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Account Books in California

THE Legal Research Committee of The Commonwealth Fund, through its Committee on the Law of Evidence, has suggested the need for a statutory restatement and simplification of the well-known exception to the rule against hearsay which admits shop-book and other business entries.

The need for such a statutory change is perhaps as great in California as anywhere. Our Code provisions concerning Evidence, by no means a perfect piece of legislation, contain little on the subject and that little is partial and confusing.¹ The cases also are hard to reconcile, often meagerly reasoned, and do not place the matter on any very certain, to say nothing of any very simple basis.

In the hope that a careful statement of the existing California law may enable the profession to act intelligently concerning any proposed statutory change, and may meanwhile be of some assistance in actual trials, the following pages have been written.

I

The briefest possible sketch of the history of the admission of business entries will throw light on the significance of many California decisions.²

It seems probable that about 1600 in England shop-books, whether the shop-keeper's entries or those of a clerk, were generally admitted. This practice was carried to the American colonies as they were established.

During the 1600's the English courts decided that the shop-keeper's own entries were inadmissible—that only entries by a clerk

¹ Cal. Code Civ. Proc. §§ 1920, 1926, 1946, 1947. Cal. Pol. Code, § 795.

² Professor James Bradley Thayer of Harvard perhaps first worked out the history. Thayer, *Cases on Evidence* (2d ed.) pp. 508-511, 516-517, 557-8, 575-7 and notes. Professor Wigmore has somewhat amplified Thayer's work and made it easily available. Wigmore on *Evidence* (2d ed.) § 1518.

could be used. It was about this time that parties and interested persons came to be excluded from testifying and it seemed to follow from this change that a party's own entries could not be admitted.

By the time the decisions just mentioned became known to the American courts, the law admitting the shop-keeper's own entries was considered too thoroughly settled and too useful to be overthrown. But the Colonial judges, in partial surrender to the English cases, placed many restrictions upon the use of shop-books. Such limitations as inadmissibility to prove cash items, or to prove the sale of articles not usually charged in books, or to prove collateral agreements (for example that another than the person receiving the goods was to be liable for their price) had their origin in this period. The same is true of requirements that the entries be about contemporaneous, that the entries offered be the original entries, that the entries be verified by the suppletory (supplementary) oath of the entrant if available and otherwise by evidence that the entries were in his handwriting and that the other requirements of the exception had been met.

The law as thus far stated may be considered the shop-book rule proper as distinguished from a broader "course of business" or "course of duty" exception which we must notice next.

In England about 1800 there appeared a tendency to admit a business entry, if the entrant were dead, in cases outside the scope of the shop-book rule which was confined to the use of books to enable the shop-keeper to recover for items charged therein. Thus under this new departure a third party's books might be used and the purpose of the use was immaterial.

This English development was again transplanted to America. In England it was subsequently limited to entries in the course of *duty*; in America, however, this limitation had little or no following; our courts were satisfied with an entry in the course of *business*. This diversity of view may be due rather unconsciously to the fact that in England under the shop-book rule a clerk's entries were admitted while a party's entries were excluded. It is obvious that the clerk owed a duty to make the entry while the party himself did not. That entries by either were admissible in America under the shop-book rule, perhaps accounts for our broad rule admitting entries in the "course of business." An extension of this course of business rule took place in America which was not paralleled in England, namely, the permitted use of the entry when the entrant was not dead but was in some other way unavailable to testify to

the facts. Insanity, absence from the jurisdiction, and even entire forgetfulness of the transaction might thus make the entrant of no use as a witness to the facts. In these cases then the entry might come in.

Meanwhile an entirely separate line of cases began projecting itself into the shop-book and course of business field, namely, those establishing the so-called refreshing recollection principle. One who cannot remember the facts may use a memorandum to revive his recollection if possible or to supplement it where it cannot be revived. The shop-book rule, the course of business rule and the refreshing recollection rule might all apply to the same situation. A sues B for a bill of groceries and offers his shop-book to prove the account. A is alive and takes the stand but cannot remember the details of the various sales even after looking at the book. Under the shop-book rule the entries may be admitted on A's supplementary oath identifying the book and otherwise meeting the detailed requirements of that rule. Under the course of business rule it may come in, A, the entrant, being unavailable due to his loss of recollection of the detailed facts. Under the refreshing recollection rule it may come in to supplement A's memory, A testifying that he made the entries at the time and then knew them to be correct. It is not surprising that these three rules have been confused. After much travail and subject to slight exceptions, it is more generally held that any entry or memorandum admissible under any one of the three rules or under any combination of them is to be admitted. It is commonly held, for example, that an entry which is the permanent record of a transaction first noted on a temporary memorandum by one person and then reported in due course of business through one or more others until it takes its place in the permanent books, is admissible if the notation, report or entry of each of the persons is found admissible either as a shop-book entry, a course of business entry, or as supplementing recollection.

Such is, roughly sketched, the history of the matter. It will help to clarify the California law if we consider it from the same three viewpoints of (1) the shop-book rule, (2) the broader course of business exception, (3) the supplementing recollection principle in combination with the first two.

II

That shop-books of a party to the case are admissible in this state to prove the transactions recorded therein when the suit seeks

recovery on such transactions is abundantly clear.³ The note shows what a variety of shop-books have been received. The cases include blacksmith's books and physician's books, stage owner's books and bank's books, restaurant books and ranch manager's books, books of country merchants and books of city department stores.

Cases in which shop-books were offered to prove the facts recorded but for some purpose other than recovering or preventing recovery on the transactions recorded, raise a different question to be discussed later in this article. Such cases involve an extension

