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John J. Dutton

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# THE OFFICIAL RECORDS EXCEPTION TO THE HEARSAY RULE IN CALIFORNIA

John J. Dutton†

The rule excluding hearsay evidence is well known.<sup>1</sup> Equally well known is the rule that an official record may be admitted into evidence as an exception to the hearsay rule.<sup>2</sup> California Code of Civil Procedure Sections 1920<sup>3</sup> and 1926<sup>4</sup> purport to set forth the doctrine, but as stated in *Chandler v. Hibberd*,<sup>5</sup> "it has been repeatedly held that those sections cannot have literal application."<sup>6</sup> The courts in interpreting these sections have provided for additional requirements to ensure trustworthiness.<sup>7</sup>

However, with the advent of the new Evidence Code in California<sup>8</sup> it seems that evidence statutes will probably be more closely followed. The question now presented is whether section 1280 of that code, which contains the official records exception, has codified existing law or provided a new standard of admissibility. Section 1280 of the California Evidence Code provides:

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† A.B., 1955, LL.B., 1958, University of California at Berkeley; Member, Order of the Coif; Former attorney, California State Judicial Council; Lecturer in Law, University of Santa Clara School of Law; Judge, Santa Clara-Cupertino Municipal Court.

<sup>1</sup> CAL. EVID. CODE § 1200 (a). This new statute adopts the standard definition of hearsay: "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." See *People v. Spriggs*, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964), for a recent discussion of the present California hearsay rule and its various exceptions.

<sup>2</sup> 5 WIGMORE, EVIDENCE § 1638a (3d ed. 1940); McCORMICK, EVIDENCE § 291 (1954).

<sup>3</sup> CAL. CODE CIV. PROC. § 1920: ENTRIES IN OFFICIAL BOOKS PRIMA FACIE EVIDENCE. Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts therein.

<sup>4</sup> CAL. CODE CIV. PROC. § 1926: ENTRIES MADE BY OFFICERS OR BOARDS PRIMA FACIE EVIDENCE. An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry.

<sup>5</sup> 165 Cal. App. 2d 39, 332 P.2d 133 (1958).

<sup>6</sup> *Id.* at 65, 332 P.2d at 149.

<sup>7</sup> *Behr v. County of Santa Cruz*, 172 Cal. App. 2d 697, 342 P.2d 987 (1959); *Hoel v. City of Los Angeles*, 136 Cal. App. 2d 295, 288 P.2d 989 (1955).

<sup>8</sup> The new California Evidence Code was adopted by the Legislature in 1965 and will become effective January 1, 1967. The code was proposed by the California Law Revision Commission after years of research and study. The final product, which is based on the Uniform Rules of Evidence and present California law, contains a number of reforms and changes in the rules of evidence.

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition or event if:

- (a) The writing was made by and within the scope of duty of a public employee;
- (b) The writing was made at or near the time of the act, condition or event; and
- (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

An examination of the language of the section does not supply a ready answer to the question as to what extent the present rule will be changed.

#### SUBSECTION (a) WRITING BY AND WITHIN THE SCOPE OF DUTY OF A PUBLIC EMPLOYEE

Subsection (a) of section 1280 makes it clear that any public employee can make the writing. The present California law is uncertain on this point: the question of how much emphasis will be placed on the making of the record by a public officer as opposed to an employee or private person has not been discussed in the California cases.

In the federal cases it seems to be established that a record made by a subordinate or employee of a public agency will be considered within the official records exception, at least where it is made under the public officer's direction.<sup>9</sup> There are even some federal cases indicating that a report made by a private person and filed with a public agency or made a part of the agency's records may be admitted into evidence as an official record if a statute requires the report.<sup>10</sup> Whether such records would presently be

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<sup>9</sup> *Evanston v. Gunn*, 99 U.S. 660, 666-67 (1878). In this case plaintiff school teacher fell through a hole in the planked covering of a city improved drainage ditch. To show absence of contributory negligence, she alleged that the hole was covered by snow and sought to introduce records of the United States Signal Service to show a snow storm just prior to the accident. The defendant city objected contending there was no law authorizing the record to be used in evidence. The Supreme Court approved the admission because the records were kept in the discharge of a public duty and stated, "nor need they be kept by a public officer himself, if the entries are made under his direction by a person authorized by him." *Accord*, *United States v. Aluminum Co. of America*, 1 F.R.D. 71, 75 (S.D.N.Y. 1939).

