction of one kind as a condition to using the other)? Or, to rephrase the question: To what extent, if any, is there a *second- or next-best evidence rule*? For example, if the original of a writing is lost but the proponent possesses a written copy made by him, must he use the copy as the next- or second-best evidence or may he disregard such copy and use the testimony of a witness who claims to have seen the original and to remember its terms?

#### The Present Law

Section 1855 of the Code of Civil Procedure sets forth in four subdivisions four exceptions to the Best Evidence Rule. These exceptions relate to:

- (1) Lost or destroyed documents.
- (2) Documents in possession of the opponent.
- (3) Public documents.
- (4) Recorded instruments.

The final paragraph of the section provides as follows:

In the cases mentioned in subdivisions three and four, a copy of the original, or of the record, must be produced; in those men-

<sup>9</sup> See McCORMICK § 208 nn. 3 and 4.

<sup>10</sup> *Grimes v. Fall*, 15 Cal. 63 (1860).

<sup>11</sup> See critique in McCORMICK § 208. McCormick approves the admissions exception only as applied to written admissions and in-court admissions.

tioned in subdivisions one and two, either a copy or oral evidence of the contents.<sup>12</sup>

The intent here seems to be that when a proponent excuses non-production of the original document on the ground that such document is in the custody of a public officer or is recorded, the proponent may not introduce oral evidence of contents. On the contrary, he must introduce a copy of the document<sup>13</sup> or (in case of recordation) he must introduce the record or copy thereof.<sup>14</sup> Thus, oral evidence of the contents of judicial records is ordinarily inadmissible.<sup>15</sup>

The above analysis shows that California has the second-best evidence rule as to public and recorded documents. Practically speaking, this means a proponent may (1) prove a public document by using the document itself or a certified copy; or (2) prove a recorded instrument by using the instrument, the record of the instrument or a certified copy of the record. However, this circumstance—that the document in the one case is a public document and in the other is a recorded document—alone does not authorize proponent to use secondary evidence other than a certified copy.

The law as just summarized is traditional and, being supported by a persuasive rationale,<sup>16</sup> is as it should be.

In reading the last paragraph of Section 1855, it appears that the Legislature intended that, in cases of lost or destroyed documents and documents in possession of the adversary not produced upon demand, there should be *no* rule preferring secondary evidence in the form of written copy to secondary evidence in the form of oral evidence of contents.<sup>17</sup>

However, a nineteenth century dictum<sup>18</sup> and a recent, but inadequately reasoned, opinion<sup>19</sup> cast doubt upon the above interpretation of the last paragraph of Section 1855. It seems, therefore, that the point must be presently regarded as doubtful.

### The URE View

As to secondary evidence made admissible by Rule 70(1)(a)-(d), it seems to be the clear intent of the rule that there shall be no preference

<sup>12</sup> See also CAL. CODE CIV. PROC. § 1937, making similar provisions for lost documents.  
<sup>13</sup> *Dyer v. Hudson*, 65 Cal. 372, 373, 4 Pac. 235 (1884) (Dictum: "If the original had been in the custody of a public officer, when evidence of its contents was sought to be given, the contents could only have been proved by the production of the original, or a copy of it.") A photostatic copy may be used. See *In re Connor*, 16 Cal.2d 701, 713, 108 P.2d 10, 17 (1940).

<sup>14</sup> If the record is destroyed by conflagration or public calamity and a party does not know the original to be in existence, he may make proof by abstract of title pursuant to CAL. CODE CIV. PROC. § 1855a. See *Mercantile Trust Co. v. All Persons*, 183 Cal. 369, 191 Pac. 691 (1920); *Dahler v. Bridge*, 163 Cal. 160, 124 Pac. 995 (1912).

<sup>15</sup> *Moran v. Abbey*, 63 Cal. 56 (1883); *Sills v. Forbes*, 33 Cal. App.2d 219, 229, 91 P.2d 246, 251 (1939). (Under CAL. CODE CIV. PROC. §§ 2051 and 2065, a witness' conviction of felony may be shown to impeach him. Moreover, the conviction may be established by the examination of the witness. This, of course, is an exception to the general rule respecting proof of judicial records.)

If the original was once in custody of a public officer but is lost, proof may be by way of oral evidence of contents. The case is then one of a lost document, as to proof of which § 1855(1) and the portion of the last paragraph thereof relating to lost documents permit oral evidence. See *Fox v. Young*, 219 Cal. 243, 26 P.2d 290 (1933); *Dyer v. Hudson*, 65 Cal. 372, 4 Pac. 235 (1884); *People v. Thompson*, 85 Cal. App.2d 261, 192 P.2d 802 (1948).

<sup>16</sup> See McCORMICK § 207.