³ *Le Franc v. Hewitt* (1857) 7 Cal. 186 (upholsterer's books); *Landis Turner*, (1860) 14 Cal. 573 (blacksmith's books); *Severance v. Lombardo* (1860) 17 Cal. 57 (seemble); *Caldwell v. McDermit* (1861) 17 Cal. 464 (seemble); *Caulfield v. Sanders* (1861) 17 Cal. 569, 573 (printer's books); *Carroll v. Storck* (1881) 57 Cal. 366 (merchandise sold); *Watrous v. Cunningham* (1886) 71 Cal. 30, 11 Pac. 811 (seemble); *Roche v. Ware* (1886) 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539 (apparently contractor's books); *Morgans v. Adel* (1888) 2 Cal. Unrep. 863, 18 Pac. 247 (books of manager showing time he worked); *West Coast Lumber Co. v. Newkirk* (1889) 80 Cal. 275, 280, 22 Pac. 231 (apparently lumber company's books); *White v. Whitney* (1889) 82 Cal. 163, 166, 22 Pac. 1138 (apparently books of country store); *Ford v. Cunningham* (1890) 87 Cal. 209, 25 Pac. 403 (apparently grain merchant's books); *McLennan v. Bank of California* (1891) 87 Cal. 569, 575, 25 Pac. 760 (bank's books); *People v. Fairfield* (1891) 90 Cal. 186, 27 Pac. 199 (seemble); *Sanborn v. Cunningham* (1893) 4 Cal. Unrep. 95, 101, 33 Pac. 894 (seemble); *Webster v. San Pedro Co.* (1894) 101 Cal. 326, 329, 35 Pac. 871 (lumber company's books); *Pauly v. Pauly* (1895) 107 Cal. 8, 23, 40 Pac. 29, 48 Am. St. Rep. 98 (bank's books); *Frank v. Pennie* (1897) 117 Cal. 254, 49 Pac. 708 (seemble); *Bushnell v. Simpson* (1898) 119 Cal. 658, 662, 51 Pac. 1080 (seemble); *Cowdery v. McChesney* (1899) 124 Cal. 363, 57 Pac. 221 (ranch books); *People v. Blackman* (1899) 127 Cal. 248, 252, 59 Pac. 573 (seemble); *Thompson v. Orefia* (1901) 134 Cal. 26, 30, 66 Pac. 24 (seemble); *City Bank v. Enos* (1901) 135 Cal. 167, 172, 67 Pac. 52 (bank's books); *Idol v. S. F. Construction Co.* (1905) 1 Cal. App. 92, 81 Pac. 665 (stage owner's books); *Mullenary v. Burton* (1906) 3 Cal. App. 263, 84 Pac. 159 (employee's books); *Yick Wo v. Underhill* (1907) 5 Cal. App. 519, 90 Pac. 967 (restaurant books); *S. F. Teaming Co. v. Gray* (1909) 11 Cal. App. 314, 104 Pac. 999 (seemble); *Batcheller v. Whittier* (1909) 12 Cal. App. 262, 267, 107 Pac. 141 (seemble); *Stone v. S. F. Brick Co.* (1910) 13 Cal. App. 203, 206, 109 Pac. 103 (machine company's books); *Chandler v. Robinett* (1913) 21 Cal. App. 333, 336 (seemble); *Campbell v. Rice* (1913) 22 Cal. App. 734, 136 Pac. 512 (seemble); *Mercantile Trust Co. v. Doe* (1914) 26 Cal. App. 246, 256, 146 Pac. 692 (coal company's books); *Colburn v. Parrett* (1915) 27 Cal. App. 541, 150 Pac. 786 (physician's books); *Shalich v. Bell* (1916) 173 Cal. 773, 776, 161 Pac. 983 (contractor's books); *Montgomery & Co. v. Railway Co.* (1916) 32 Cal. App. 32, 161 Pac. 1171 (lumber company's books); *Preston v. Dunn* (1917) 33 Cal. App. 747, 749, 166 Pac. 603 (manufacturer's books); *Schneider v. Oakman Mining Co.* (1918) 38 Cal. App. 338, 176 Pac. 177 (mine manager's books); *Patrick v. Tetzlaff* (1920) 46 Cal. App. 243, 189 Pac. 115 (garage books); *Dyer v. Minturn* (1920) 47 Cal. App. 1, 7, 192 Pac. 55 (investor's books); *Sugar Loaf Association v. Skewes* (1920) 47 Cal. App. 470, 190 Pac. 1076 (orange packer's books); *Jan Wai v. Smith-Riddell Co.* (1921) 55 Cal. App. 59, 65, 202 Pac. 952 (butcher's books); *Lewis v. McNeal* (1922) 58 Cal. App. 70, 75, 207 Pac. 1021 (seemble); *Koeberle v. Friganza* (1924) 66 Cal. App. 323, 329, 226 Pac. 35 (merchant's books).

of the shop-book rule proper and are likely to form a first step toward a broad "entries in the course of business" exception.

Confining our discussion at present, then, to the shop-book rule in the limited sense just explained, what are the conditions on which books are admitted?

Following the general American rule, entries made by a proprietor are just as admissible as those made by a clerk.⁴ Some American courts have refused entries by a proprietor if he kept a clerk, on the view that a party should not make evidence for himself unless unavoidable. One California case adopts this view,⁵ but it may be doubted if it would be followed today.⁶ That proprietors quite properly make entries even when they have clerks should be a sufficient reason for not following it. Of course entries by a clerk are admissible, other objections being absent.⁷ Whoever makes the entry must have knowledge of the transaction recorded.⁸

There is much American authority that cash items cannot be proved by shop-books because for loans of money the store-keeper would or should require other evidence. In some states only very small cash transactions could be proved by books. In *Le Franc v. Hewitt*⁹ there is a dictum forbidding the use of cash items but this limitation is ignored in later cases.¹⁰ The admission of the books of banks, which is settled,¹¹ shows that there is no objection *per se* to

⁴ *Le Franc v. Hewitt* (1857) 7 Cal. 186; *White v. Whitney* (1889) 82 Cal. 163, 166; *Idol v. S. F. Construction Co.* (1905) 1 Cal. App. 92.

⁵ *Watrous v. Cunningham* (1886) 71 Cal. 30. See also *Landis v. Turner* (1860) 14 Cal. 573.

⁶ See *Wigmore on Evidence* (2d ed.) § 1538.

⁷ *Kerns v. McKean* (1888) 76 Cal. 87, 18 Pac. 122 (semble). This was not a shop book case proper, the books were offered to prove performance of an independent contract. In the following notes concerning requisites for admissibility, as in this one, cases in which shop books or other business entries were used for some collateral purpose will be included and without special mention of the fact. Our courts have not distinguished between the two classes of cases and have applied the precedents indiscriminately. As will appear later the limits on the course of business rule are different from those on the shop book rule in one or two particulars though in general they are the same.

⁸ *Kerns v. McKean* (1888) 76 Cal. 87; *Butler v. Estrella Co.* (1899) 124 Cal. 239, 242, 56 Pac. 1040; *Chandler v. Robinett* (1913) 21 Cal. App. 333, 336; *Chan Kiu Sing v. Gordon* (1915) 171 Cal. 28, 31, 151 Pac. 657. In *Jan Wai v. Smith-Riddell Co.* (1921) 55 Cal. App. 59, 64, the entrant did not have knowledge concerning a part of the meat sold but there was other evidence of the accuracy of these items and so the ease can hardly be deemed a contrary decision.

⁹ (1857) 7 Cal. 186.

¹⁰ *White v. Whitney* (1889) 82 Cal. 163; *Mullenary v. Burton* (1906) 3 Cal. App. 263.