<sup>10</sup> *Sternberg Dredging Co. v. Moran Towing and Transp. Co.*, 196 F.2d 1002, 1005 (2d Cir. 1952), where a letter to the Coast Guard, written by one of the witnesses, was offered in evidence to discredit the oral testimony of the writer. The court disapproved the denial of admission citing the regulation which required the rendering of a report in these circumstances and calling the letter an official document, stating: ". . . this official record doctrine ordinarily applies to reports made by persons who are themselves public officials and not to private persons charged by law with a duty to report. Moreover, the decisions are not altogether uniform that reports of private persons are within the rule. However, there is substantial support for saying that they

admitted in California cannot be answered with any degree of certainty. Code of Civil Procedure Sections 1920 and 1926 are probably broad enough to admit both types of records in evidence,<sup>11</sup> and there are cases which appear to permit such evidence without specifically discussing the problem.<sup>12</sup> Indeed, there seems to be no good reason for excluding records prepared by a subordinate or employee of an agency.<sup>13</sup> There may be more of a question, however, whether reports of a private person incorporated into public records should be admitted.<sup>14</sup> In such a case there would appear to be less guarantee of accuracy than in official records routinely made by a public agency. Moreover, in most cases it would be inconsistent with the requirement, discussed below, that the official or his subordinates must have first-hand knowledge of the facts recorded.

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are, and this accords with the modern acceptance of reports made in the due course of business." *Accord*, *Desimone v. United States*, 227 F.2d 864 (9th Cir. 1955) (quarterly income tax return); *M'Inerney v. United States*, 143 Fed. 729 (1st Cir. 1906) (ship manifest).

*Contra*, *Olender v. United States*, 210 F.2d 795, 801 (9th Cir. 1954), involved alleged income tax evasion. The government introduced a file from the Public Welfare Department containing forms completed by defendant's mother-in-law, an affidavit by defendant's wife, reports of department investigators and reports from several banks. This information tended to show that the mother in law could not have made a purported gift to the defendant. The court held that the report should have been excluded and further stated: ". . . this circuit and most of the other circuits which have passed on the question have held that the facts stated in the documents must have been within the personal knowledge and observation of the recording official or his subordinates . . ." *Accord*, *Matthews v. United States*, 217 F.2d 409 (5th Cir. 1954); *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir. 1952).

<sup>11</sup> The language of the sections, "by another person in performance of a duty specially enjoined by law" (§ 1920), and "or under the direction and in the presence of either" (§ 1926), seems to allow sufficient latitude for the admissibility of such reports.

<sup>12</sup> *Ames v. Empire Star Mines Co.*, 17 Cal. 2d 213, 110 P.2d 13 (1941); *Nilsson v. State Personnel Board*, 25 Cal. App. 2d 699, 78 P.2d 467 (1938). In the case of *Daves Market, Inc. v. Dept. Alcoholic Beverage Control*, 222 Cal. App. 2d 671, 35 Cal. Rptr. 348 (1963), fair trade contracts which were probably filed by private persons were admitted into evidence as official records. It would seem that the significant fact in this case was the filing of the contracts themselves; that is, the records were not being offered to prove observations by private persons. Perhaps under these circumstances there is a sufficient probability of truth and accuracy of the records so that they should be admitted.

<sup>13</sup> See *McCORMICK, EVIDENCE* § 291 (1954).