<sup>17</sup> The rule of no-preference is the English rule. It seems to be, however, the minority rule in this country. The predominant American view is to enforce preferences of various kinds. See McCORMICK § 207.

<sup>18</sup> *Ford v. Cunningham*, 87 Cal. 209, 210, 25 Pac. 403 (1890).

<sup>19</sup> *Murphy v. Nielsen*, 132 Cal. App.2d 396, 282 P.2d 126 (1955), criticized adversely in 30 So. CALIF. L. REV. 355 (1957).

of copy-evidence to other kinds of secondary evidence. Nothing in the rule itself indicates such preference. Moreover, the Comment on the rule states: "No distinction is made between grades of secondary evidence, and purported copies of ordinary writings are treated as secondary and not preferential in the same sense as any other type of evidence of content."

What, however, is the situation respecting documents falling under Rule 70(1)(e), namely, official records and recorded writings affecting property? Since Rule 70(1)(e) is an exception to the general rule requiring the original as evidence, it is manifest that secondary evidence of some kind is admissible. But, for present purposes, the crucial question is: secondary evidence of *what* kind?

Suppose that in the civil action of "A v. B," A offers a witness to testify to the terms of a judgment entered in a previous action between A and B. The document (the judgment) is an official record. Under Rule 70(1)(e), the original document need not be produced, *i.e.*, secondary evidence is admissible. What, if anything, in the Uniform Rules requires that A (if he uses secondary evidence) must use such evidence in the form of a certified copy?

Rule 63(17) makes such copy admissible. This, however, is permissive—that is, it grants permission to use such copy, notwithstanding the fact that the copy is hearsay evidence. There is, therefore, nothing in Rule 63(17) *requiring* proponent to use such evidence.

Suppose next that A offers a witness to testify to the terms of a recorded deed executed by A and delivered by A to B. Again, secondary evidence is admissible under Rule 70(1)(e). Again, the record is admissible (though hearsay) under Rule 63(19), and a copy of the record is admissible (though hearsay) under Rule 63(17). However, both Rule 63(19) and Rule 63(17) are permissive. Neither requires A to use the evidence which it permits A to use.

It is concluded that the Uniform Rules omit to provide (1) any rule whereby a public document (if not proved by the original) should be proved by certified copy, and (2) any rule whereby a recorded instrument must be proved by the instrument, the record thereof, or a certified copy of the record. It is recommended, therefore, that Rule 70(1)(e) be amended by adding the following thereto:

and that the evidence offered is a copy of such official record admissible under Rule 63(17) or is the record of such writing admissible under Rule 63(19) or a copy of such record admissible under Rule 63(17).

## Rule 70(2)—Functions of Judge and Jury

Rule 70(2) provides as follows:

If the judge makes one of the findings specified in the preceding paragraph, secondary evidence of the content of the writing is admissible. Evidence offered by the opponent tending to prove (a) that the asserted writing never existed, or (b) that a writing produced at the trial is the asserted writing, or (c) that the secondary evidence does not correctly reflect the content of the asserted writings, 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.

The Comment explains as follows the purpose of this subdivision:

The purpose of this paragraph is to indicate the separation of functions between the judge and the trier of fact. The function of the judge is to pass on the preliminary question of whether secondary evidence may be offered. In so doing he must assume that the original writing existed and is not the writing produced at the trial, even though the opponent offers evidence to prove that such a writing never existed or that a writing which he produces is in fact the original. The issues raised by these claims as well as the issue of whether the secondary evidence correctly reflects the content of the original are questions for the trier of fact.

Professor Morgan speaking on the purpose of the parallel Model Code provision gave the following exposition:

The point I want to call your attention to particularly and the one on which the authorities are not particularly clear is this. The case where the proponent of a document insists that the original did exist but that it has been lost or destroyed. The opponent insists that in the first case there was no such document. Now, if you say the judge has got to find that the original was lost, he would have to find that the original once existed and that would take the question from the trier of fact. So that what the rule in that kind of situation says is that if the proponent puts in sufficient evidence to justify the trier of fact in finding that the original existed, then the question for the trial judge is whether the paper that the proponent claims to be the original is satisfactorily accounted for. An aggravated example of that same kind of problem is when the opponent produces a document in court and says "This is the original." Now, the proponent says "No, that is not the original. This is something you are substituting for the original." There again we have provided that the question for the trial judge is simply (1) whether there is sufficient evidence for the trier of fact to find that a document did

exist which the proponent is not producing and (2) whether he has established a sufficient reason for not producing that document. There are only one or two cases that raise the question squarely and the English case which raised it does not fully determine it.<sup>20</sup>

Rule 70(2) is recommended as a rational solution of the problems with which it deals.