¹¹ *McLennan v. Bank of California* (1891) 87 Cal. 569, 575; *Pauly v. Pauly* (1895) 107 Cal. 8, 23; *City Bank v. Enos* (1901) 135 Cal. 167, 172; *Blinn Co. v. McArthur* (1907) 150 Cal. 610, 614, 89 Pac. 436.

cash items. But there is objection to entries that do not belong in the sort of a book which is offered in proof.¹² There is a limit on the amount of merchandise or labor which may be included in a single item according to a few cases elsewhere¹³ on the view that in the case of very large transactions other evidence of the matter should be kept. In *Ross v. Brusie*¹⁴ a credit of two hundred and fifty dollars for land bought of plaintiff was excluded because not within the shop-book rule. This evidence was held admissible on a second appeal, but on grounds foreign to the account book rule.^{14½}

Following authority elsewhere, the California courts have held that books are not admissible to prove collateral arrangements. Examples will explain what "collateral" means here. An entry that goods *delivered* to A were *sold* to A and B as partners was excluded.¹⁵ So of an entry that plaintiff's salary was to be a stated sum,¹⁶ and so of an entry that an attorney's fee was fixed at one-half the recovery.¹⁷ But a debit of fifteen hundred dollars as the balance due on a mine was admitted.¹⁸ Surely then a charge for plaintiff's labor at a certain salary should be admissible. Probably it was the stating of the salary *before* the doing of the work that seemed unusual and led to exclusion in the cases cited in notes sixteen and seventeen.

The entry must be a record of a business transaction and made in the regular course of business. Therefore memoranda of the receipts and expenses of a certain investment have been ruled out;¹⁹ they were no part of the record of business with others. Again a "poker book", containing an account of gains and losses at poker, was said to be inadmissible as not a tradesman's book.²⁰ It was a record of dealings with others. Probably a better reason for excluding it lies in the nature of the business recorded.

¹² *Yick Wo v. Underhill* (1907) 5 Cal. App. 519 (loan of five hundred dollars entered in the books of a restaurant); *Fletcher v. Kidder* (1912) 163 Cal. 769, 127 Pac. 73 (entry of a trust of certain stock entered in a stock and assessment book).

¹³ *Wigmore on Evidence* (2d ed.) § 1543.

¹⁴ (1886) 10 Pac. (Cal.) 121.

^{14½} *Ross v. Brusie* (1886) 10 Cal. 465.

¹⁵ *Severance v. Lombardo* (1860) 17 Cal. 57.

¹⁶ *Bushnell v. Simpson* (1898) 119 Cal. 658, 662.

¹⁷ *Batcheller v. Whittier* (1909) 12 Cal. App. 262, 267.

¹⁸ *Schneider v. Oakman Mining Co.* (1918) 38 Cal. App. 338.

¹⁹ *Collin v. Card* (1852) 2 Cal. 421; *Thompson v. Orefia* (1901) 134 Cal. 26, 30. Perhaps *Rogers v. Graves* (1856) 1 Cal. Unrep. 21 belongs here. Apparently defendant sold most of his hides to plaintiff—a few to others. Defendant kept account of all animals slaughtered and of the sales to others. Held inadmissible as no account directly with the plaintiff. The decision appears incorrect.

²⁰ *Frank v. Pennie* (1897) 117 Cal. 254.

In *Ensign v. Southern Pacific Company*,²¹ a "day" book containing an account between the deceased and his father was excluded as a private memorandum. It was, however, an account of business with another person, the father. As far as appeared it was the entire record of the entrant's credit business except, possibly, business done with others who kept careful accounts. Must one do business with several to make his books admissible? There was no objection to the character of the business. The court's statement that the book was private appears unimportant: all ordinary account books are private in the same sense. It seems that the decision might well have been otherwise. Our unfortunate statutory pronouncements about entries in books apparently had much influence. Since it is settled that shop-books are admissible despite the fact that no statement in the Codes so declares, it is odd to rule out a book today because not falling within the inadequate code provisions. Finally *Mullenary v. Burton*²² is an almost parallel case decided the other way.

Our courts have insisted that the entry offered must be the original entry,²³ following the general rule elsewhere, despite the fact that section 1947 of the Code of Civil Procedure provides that all entries copied one from another in the usual course of business are to be regarded as originals.²⁴ The code provision seems eminently sensible and should be given effect. The only case relying upon it appears to be *Patrick v. Tetzlaff*²⁵ in which it was said that the books, as well as the time cards from which the entries were made, were admissible. Possibly that dictum might be correct even if we had no section 1947, because the time cards might be considered temporary memoranda. That "original entry" means the first permanent entry as distinguished from fleeting records is clear.²⁶ If

²¹ (1924) 193 Cal. 311, 320, 223 Pac. 953.

²² (1906) 3 Cal. App. 263.

²³ *Watrous v. Cunningham* (1886) 71 Cal. 30; *Kerns v. McKean* (1888) 76 Cal. 87; *Sanborn v. Cunningham* (1893) 4 Cal. Unrep. 95, 101 (semble); *Idol v. S. F. Construction Co.* (1905) 1 Cal. App. 92 (semble); *Stone v. S. F. Brick Co.* (1910) 13 Cal. App. 203 (semble); *Campbell v. Rice* (1913) 22 Cal. App. 734; *Preston v. Dunn* (1917) 33 Cal. App. 747.

²⁴ Of the cases in the preceding note *Watrous v. Cunningham* and *Kerns v. McKean* simply gave the original entry requirement as one of several grounds for the decision, *Campbell v. Rice* merely excluded a later entry in books not made about the time of the transaction and *Preston v. Dunn* ruled out ledger entries taken from prior records without giving any clear reason. If we exclude the other cases as dicta, the way seems open for a proper adherence to § 1947.

²⁵ (1920) 46 Cal. App. 243.

²⁶ *Landis v. Turner* (1860) 14 Cal. 573, 576; *Idol v. S. F. Construction Co.* (1905) 1 Cal. App. 92 (semble); *Jan Wai v. Smith-Riddell Co.* (1921) 55 Cal. App. 59, 65.

the original entry is unavailable, secondary evidence is admissible.²⁷ If the original entries are voluminous and only the result of them is required, evidence of such result, otherwise proper, is admissible.²⁸

The form of the entry, whether day book, ledger or less formal, is generally held immaterial and such seems to be the California rule.²⁹ The entries must be made near the time of the transactions³⁰ as otherwise we should be trusting too long to an unaided memory of details. The entries must state the details; they cannot be merely summaries of several transactions.³¹ Is the absence of an entry, where one would be expected if a disputed transaction took place, evidence that no such transaction occurred? One would think so. The business world no doubt relies on such evidence. If there is regularity in the keeping of the books, improper omissions will violate that regularity as much as false entries. But mistakes of omission are more readily made than those of commission. Still the chance of such mistakes in account books is, it seems, too slight to exclude their use in the way under discussion. The last California case³² excludes such evidence but the matter can hardly be considered as settled.³³

The California cases relating to the so-called supplementary oath, the testimony authenticating the books and necessary to their admissibility, are meager in number and throw but an uncertain light. Of course there must be evidence of the facts necessary to admissibility. Someone must testify to the authorship of the entries, the knowledge of the entrant, that the books were kept in the course of business, that the entry is original, that it was fairly contemporaneous and any other fact that may be essential to admission. Sometimes our

²⁷ *Caulfield v. Sanders* (1861) 17 Cal. 569.

²⁸ Cal. Code Civ. Proc. § 1855; *People v. Dole* (1898) 122 Cal. 486, 496; *Wilson v. Alcatraz Co.* (1904) 142 Cal. 182, 189.