<sup>14</sup> See *People v. Lessard*, 58 Cal. 2d 447, 375 P.2d 46, 25 Cal. Rptr. 78 (1962), where transcript of witnesses' testimony at coroner's inquest was offered by defendant, the Supreme Court sustained the rejection on the basis that it was not a public record. *But see* *Orange County Water District v. City of Riverside*, 173 Cal. App. 2d 137, 182, 343 P.2d 450, 475 (1959) where the Court of Appeals sustained the admission of a tabulation of individual property owners' reports (in part required by the regulations of the Water District) which included the use of the water. The court stated, "We think, then, that, although in some sort hearsay, these very numerous statements, had they been brought into court, would have been admissible (Code Civ. Proc., § 1920), and that, in the absence of any demand that they be produced, the summary from them compiled by the district was properly admitted for what it was worth."

A related question in determining whether a document is an official record is: how strict will the courts be in requiring that there be a duty to keep the particular record? Is it necessary that a statute specifically require that the record be kept, or is it sufficient merely that the record be one that is usually and customarily kept by the agency? The language in some of the cases implies that there must be a statute specifically requiring the particular record.<sup>15</sup> A recent example of this view is found in the case of *Roberts v. Permanente Corp.*,<sup>16</sup> where the plaintiff sought damages for injury to property from the operation of the defendant's cement plant. The decision for the defendant was reversed because of prejudicial error in jury instructions. But the court specifically discussed and found error in the admission of a report authenticated by the clerk of the Board of Supervisors of Santa Clara County. The report, entitled "Study, San Antonio Hills, Inc., Air Pollution Complaint 1955-1956," was made by the Santa Clara County Air Pollution Control District. It reviewed the operations of the cement plant and also a nearby quarry and contained statements of opinion and conclusions as to the greater probability of property damage in the area being caused by the quarry dust. In rather strong terms, the court indicated that the report should have been excluded.

. . . [T]he records must be made by an official pursuant to governmental duty. [Citations omitted.] The record is devoid of any evidence which indicates it was the duty of the County Health Department to investigate such alleged air pollution, or more important, record its findings pursuant to investigation . . . . Finding no duty on the agency to investigate or make this report, we conclude that it is not a public record within the meaning of Code of Civil Procedure, section 1920, and its introduction into evidence was error.<sup>17</sup>

But those cases which have found no duty to make the record, have also involved the recording of matters upon which the official could not have given oral testimony if he had been present on the witness stand and the record could have been excluded upon that ground. The official lacked either first-hand knowledge of the facts or recorded opinions and conclusions. There are cases, however, where the official making the record quite obviously is not doing so in the regular course of official duty, and the documents should not be considered official records.<sup>18</sup> On the other hand, in the cases where

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<sup>15</sup> *Roberts v. Permanente Corp.*, 188 Cal. App. 2d 526, 10 Cal. Rptr. 519 (1961); *Reisman v. Los Angeles City School Dist.*, 123 Cal. App. 2d 493, 267 P.2d 36 (1954); *City of Stockton v. Vote*, 76 Cal. App. 369, 244 Pac. 609 (1926). See *Ogilvie v. Aetna Life Insurance Co.*, 189 Cal. 406 (1922).

<sup>16</sup> 188 Cal. App. 2d 526, 10 Cal. Rptr. 519 (1961).

<sup>17</sup> *Id.* at 533, 10 Cal. Rptr. at 523.

<sup>18</sup> *Pruett v. Burr*, 118 Cal. App. 2d 188, 257 P.2d 690 (1953). See *City of Los Angeles v. Watterson*, 8 Cal. App. 2d 331, 48 P.2d 87 (1935), where the lower court

it appears that it is the usual type of record that should be kept by such an agency, no great emphasis is placed on the question.<sup>19</sup>

The new Evidence Code appears to definitively settle the question of who must make the record, and is therefore, in a sense, an extension of present California law. However, there is no reason to believe that the code is a departure from present California law on the question of duty to make the record.