### Summary

Adoption of Rule 70 in this State would affect the present law in several respects. These may be summarized as follows (it being assumed that because of paragraph number 4, *infra*, the requirements stated in paragraphs 1-3 are inapplicable to so-called collateral documents):

1. The foundation for secondary evidence of the contents of a document located without the State would have to include a showing that the document "is not procurable by the proponent." The present law seems to be that no such showing is required.

2. The foundation for proof by secondary evidence of the contents of a written notice in possession of the adversary would have to include a showing that proponent had given the adversary notice to produce the writing. Presently such notice to produce is not required.

3. The foundation for proof by secondary evidence of the contents of a writing wrongfully obtained or withheld by the adversary would have to include a showing that proponent had given the adversary notice to produce the writing. Presently such notice to produce is not required.

4. The historic "collateral documents" exception to the Best Evidence Rule would be recognized. Presently this exception is probably not recognized.

5. If the proponent of secondary evidence of a writing satisfactorily excused nonproduction of the original on the basis that such original is lost or destroyed or is in possession of the adversary and has not been produced upon demand, such proponent would not be required to use secondary evidence in the form of an available written copy, nor would he have to show the nonavailability of a written copy as foundation for the use of oral evidence.

Presently the law may be that a written copy is preferred to oral evidence of contents.

6. The functions of judge and jury would be defined by Rule 70(2).

### Recommendation

It is recommended that Rule 70 be amended as advised above and be approved as so amended.

<sup>20</sup> 19 A.L.I. PROCEEDINGS 233-234 (1942).

## RULE 71—PROOF OF ATTESTED WRITINGS

Rule 71 provides as follows:

**RULE 71. *Proof of 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.

The rule deals with proof of the execution of an attested document, that is, a document to which there is a subscribing witness.<sup>1</sup>

### The Common Law Rule

McCormick states the common law rule as follows:

[W]hen a document signed by subscribing witnesses is sought to be authenticated by witnesses . . . an attesting witness must first be called, or all attesters must be shown to be unavailable, before other witnesses can be called to authenticate it.<sup>2</sup>

McCormick views the common law requirement as "often inconvenient, and of doubtful expediency."<sup>3</sup> The URE Commissioners regard it as "a survival of medieval formality without practical basis."<sup>4</sup>

### California Modification of Common Law Rule

Code of Civil Procedure Section 1940 provides as follows:

Any writing may be proved either:

One—By any one who saw the writing executed; or,

Two—By evidence of the genuineness of the handwriting of the maker; or,

Three—By a subscribing witness.

This is a sweeping nullification of the common law rule whereby what used to be a compulsion upon the proponent to use the attesting witness now becomes a mere option to do so. For example, if a plaintiff sues upon an assigned contract and the defendant defends on the basis of a written release executed by the plaintiff's assignor and attested by W, the defendant need not call W to authenticate the document nor need he excuse nonproduction of W in order to utilize some alternative means of authentication (such as authentication by comparison of signatures).<sup>5</sup>

<sup>1</sup> CAL. CODE CIV. PROC. § 1935 defines subscribing witness as follows: ". . . A subscribing witness is one who sees a writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness."

<sup>2</sup> MCCORMICK § 188.

<sup>3</sup> *Ibid.*

<sup>4</sup> RULE 71 Comment.

<sup>5</sup> *Castor v. Bernstein*, 2 Cal. App. 703, 84 Pac. 244 (1906).

### Proof of Attested Wills

Although California has abrogated the common law principle as a general proposition, the principle has been retained with reference to proof of attested wills. Thus Sections 329 and 372 of the Probate Code provide as follows:

329. If no one appears to contest the probate, the court may admit the will to probate on the evidence of one of the subscribing witnesses only, if the evidence shows that the will was executed in all particulars as required by law. If none of the subscribing witnesses resides in the county, but the deposition of one of them can be taken elsewhere, the court may direct it to be taken, and may authorize a photographic copy of the will to be made and to be presented to such witness on his examination, who may be asked the same questions with respect to it and the handwriting of himself, the testator and the other witnesses, as would be pertinent and competent if the original will were present. If the subscribing witnesses are competent at the time of attesting the execution, their subsequent incompetency, from whatever cause, will not prevent the probate of the will, if it is otherwise satisfactorily proved. If the evidence of no subscribing witness can be procured, the court may admit the will to probate upon proof of the handwriting of the testator and of any one of the subscribing witnesses. The evidence of one or more of the subscribing witnesses may be received by an affidavit to which there is attached a photographic copy of the will, in any uncontested will proceedings.