²⁹ *Sanborn v. Cunningham* (1893) 4 Cal. Unrep. 95, 101 (semble); *Patrick v. Tetzlaff* (1920) 46 Cal. App. 243 (time cards admitted without discussion of this question).

³⁰ *Severance v. Lombardo* (1860) 17 Cal. 57 (semble); *Watrous v. Cunningham* (1886) 71 Cal. 30; *Hesser v. Rowley* (1903) 139 Cal. 410, 416, 73 Pac. 156; *Chandler v. Robinett* (1913) 21 Cal. App. 333; *Chan Kiu Sing v. Gordon* (1915) 171 Cal. 28.

³¹ *Chandler v. Robinett* (1913) 21 Cal. App. 333.

³² *Lewis v. McNeal* (1922) 58 Cal. App. 70, 75 (rehearing in Supreme Court denied).

³³ Also excluding the evidence are: *Kerns v. McKean* (1888) 76 Cal. 87; *Kerns v. Dean* (1888) 77 Cal. 555, 558. But in the following cases such evidence was admitted, though only in the last was the point noticed: *Ford v. Cunningham* (1890) 87 Cal. 209; *People v. Fairfield* (1891) 90 Cal. 186; *Austin v. Wilcoxson* (1906) 149 Cal. 24, 30, 84 Pac. 417, 5 L. R. A. (N. S.) 870; *Dyer v. Minturn* (1920) 47 Cal. App. 1, 7.

courts talk as if anyone having the requisite knowledge could establish these preliminary facts.³⁴ But in other cases the more common view, that the entrant must be called if available, is taken.³⁵ No doubt if the entrant is unavailable others may testify to the existence of the preliminary facts.³⁶ There are no cases discussing what unavailability will suffice—death is the only one passed upon.³⁷ Any real unavailability as a witness to the required facts should be sufficient.

Whether the entrant *may* make the suppletory oath when he is for some reason an incompetent witness, has been more fully settled. That he is incompetent as a party does not exclude him from testifying in this preliminary way on the question of admissibility.³⁸ Likewise that he, the entrant, is incompetent under our provision forbidding the survivor testifying against the estate of a deceased person in certain cases, does not prevent this special testimony.³⁹ In *Stuart v. Lord*⁴⁰ it was said that probably this privilege of making the suppletory oath, given to one otherwise incompetent, would not extend to testifying that the books were correct. In *Colburn v. Parrett*⁴¹ this suggestion was made the basis of a decision. The argument which carried the court seems to have been that to allow the plaintiff to testify to the correctness of the books would enable him in reality to testify to the facts entered, that his evidence would have a greater effect than merely qualifying the books. This overlooks the fact that such testimony is solely for the consideration of the judge and that the jury might well be kept from hearing it. It is offered solely to make the books admissible. As has been stated by another,⁴² the orthodox notion at common law was and is that

³⁴ *Carroll v. Storck* (1881) 57 Cal. 366; *Roche v. Ware* (1886) 71 Cal. 375 (semble); *Montgomery & Co. v. Railway Co.* (1916) 32 Cal. App. 32; *Patrick v. Tetzlaff* (1920) 46 Cal. App. 243 (perhaps going on the ground that the entrants, mechanics in a garage, were presumably unavailable).

³⁵ *Kerns v. McKean* (1888) 76 Cal. 87; *White v. Whitney* (1889) 82 Cal. 163 (taken for granted). See *Dyer v. Minturn* (1920) 47 Cal. App. 1, 7, for the statement that the required testimony may be given by the entrant.

³⁶ *Austin v. Wilcoxson* (1906) 149 Cal. 24, 31 (party entrant dead).

³⁷ See, *supra*, n. 36.

³⁸ *Landis v. Turner* (1860) 14 Cal. 573.

³⁹ *Roche v. Ware* (1886) 71 Cal. 375; *Cowdery v. McChesney* (1899) 124 Cal. 363, 367; *City Bank v. Enos* (1901) 135 Cal. 167, 172 (it seems it was unnecessary to the decision); *Stuart v. Lord* (1903) 138 Cal. 672, 677, 72 Pac. 142 (semble, but limiting the rule); *Colburn v. Parrett* (1915) 27 Cal. App. 541 (also limiting the rule). The limitations in the last two cases are to be discussed at once.

⁴⁰ (1903) 138 Cal. 672, 677.

⁴¹ (1915) 27 Cal. App. 541.

⁴² Professor A. M. Kidd in 13 *California Law Review*, 292, giving references.

the suppletory oath includes testifying to the accuracy of the books. We have seen that one otherwise incompetent was allowed to make this suppletory oath. The conclusion is inevitable that the entrant, though otherwise incompetent, should be allowed to testify to the correctness of the books. Moreover, it is no longer clear in California, nor very well settled generally, that there must be evidence of correctness.⁴³ If no evidence of correctness is necessary, *Colburn v. Parrett* is innocuous. Whether evidence of correctness is necessary or not, evidence of falsification or alterations will exclude,⁴⁴ unless shown to have been properly made⁴⁵ or not to have affected the account involved in the case.⁴⁶

It hardly needs saying that the fact that the entries are for the interest of the entrant does not exclude them;⁴⁷ most entries offered are just that. That books are kept in a foreign language does not destroy their admissibility.⁴⁸

The continued admission in America during the 1600's and 1700's of the entries of a party himself, despite their exclusion in England, was no doubt based on the necessity for using the books to avoid a total failure of evidence because of the party's incompetency at that time. Now that parties are competent witnesses and the necessity gone, should the shop-book rule be abolished? Dean Wigmore emphatically says, yes.⁴⁹ If the admission of entries in the course of business is conceded, little if any harm will be done by ridding the law of the complicated shop-book rule. Until recently, anyhow, the course of business exception has had a dubious position in California. It is not surprising, therefore, that our courts have

⁴³ In California evidence of correctness has generally been held necessary: *Watrous v. Cunningham* (1886) 71 Cal. 30; *Kerns v. McKean* (1888) 76 Cal. 87; *Kerns v. Dean* (1888) 77 Cal. 555, 558; *Colburn v. Parrett* (1915) 27 Cal. App. 541. But in *Patrick v. Tetzlaff* (1920) 46 Cal. App. 243 it was held that such evidence is not necessary, that such a requirement would greatly hamper the use of books.

Authority in other jurisdictions for such a requirement is meager. See Wigmore on Evidence (2d ed.) § 1554; Jones on Evidence (3d ed.) § 573. It seems usually to have been assumed that such evidence is necessary without express authority or careful consideration.

⁴⁴ *Caldwell v. McDermitt* (1861) 17 Cal. 464; *People v. Blackman* (1899) 127 Cal. 248, 253.

⁴⁵ *Le Franc v. Hewitt* (1857) 7 Cal. 186; *Schneider v. Oakman Mining Co.* (1918) 38 Cal. App. 338.