#### SUBSECTION (b) WRITING MADE AT OR NEAR THE TIME OF ACT

The source and reason for this requirement, that the writing be made at or near the time of the act, is uncertain.<sup>20</sup> Other exceptions to the hearsay rule such as the business records exception<sup>21</sup> include this criterion, but there is no discussion in the California cases of such a requirement for official records. It may have been adopted from the business records exception<sup>22</sup> for purposes of uniformity since most, if not all, official documents are also within the scope of that exception.<sup>23</sup> On the other hand, it may be that the draftsmen of the new code were concerned about evidence manufactured for litigation and sought by this subsection to exclude such evidence. Two cases may serve to illustrate this point. In *Reisman v. Los Angeles City School District*,<sup>24</sup> a child died as the result of a fall on an asphalt playground at school. A report indicating the comparative safety of asphalt playgrounds in Los Angeles Schools was admitted.

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was sustained in its refusal to admit a letter from a state engineer to the Governor concerning the matters in controversy.

<sup>19</sup> *Harris v. Alcoholic Bev. Con. Appeals Bd.*, 212 Cal. App. 2d 106, 28 Cal. Rptr. 74 (1963).

<sup>20</sup> The comments of the California Law Revision Commission shed very little light on the matter.

<sup>21</sup> California Code of Civil Procedure Section 1953(f) states: "a record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

<sup>22</sup> CAL. EVID. CODE § 1271. "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

"(a) The writing was made in the regular course of business;

"(b) The writing was made at or near the time of the act, condition, or event;" [subsections (c) and (d) omitted].

<sup>23</sup> *Nichols v. McCoy*, 38 Cal. 2d 447, 240 P.2d 569 (1952); *McLean v. City and County of S.F.*, 151 Cal. App. 2d 133, 311 P.2d 158 (1957); *Fox v. San Francisco Unified School Dist.*, 111 Cal. App. 2d 885, 245 P.2d 603 (1952); CAL. CODE CIV. PROC. § 1953(e) and § 1953(f). See *DeHart v. Allen*, 26 Cal. 2d 829, 161 P.2d 453 (1945); Comments of the California Law Revision Commission to California Evidence Code sections 1270 and 1280.

<sup>24</sup> 123 Cal. App. 2d 493, 267 P.2d 36 (1954).

The report, though covering a twenty-year span of statistics, was not compiled until after the claim for damages was presented. The school district sought to sustain the report as an official record, but the court rejected it as containing numerous opinions, arguments and statements of purported facts which would not have been admissible as oral testimony. Similarly, in *Roberts v. Permanente Corp.*,<sup>25</sup> the original action was brought by the plaintiff in December 1954. However, the "study" of the Air Pollution Control District was for the period 1955-1956. The admission of this record was also called error and the reason given was the lack of duty to make the investigation or prepare the report. Nevertheless, the fact that the record was prepared subsequent to the litigation may have been of concern to the court.

It can be seen that the evidence in these cases could be excluded under subsection (c) of section 1280 thereby rendering the use of subsection (b) superfluous. Moreover, this additional restriction as to time may bring an inflexibility to the official records rule which will be both undesirable and unnecessary. This is particularly so in light of subsection (c) which requires that the time of preparation of the document must be such as to indicate its trustworthiness.

#### SUBSECTION (c) SOURCES OF INFORMATION AND METHOD AND TIME OF PREPARATION MUST INDICATE TRUSTWORTHINESS

The comment by the Law Revision Commission to Evidence Code Section 1280 seems to indicate that the present law as to trustworthiness of the document will be continued. The present California law, established by the cases, is that the record will be admitted only if the official or other person making the record could testify to the same effect if he were on the stand.<sup>26</sup> This proposition generally involves two specific requirements. The official must have first-hand knowledge,<sup>27</sup> and the evidence must not amount to state-

<sup>25</sup> *Supra* note 16.