372. If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined; and the death, absence, or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses resides in the county, and the evidence of none of them can be produced, the court may admit the evidence of other witnesses to prove the due execution of the will; and, as evidence of the execution, it may admit proof of the handwriting of the testator and of any of the subscribing witnesses.<sup>6</sup>

### Rule 71 Does Not Change California Law

Rule 71 is intended to abrogate the common law rule, except as the latter is specifically retained by statute of the jurisdiction adopting Rule 71.<sup>7</sup>

Adoption in California of the principle of Rule 71 would thus retain the present general rule of Code of Civil Procedure Section 1940, together with the exception to that general rule now embodied in Probate Code Sections 329 and 372.

### Amendment of Rule 71

The present phrasing of Rule 71 is, however, not appropriate to accomplish the purpose of that rule in California. Our statute requir-

<sup>6</sup> CAL. CODE CIV. PROC. § 1941 provides: ". . . If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence."

<sup>7</sup> RULE 71 Comment.

ing attestation is Probate Code Section 50, whereas our statutes requiring proof by the attestors are Probate Code Sections 329 and 372.

In this jurisdiction, Rule 71 should therefore refer to the latter two sections and not to the former (which it does as now phrased).

It is recommended that Rule 71 be amended to read as follows:

Except as provided in Sections 329 and 372 of the Probate Code, when the execution of an attested writing is in issue, no attestor is a necessary witness even though all attestors are available.

**Recommendation**

It is recommended that Rule 71, redrafted to read as above, be approved.

## **RULE 72—PHOTOGRAPHIC COPIES TO PROVE CONTENT OF BUSINESS AND PUBLIC RECORDS**

This rule is a simplified version of the Uniform Photographic Copies of Business and Public Records as Evidence Act, which is currently in force in California as Sections 1953i-1953l of the Code of Civil Procedure.

Whether Rule 72 should be substituted for Sections 1953i-1953l is one of the problems of incorporating the Uniform Rules into the California Codes and Statutes.

Since such problems are the subject of later discussion, no further comment on Rule 72 is made at this point.

## STATUTES TO BE REVISED, RETAINED OR REPEALED

In this part, it is proposed :

(1) To indicate all of the California legislation touching authentication which has been discovered, and

(2) To indicate how such legislation would be affected by the proposals set forth above. All of the codes have been examined and also Deering's General Laws.

### Rule 67

*Code of Civil Procedure Section 1963(34)* provides :

[It is presumed 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.

Upon enactment of Rule 67, this provision should be repealed, since the third sentence of Rule 67 is obviously intended to substitute for Section 1963(34).

*Code of Civil Procedure Section 1940* provides :

Any writing may be proved either :

One—By any one who saw the writing executed ; or,

Two—By evidence of the genuineness of the handwriting of the maker ; or,

Three—By a subscribing witness.

*Code of Civil Procedure Section 1941* provides :

If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence.

*Code of Civil Procedure Section 1942* provides :

Where, however, evidence is given that the party against whom the writing is offered has at any time admitted its execution no other evidence of the execution need be given, when the instrument is one mentioned in Section 1945, or one produced from the custody of the adverse party, and has been acted upon by him as genuine.

*Code of Civil Procedure Section 1943* provides :

The handwriting of a person may be proved by any one who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting.

*Code of Civil Procedure Section 1944* provides :

Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evi-

dence is offered, or proved to be genuine to the satisfaction of the Judge.

*Code of Civil Procedure Section 1945* provides:

Where a writing is more than thirty years old, the comparisons may be made with writings purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact.

Arguably, if Rule 67 is enacted, the foregoing sections should be repealed. Thus it may be contended that, since all of these sections deal with "evidence sufficient to sustain a finding of . . . authenticity" and since by the second sentence of Rule 67 authentication may be made by such evidence, such specific code sections as the above are superfluous.

Theoretically, this argument is sound. However, as a practical matter, it may be well to have on the books statutory specifics which apply the general proposition of Rule 67, second sentence, as do the foregoing sections. It is recommended, therefore, that Code of Civil Procedure Sections 1940-45 be left intact.

### Rule 68

*Code of Civil Procedure Section 1918* provides:

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, su-

perior, 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.

This section should be repealed since it is superseded by Rule 68.

### Rule 70

*Code of Civil Procedure Section 1855* provides:

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.

*Code of Civil Procedure Section 1870(14)* provides:

Evidence may be given . . . of . . . (14) The contents of a writing, when oral evidence thereof is admissible.

*Code of Civil Procedure Section 1937* provides:

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.

*Code of Civil Procedure Section 1938* provides:

If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail 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.

Sections 1855, 1870(14), 1937, and 1938 should be repealed. All are superseded by Rule 70.

### Rule 71

The recommended Rule 71 makes reference to present statutes that should be continued in operation. Thus, there is no adjustment problem.

### Rule 72

This rule states the substance of the Uniform Photographic Copies of Business and Public Records Act. Presently we have the Uniform Act—*Code of Civil Procedure Sections 1953i-1953l*. If we adopt Rule 72, these sections should be repealed.

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