⁴⁶ *Webster v. San Pedro Co.* (1894) 101 Cal. 326, 329. But such evidence is admissible to discredit the entries. *People v. Fairfield* (1891) 90 Cal. 186.

⁴⁷ *Sill v. Reese* (1874) 47 Cal. 294, 341; *Ross v. Brusie* (1886) 10 Pac. (Cal.) 121 (semble).

⁴⁸ *Yick Wo v. Underhill* (1907) 5 Cal. App. 519; *Chan Kiu Sing v. Gordon* (1915) 171 Cal. 28, 31 (no objection made on this ground).

⁴⁹ Wigmore on Evidence (2d ed.) § 1560.

said that the present competency of parties to testify has not affected the shop-book rule.⁵⁰

Of course account books are not exclusive evidence; other evidence is also admissible.⁵¹ Nor are they secondary evidence, available only when other evidence is lacking.⁵²

III

We come now to the broader exception for entries in the course of business.

It is safest to consider by themselves shop-book entries used in a way outside the scope of the shop-book rule proper. Such entries may be in the books of a party but not used to enable a party to recover on the transaction recorded, or they may be in the shop-books of third parties. *Austin v. Wilcoxson*⁵³ illustrates the matter well. Plaintiff claimed that her grand-uncle Jackson Wilcoxson had transferred to the defendant seventy-five thousand dollars to be held in trust for the plaintiff. To prove that no such transfer took place, the defendant offered the account books of Jackson Wilcoxson and of the bank where he did business. These would show that at the time of the alleged creation of the trust, Jackson Wilcoxson had no funds available to consummate such a transaction. Had these books been offered by the bank to show the state of Jackson Wilcoxson's account in an action by him to recover the balance on deposit, the case would involve the ordinary shop-book rule. Had Jackson Wilcoxson's books been offered to enable him to recover against someone therein shown to be indebted to him, the shop-book rule would govern. But there was no attempt to recover or defend on any transaction recorded in the books. The case is outside the shop-book rule and illustrates a broader principle, one phase of the "entries in the course of business" exception. Both Wilcoxson's and the bank's books were admitted, Wilcoxson's over objection. The California cases pretty clearly indicate that such a collateral use of

⁵⁰ *Roche v. Ware* (1886) 71 Cal. 375 (semble); *Bushnell v. Simpson* (1898) 119 Cal. 658 (but the only evidence let in could have been received as admissions).

⁵¹ *Schurtz v. Kerkow* (1890) 85 Cal. 277; *Cowdery v. McChesney* (1899) 124 Cal. 363; *Maguire v. Cunningham* (1923) 64 Cal. App. 536, 549, 222 Pac. 838.

⁵² *Maguire v. Cunningham* (1923) 64 Cal. App. 536, 549 (semble). The statement contra in *People v. Blackman* (1899) 127 Cal. 248, 253 must be considered erroneous.

⁵³ (1906) 149 Cal. 24, 30.

shop-books is permitted.⁵⁴ To that extent then the course of business exception seems established in this state.

When we consider course of business entries, not in shop-books at all, the authorities are less numerous. One of the leading cases introducing the course of business exception in the United States is *Nichols v. Webb*⁵⁵ which concerned the admissibility of the protest of an inland bill and, further, the admissibility of a copy of the notary's record of such a protest. The admissibility of such evidence was set at rest in this state in early times by statute.⁵⁶ To that limited extent the course of business exception is established. An important case involving entries in the course of business is *People v. Mitchell*⁵⁷ in which the entries by a conductor of the time of arrival and departure of trains were excluded. They might have been excluded because the conductor was neither called to the stand nor accounted for. But the court said they would have excluded them as hearsay anyhow. The authority of this case is, however, largely neutralized by *People v. Britt*⁵⁸ in which the court said that such a record should have been admitted but that the error, considering the state of the case, was harmless. This last case is good authority for a broad exception. In *Hesser v. Rowley*⁵⁹ sheriff's books that might well have been held admissible as public records, were, it

⁵⁴ Books admitted: *Lubert v. Chauviteau* (1853) 3 Cal. 458, 463, 58 Am. Dec. 415 (possibly using only an account between the parties); *Sill v. Reese* (1874) 47 Cal. 294, 341; *Watrous v. Cunningham* (1884) 65 Cal. 410; *Schurtz v. Kerkow* (1890) 85 Cal. 277; *People v. Leonard* (1895) 106 Cal. 302, 313, 39 Pac. 617 (possibly admitted simply as an admission by defendant) *Austin v. Wilcoxson* (1906) 149 Cal. 24, 30; *Blinn Lumber Co. v. McArthur* (1907) 150 Cal. 610, 89 Pac. 436; *People v. Walker* (1911) 15 Cal. App. 400, 407, 114 Pac. 1009; *People v. Vacarella* (1923) 61 Cal. App. 119, 123, 214 Pac. 237; *In Re Bells Estate* (1926) — Cal. — 243 Pac. 423, 428 (college account book).

Books assumed admissible: *Maguire v. Cunningham* (1923) 64 Cal. App. 536, 549.

Books ruled out on other grounds: *People v. Blackman* (1899) 127 Cal. 248, 252; *Butler v. Estrella Co.* (1899) 124 Cal. 239, 242; *Chan Kiu Sing v. Gordon* (1915) 171 Cal. 28, 31; *Ensign v. Southern Pacific Co.* (1924) 193 Cal. 311, 320, 223 Pac. 953.

Books excluded: *Heyneman v. Dannenberg* (1856) 6 Cal. 376, 380, 65 Am. Dec. 519 (semble, counsel argued that admission was confined to establishing the account of a merchant against a customer); *Kerns v. McKean* (1888) 76 Cal. 87 (one of the reasons for excluding); *Kerns v. Dean* (1888) 77 Cal. 555, 558 (simply following the previous case); *People v. Rowland* (1909) 12 Cal. App. 6, 19, 106 Pac. 428 (semble, dictum that not admissible against an accused).

⁵⁵ (1823) 21 U. S. (8 Wheat) 326, 5 L. Ed. 628.

⁵⁶ *McFarland v. Pico* (1857) 8 Cal. 626, 635, 68 Am. Dec. 325. The present statutes are: Cal. Pol. Code, § 795; Cal. Code Civ. Proc. §§ 1920 and 1926 taken with Cal. Pol. Code, § 794.

⁵⁷ (1892) 94 Cal. 550, 554, 29 Pac. 1106.

⁵⁸ (1923) 62 Cal. App. 674, 680, 217 Pac. 767.