<sup>26</sup> *Behr v. County of Santa Cruz*, *supra* note 7; *Hoel v. City of Los Angeles*, *supra* note 7; *Reisman v. Los Angeles City School Dist.*, *supra* note 24; *Harrigan v. Chaperon*, 118 Cal. App. 2d 167, 257 P.2d 716 (1953); *McGowan v. City of Los Angeles*, 100 Cal. App. 2d 386, 223 P.2d 862 (1950); *City of Los Angeles v. Watterson*, *supra* note 18; *McCORMICK, EVIDENCE* § 291 and § 293 (1954); *WITKIN, CALIFORNIA EVIDENCE* § 296 (1958).

<sup>27</sup> *McGowan v. City of Los Angeles*, 100 Cal. App. 2d 386, 223 P.2d 862 (1950), involved an intersection accident with a police car. A county coroner's report on the results of a blood alcohol test, on blood contained in a bottle labeled with the name of the dead driver, was denied admission. The coroner's office did not have first hand knowledge that the blood tested had come from the body of the driver. The court stated: "if it had been proved that the blood analyzed by the county coroner's office had been taken from the body of Cox before any extraneous matter had been injected

ments of opinion and conclusion to which the person could not testify in court.<sup>28</sup> The same criteria are generally applied in the related area of business records. However, in that area two cases have suggested that first-hand knowledge is not essential to admissibility.<sup>29</sup> But the statement in both opinions does not appear to be a significant part of the case. In a third case, *Ames v. Empire Star Mines Co.*,<sup>30</sup> documents which the court accepted as *official* records seemed to contain information of which the public official or his subordinate would not have had first-hand knowledge. This case, however, involved ancient mining claims which could not be proved in any other way, and should probably be restricted to its facts. Apart from these three cases, the weight of authority in California properly requires first-hand knowledge on the part of the persons in the public agency who made the record.<sup>30a</sup> Similarly, the cases hold that statements of opinion and conclusion in official records should not be admitted into evidence.<sup>31</sup> It has been suggested that the opinion rule should be relaxed for statements in official records.<sup>32</sup> On the contrary, it seems

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into his body, the coroner's record of the analysis would have been admissible and prima facie evidence of the facts therein stated." *Supra* at 389, 223 P.2d at 864. Further, in quoting Wigmore, the court said: ". . . for matters not occurring in the presence of the officer, his record or certificate is inadmissible, not only because in general a witness must have personal knowledge, but also because an officer's duty is usually concerned only with matters done by or before him." *Supra* at 391, 223 P.2d at 865.

<sup>28</sup> *Reisman v. Los Angeles City School Dist.*, *supra* note 24; *Pruett v. Burr*, *supra* note 18; *Lusardi v. Prukop*, 116 Cal. App. 506, 2 P.2d 870 (1931). In the case of *People v. Terrell*, 138 Cal. App. 2d 35, 291 P.2d 155 (1955), a business records case, the court held that a statement in the hospital record, of the doctor's diagnosis of criminal abortion, was an opinion that could not be testified to by the doctor in person and therefore could not be admitted. However, it was made clear in *People v. Williams*, 174 Cal. App. 2d 364, 345 P.2d 47 (1959), that the usual medical conclusions to which a doctor may testify can be admitted into evidence as an official record. *But see* California Law Revision Commission Study relating to Uniform Rules of Evidence at 328 (1962).

<sup>29</sup> In *Nichols v. McCoy*, *supra* note 23, the question was whether the blood analysed was that of the decedent. Apart from the label on the sample of the blood, there was independent evidence that the deceased was the only body in the mortuary at the time the blood was withdrawn. The issue, therefore, seemed to be more of a problem involving the chain of evidence rather than the first-hand knowledge of the official analyzing the blood. *Loper v. Morrison*, 23 Cal. 2d 600, 608-9, 145 P.2d 1, 5 (1944), in a dictum, contains the following statement: "it is the object of the business records statutes to eliminate the necessity of calling each witness, and to substitute the record of the transaction or event. It is not necessary that the person making the entry have personal knowledge of the transaction." The court probably meant only to indicate that if someone else in the business, who reported the information in the regular course of business, had personal knowledge, that would be sufficient.