⁵⁹ (1903) 139 Cal. 410, 415.

seems, admitted under the present exception. In *People v. Vacarella*⁶⁰ the record of long distance calls kept by a telephone company was admitted to prove communication between two persons at a certain time. This telephone record might be considered a shop-book charging the subscriber with the expense of the call. But it is a novel sort of shop-book and certainly its use was outside the shop-book rule proper. It helps to make out the case for a broad exception in this state. In *Peterson Brothers v. Mineral Company*⁶¹ the report of a person engaged to process and pack prunes was excluded as insufficiently authenticated—two justices thought part of it sufficiently verified and so admissible. This case indicates that a written statement made in the course of business is admissible. Certainly it was not a shop-book. In the recent case, *In re Bell's Estate*,^{61½} the baptismal records of a church were admitted to establish the fact and date of baptism. This case would be a satisfactory authority had not the admissibility for the above purpose been conceded; only an ill-made objection to their use for some other purpose was interposed. There remain for mention two cases⁶² excluding the bed-side written report of a trained nurse. One wonders whether these were correctly decided. Possibly the entries, not being intended as a permanent record, do not meet requirements. On the whole it seems a reasonable conjecture that in the future any written entries made in the regular course of business whether in a shop-book or elsewhere and meeting other proper requirements will be admitted.

What are these other proper requirements? In general they are the same as those limiting the use of shop-books. We may hastily enumerate them. Entries in the course of business are admissible whether made by party or clerk.⁶³ The entrant must have knowledge.⁶⁴ Cash items are admissible as fully as any if they belong in the book in question.⁶⁵ Statements of collateral

⁶⁰ (1923) 61 Cal. App. 119, 123, 214 Pac. 237.

⁶¹ (1903) 140 Cal. 624, 632, 74 Pac. 162.

^{61½} (1926) — Cal. —, 243 Pac. 423, 428.

⁶² *In re Flint* (1893) 100 Cal. 391, 399, 34 Pac. 863; *Estate of Everts* (1912) 163 Cal. 449, 456, 125 Pac. 1058.

⁶³ *Kerns v. McKean* (1888) 76 Cal. 87 (semble). The cases cited in this and succeeding notes to show the limitations on the course of business exception have all been cited above in setting out the limitations on the shop book rule. See, *supra*, n. 7. The courts have drawn no distinctions. In the former place (*supra*, n. 7 et seq.) all the cases are cited, here only those cases which concerned the use of entries outside the shop book rule are given.

⁶⁴ *Kerns v. McKean* (1888) 76 Cal. 87; *Butler v. Estrella Co.* (1899) 124 Cal. 239, 242; *Chan Kiu Sing v. Gordon* (1915) 171 Cal. 28, 31.

⁶⁵ *Blinn Co. v. McArthur* (1907) 150 Cal. 610, 614 (bank's books).

arrangements- not belonging in the book offered, would no doubt be excluded although there is no authority outside of shop-books proper.⁶⁶ The entry must be made in the course of business, not as a private memorandum.⁶⁷ The original entry must be offered⁶⁸ unless section 1947 of the Code of Civil Procedure is given more respect in the future than it has received in the past.⁶⁹ The form of the entry or book is no doubt immaterial.⁷⁰ Fair contemporaneousness is required.⁷¹ Whether the absence of an entry is evidence that the alleged transaction did not occur is disputed.⁷² The books must be free from important and unexplained alteration or falsification.⁷³ The entries may be for interest⁷⁴ and in a foreign language.⁷⁵ Entries are neither exclusive evidence⁷⁶ nor secondary evidence.⁷⁷

We now turn to the situations in which the requirements in the two classes of cases (1. shop-books proper and 2. entries in the course of business generally) may differ.

In the case of shop-books, as we have seen, it is generally held that if the entrant is available he must make the suppletory oath though there are California cases to the contrary.⁷⁸ Under the course of business exception it is generally held that if the entrant is available the entry is inadmissible;⁷⁹ it must in that event be used to refresh or supplement memory. Under the corresponding course of duty rule in England, death alone is considered a sufficient unavailability to let the entry in.⁸⁰ But in America, differing in the various jurisdictions, a broader notion of unavailability prevails.⁸¹

⁶⁶ See, *supra*, notes 15, 16, 17, 18.

⁶⁷ *Ensign v. Southern Pacific Co.* (1924) 193 Cal. 311, 320. Some doubt whether the rule was properly applied in this case has been already expressed at p. 269.

⁶⁸ *Kerns v. McKean* (1888) 76 Cal. 87.

⁶⁹ See the discussion p. 269 above.

⁷⁰ See above p. 270.

⁷¹ *Hesser v. Rowley* (1903) 139 Cal. 410, 416; *Chan Kiu Sing v. Gordon* (1915) 171 Cal. 28.

⁷² Is not admissible: *Kerns v. McKean* (1888) 76 Cal. 87; *Kerns v. Dean* (1888) 77 Cal. 555, 558. Is admissible: *Austin v. Wilcoxson* (1906) 149 Cal. 24, 30, 84 Pac. 417, 5 L. R. Am. (N. S.) 870. See p. 270 above.

⁷³ *People v. Blackman* (1899) 127 Cal. 248, 253. See also p. 272 above.

⁷⁴ *Sill v. Reese* (1874) 47 Cal. 294, 341.

⁷⁵ *Chan Kiu Sing v. Gordon* (1915) 171 Cal. 28, 31.

⁷⁶ *Schurtz v. Kerkow* (1890) 85 Cal. 277, 24 Pac. 609; *Maguire v. Cunningham* (1923) 64 Cal. App. 536, 549.

⁷⁷ *Maguire v. Cunningham* (1923) 64 Cal. App. 536, 549.

⁷⁸ See *supra*, notes 33, 34.

⁷⁹ *Wigmore on Evidence* (2d ed.) § 1521.

⁸⁰ In *Cooper v. Marsden* (1793) 1 Esp. 1, an entry by a clerk then absent in India was excluded. In *Pritt v. Fairclough* (1812) 3 Camp. 305 an entry by a deceased clerk was admitted.

⁸¹ *Wigmore on Evidence* (2d ed.) § 1521.

The California cases are very unsatisfactory concerning these matters. Several cases ignore entirely any question of unavailability.⁸² This may be accounted for by the fact that no express distinction is taken in our cases between the shop-book rule proper where unavailability is not a requisite and the present course of business rule where it is. A few California cases, however, point out an actual unavailability of the entrant in showing the entries admissible.⁸³ Two cases apparently exclude entries because the entrant was available and did not offer to use the books to refresh or supplement memory;⁸⁴ this of course is adopting the general American rule. In the absence of cases expressly to the contrary it is perhaps correct to conclude that unavailability of the entrant is necessary in this state. Our curious statute bearing on regular entries mentions death alone.⁸⁵

The just-mentioned statute,⁸⁶ if treated as the sole basis for admitting entries, would place California with England in requiring that the entry should be made in the course of duty. Indeed it requires that the entry be made either "in the performance of a duty specially enjoined by law" or "in the ordinary course of professional conduct." Of course the cases go far beyond these limits.

In England an oral statement made in the course of duty has been admitted.⁸⁷ In America the admission of oral statements is forbidden except where an oral report is immediately entered by another in the course of his business. This matter is discussed with the next class of cases to which we shall now turn.

⁸² *Kerns v. McKean* (1888) 76 Cal. 87 (excluded for various reasons; entrant available and fact not mentioned); *Schurtz v. Kerkow* (1890) 85 Cal. 277 (books admitted; entrant probably available); *Butler v. Estrella Co.* (1899) 124 Cal. 239, 242; same as *Kerns v. McKean*, *supra*; *Austin v. Wilcoxson* (1906) 149 Cal. 24, 31 (admitted bank books without any discussion of present question; admitted other books because entrant dead); *Chan Kiu Sing v. Gordon* (1915) 171 Cal. 28 (enumerated various requirements without mention of unavailability; books excluded); *People v. Vacarella* (1923) 61 Cal. App. 119, 123 (telephone records admitted without any question as to unavailability); *People v. Britt* (1923) 62 Cal. App. 674, 680 (admitted without raising the question of unavailability).

⁸³ *Sill v. Reese* (1874) 47 Cal. 294, 341 (death); *Hesser v. Rowley* (1903) 139 Cal. 410, 415 (facts forgotten); *Austin v. Wilcoxson* (1906) 149 Cal. 24, 31 (death).

⁸⁴ *In re Flint* (1893) 100 Cal. 391, 399 (trained nurse's record); *Peterson Bros. v. Mineral Co.* (1903) 140 Cal. 624, 632 (report of a prune packer). See also *People v. Mitchel* (1892) 94 Cal. 550, 554 (in which absence and death are simply mentioned as possible grounds of unavailability).

⁸⁵ Cal. Code Civ. Proc. § 1946.

⁸⁶ *Supra*, n. 85.

⁸⁷ *Regina v. Buckley* (1873) 13 Cox Cr. Cas. 293. See *Wigmore on Evidence* (2d ed.) § 1528.

IV

The principle of refreshing recollection and that of supplementing recollection are established in California by the Code⁸⁸ and numerous cases.⁸⁹ In refreshing, as the word implies, the memory is actually revived by a memorandum; in supplementing, on the other hand, the memory is not revived—the memorandum is used, because the witness testifies to its accuracy, to add to his present memory.⁹⁰ The exact theory of supplementing is not material to our present purpose. We are interested in combinations of the principle of supplementing recollection with the principle of admitting business entries.

The type of case we are now to discuss, then, is one where A, having knowledge of a fact, reports it to B, who otherwise has no knowledge of it, and B promptly makes a written entry of it. It is obvious that A's report may have been written or oral. Also (1) both A and B may be available as witnesses, or (2) A alone may be available, or (3) B alone may be available, or (4) neither may be available. By available here we mean capable of being called to the stand to verify the report or entry. If either A or B can be called as a witness and now has an actual memory of the fact, whether after refreshing it from the entry or without such refreshing, the problem vanishes as such evidence is of course admissible. It is when neither can now recollect the detailed facts that the difficulty is present.

The possibilities suggested above, for convenience of discussion, may be arranged in the following cases:

- a. A makes a *written* report which B enters and both are available at the trial.
- b. A makes an *oral* report which B enters and both are available.
- c. A makes a *written* report which B enters and *A alone* is available.
- d. A makes a *written* report which B enters and *B alone* is available.
- e. A makes an *oral* report which B enters and *B alone* is available.

⁸⁸ Cal. Code Civ. Proc. § 2047.

⁸⁹ Treadwell v. Wells (1854) 4 Cal. 260, 263; Burbank v. Dennis (1894) 101 Cal. 90, 104, 35 Pac. 444; Estate of Moore (1919) 180 Cal. 570, 584, 182 Pac. 44.

⁹⁰ See Wigmore on Evidence (2d ed.) § 735; Neff v. Neff (1921) 96 Conn. 273, 114 Atl. 126.

f. A makes an *oral* report which B enters and *neither* is available at the trial.

We have not exhausted the possibilities but have selected the situations that have arisen in the California cases adding case "a" as a useful introduction. An examination of these situations should sufficiently disclose the principles to enable one to make a correct solution of any others.

a. When A makes a written report which B enters and both are called at the trial, the entry should be admissible. It must be added at once that throughout we are assuming that the original report when written is lost or otherwise unavailable. If it were in existence, it would be the primary evidence and exclude B's entry as secondary evidence, unless we could truthfully describe A's report as a fleeting memorandum⁹¹ or unless we could safely rely on the provisions of section 1947 of the Code of Civil Procedure, which is doubtful.⁹²

What reasoning justifies the conclusion that the entry of B should be admissible? This. A could supplement his memory by the written report if available. When, as assumed here, it is unavailable, then he can supplement his memory by a copy of it.⁹³ B's entry is such a copy. It, however, must be proved a true copy. B's testimony that he made the entry accurately from A's report serves this purpose.⁹⁴ The chief lesson to be learned from this first case is that a person, here A, may supplement his memory of the fact by the use of a properly verified copy of the lost report.

b. In this case A makes an *oral* report which B promptly enters and both A and B are available. The only difference between this and case "a" is that in the present case the original report was oral while in case "a" it was written and lost. This should not change the result and the evidence should be admissible. A lost written report does not seem any more useful as a basis for B's entry than an oral report. Both are gone. B's entry adequately proves either. True there is a slightly greater chance for error in B's entry, if made from an oral report, than if made from a written report lying before B. This chance necessitates the limit that B's entry shall be made

⁹¹ See above p. 269.

⁹² See above p. 269.

⁹³ Wigmore on Evidence (2d ed.) §§ 749, 750.

⁹⁴ This and all other cases of establishing a sworn copy are really illustrations of supplementing memory. The witness cannot, except in rare instances, recollect the exact contents of the lost original. He proves those contents by supplementing his recollection by the copy, a memorandum of the contents made while his memory was fresh, and which he can now swear was an accurate copy.

promptly before there is any serious danger of a slip of memory on his part.

But the reader may exclaim, How can A supplement his memory by his *oral* report? The answer is that if there were no satisfactory record of that report, he could not; but that here we have a proper record of it. Since case "a" showed us that a copy of the original report may be used, there is no objection to A's use of B's entry here.

The authorities generally concede the admissibility of the entry though not without some conflict.⁹⁵ Conflict also exists in the California cases. The leading case is *People v. John*.⁹⁶ There the object was to prove the testimony given by a foreigner at the preliminary hearing to impeach his testimony at the trial. The method adopted was (1) to put the interpreter on the stand to testify to the accuracy of his interpretation, and (2) to call the stenographer to verify his record⁹⁷ of what the interpreter said. Part (1) of this evidence was obviously the oral report by the interpreter of what the foreigner testified. Part (2) is the written entry of the report. The evidence should have been admitted. The court excluded it as hearsay.

The cases they relied on are not in point. In *People v. Lee Fat*⁹⁸ neither the interpreter nor the reporter was called to the stand. In *People v. Ah Yute*⁹⁹ only the reporter was called. In *People v. Lem Deo*¹⁰⁰ it was held that the interpreter was a proper witness and so that his presence at a grand jury session was unobjectionable. Moreover in both the *Lee Fat* and the *Ah Yute* cases there are intimations that the evidence would have been admitted if the interpreter and the reporter both had been called.