<sup>30</sup> 17 Cal. 2d 213, 110 P.2d 13 (1941).

<sup>30a</sup> WITKIN, CALIFORNIA EVIDENCE § 296 (1958); cases cited in notes 26 and 27 *supra*.

<sup>31</sup> See cases cited notes 26 and 28 *supra*.

<sup>32</sup> McCORMICK, EVIDENCE § 18 (1954).

the rule should be at least as strict, in view of the fact that there is no opportunity for cross examination to test the basis for the opinion.<sup>33</sup> Nevertheless, the new code may allow such statements since none of the language of section 1280 covers the matter. It could be argued that opinions are included in "method of . . . preparation"<sup>33a</sup> but this would seem to be a rather strained construction.

#### FOUNDATION REQUIREMENT

Exactly what evidence is necessary to lay a foundation for the admissibility of an official record cannot be stated with certainty. It seems clear that there must be some evidence that the document was kept in the regular course of official duty,<sup>34</sup> and that it is not sufficient merely to have a person from the public agency testify that the document is a public record.<sup>35</sup> But where a certified copy of an official record is offered, the certification establishes the authenticity of the document,<sup>36</sup> and perhaps it can be admitted in evidence without further foundation if, from the face of the writing itself, it is apparent that it is an admissible official record.<sup>37</sup> Moreover, the presumption that official duty has been regularly performed may be of some assistance in laying the foundation.<sup>38</sup> Finally, it seems to be accepted that someone other than the individual who made the record may testify to lay the foundation for its admissibility.<sup>39</sup>

#### CONCLUSION

Under the present state of the law, to admit a document in evidence as an official record it must be made in the regular course of official duty, and the statements must be such that the officials or

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<sup>33</sup> *Pruett v. Burr*, 118 Cal. App. 2d 188, 203, 257 P.2d 690, 699-700 (1953). The court stated: "while the judgment may appear to be just and comparatively small, and considerable expense might well be saved in not producing the testimony of witnesses in respect to the foundation, the rules of evidence should not be relaxed for these reasons alone. The statutory requirements necessary to have a writing admitted as a business record, official record or a public writing should be met. Otherwise, all legal barriers heretofore established by the law protecting one's right to be confronted by witnesses and the right to cross-examination, might well vanish under these exceptions." See also *Lusardi v. Prukop*, *supra* note 28. *But see* *Orange County Water District v. City of Riverside*, *supra* note 14.

<sup>33a</sup> CAL. EVID. CODE § 1280(c).

<sup>34</sup> *People v. Byars*, 188 Cal. App. 2d 794, 10 Cal. Rptr. 677 (1961).

<sup>35</sup> *Roberts v. Permanente Corp.*, *supra* note 16.

<sup>36</sup> CAL. CODE CIV. PROC. §§ 1893, 1901, 1905, and 1918; CAL. EVID. CODE §§ 1452, 1453, 1530-1532; McCORMICK, EVIDENCE § 186 (1954).

<sup>37</sup> *Pruett v. Burr*, 118 Cal. App. 2d 188, 201, 257 P.2d 690, 699 (1953).

<sup>38</sup> *Nilsson v. State Personnel Board*, 25 Cal. App. 2d 699, 704, 78 P.2d 467, 469 (1938).

<sup>39</sup> *People v. Williams*, 174 Cal. App. 2d 364, 345 P.2d 47 (1959); *Sweet v. Erickson*, 166 Cal. App. 2d 598, 333 P.2d 369 (1958).

employees of the public agency could testify to the same effect if they were personally present on the witness stand. Section 1280 of the new Evidence Code is in large part a codification of this rule, but with the added requirement of close proximity in time. Thus, while much of the California Evidence Code tends toward allowing greater admissibility of evidence, section 1280 will perhaps restrict this particular exception to the hearsay rule and exclude evidence which is now admissible.