*People v. John*¹⁰¹ should not be followed though it has not

⁹⁵ See the cases collected in Wigmore on Evidence (2d ed.) §§ 571, 1530, 1555.

⁹⁶ (1902) 137 Cal. 220, 69 Pac. 1063, and on a second appeal (1904) 144 Cal. 284, 77 Pac. 950.

⁹⁷ The headnote puts it this way. The report itself indicates that the stenographer testified from memory to what the interpreter said. If that is so, a very unlikely thing, the evidence might well be excluded on the ground that the stenographer's recollection of the exact words of the interpreter, considering all that she must have heard before and since, was too untrustworthy to be admitted. See *People v. Hill* (1899) 123 Cal. 551, 572, 56 Pac. 424; *People v. Crandall* (1899) 125 Cal. 129, 133, 57 Pac. 785; *Mallinger v. Sarbach* (1915) 94 Kan. 504, 146 Pac. 1148; *Shear v. Van Dyke* (1877) 10 Hun (N. Y.) 528; *Gillotti v. State* (1908) 135 Wis. 634, 116 N. W. 252; Wigmore on Evidence (2d ed.) § 744 note.

⁹⁸ (1880) 54 Cal. 527, 531.

⁹⁹ (1880) 56 Cal. 119.

¹⁰⁰ (1901) 132 Cal. 199, 64 Pac. 260.

¹⁰¹ (1902) 137 Cal. 220, (1904) 144 Cal. 284.

been expressly overruled. *People v. Buckley*,¹⁰² however, despite the Supreme Court's statement to the contrary, seems inconsistent with it. There the object was to prove the contents of certain shorthand notes. A interpreted them aloud to B and B typed a long-hand copy. In other words A made an oral report of the contents of the notes and B promptly made a written record of that report. Both A and B were called to the stand. The court admitted the evidence. Again *People v. John*¹⁰³ ignored a prior decision, *People v. Sierp*,¹⁰⁴ exactly contrary to it except that the evidence given at the preliminary hearing was used at the trial on the issues rather than merely for impeachment. Evidence given to the jury on the issues should if anything be more carefully selected than that used for impeachment; the distinction appears unimportant.

Moreover later cases have left no ground for *People v. John*¹⁰⁵ to stand on. The reasons, however, on which it has virtually been overruled do not apply to all cases falling under our case "b" but only to the proof of testimony given at a preliminary hearing. In *People v. Lewandowski*¹⁰⁶ the court held that evidence at the preliminary hearing could be proved at the trial for use on the issues by the shorthand reporter verifying his record even without calling the interpreter. The argument was that sections 686 and 869 of the Penal Code make the official report of evidence given at the preliminary hearing a "deposition" and that the use of an interpreter does not affect this result. *People v. John*¹⁰⁷ was distinguished as a case where the prior evidence was offered at the trial only for impeachment. But this distinction was misstated and ignored in *People v. Lopez*.¹⁰⁸ That case was precisely like *People v. John*¹⁰⁹ except that apparently the interpreter was not called. The evidence at the preliminary hearing was used for impeachment at the trial exactly as in the John case. The reasoning of the court is the same as in *People v. Lewandowski*.¹¹⁰

On the other hand in *People v. Ong Git*,¹¹¹ a case exactly like the Lopez case¹¹² except that the former evidence was given at a

¹⁰² (1904) 143 Cal. 375, 386, 77 Pac. 169.

¹⁰³ (1902) 137 Cal. 220, (1904) 144 Cal. 284.

¹⁰⁴ (1897) 116 Cal. 249, 250, 48 Pac. 88.

¹⁰⁵ (1902) 137 Cal. 220, (1904) 144 Cal. 284.

¹⁰⁶ (1904) 143 Cal. 574, 577.

¹⁰⁷ (1902) 137 Cal. 220, (1904) 144 Cal. 284.

¹⁰⁸ (1913) 21 Cal. App. 188, 191, 131 Pac. 104.

¹⁰⁹ (1902) 137 Cal. 220, (1904) 144 Cal. 284.

¹¹⁰ (1904) 143 Cal. 574, 577.

¹¹¹ (1913) 23 Cal. App. 148, 155, 137 Pac. 283.

¹¹² (1913) 21 Cal. App. 188.

coroner's inquest rather than at a preliminary hearing, the evidence was excluded. Evidence given at a coroner's inquest is admissible in California¹¹³ if properly proved. Sections 1515 and 1516 of the Penal Code provide for its reduction to writing and transmission to the county clerk. Why should there be a line drawn between evidence at a coroner's inquest and evidence at a preliminary hearing? The evidence at the coroner's inquest might be excluded entirely for lack of proper opportunity for cross-examination as is often done elsewhere.¹¹⁴ When, however, its admissibility is conceded, as in *People v. Devine*,¹¹⁵ there seems to be no basis left for distinguishing it from evidence at a preliminary hearing. It is as much a "deposition" in the one case as the other.

This entire matter of case "b" is thus quite unsettled in this state. Perhaps the present indication of the cases is that (a) testimony at a preliminary hearing may be proved by the report of the shorthand reporter even without calling the interpreter, and *a fortiori* when he also is called, (b) that testimony at a coroner's inquest cannot be so proved, (c) that in other cases evidence falling under case "b" is admissible. Some additional cases bearing on it are to be found in a note.¹¹⁶ A thorough investigation by the Supreme Court would be desirable. May the opportunity offer soon!

c. In this case A made a written report, now lost, which B promptly entered and *A alone* is available at the trial. Here, also, the evidence should be admitted. So far as A's part in the transaction is concerned, this case is identical with case "a". A's written report is lost and so he can supplement his memory by a properly verified copy. But the situation with regard to B is new: he is unavailable. His record must come in under some exception to the hearsay rule. B's entry usually meets the requirements for entries in the regular course of business. The requisites for admission under that exception are discussed above.¹¹⁷ Clearly if B's entry is a business entry it will be admissible, being in writing and made upon knowledge of what it is offered to prove, namely,

¹¹³ *People v. Devine* (1872) 44 Cal. 452.

¹¹⁴ See Wigmore on Evidence (2d ed.) § 1374.

¹¹⁵ (1872) 44 Cal. 452.

¹¹⁶ *People v. McFarlane* (1903) 138 Cal. 481, 487, 490, 72 Pac. 48; *People v. Donnolly* (1904) 143 Cal. 394, 399, 77 Pac. 177; *People v. Garnett* (1908) 9 Cal. App. 194, 201, 98 Pac. 247; *People v. Luis* (1910) 158 Cal. 185, 192, 110 Pac. 580; *People v. Petruzo* (1910) 13 Cal. App. 569, 574, 110 Pac. 324; *Boicelli v. Giannini* (1924) 65 Cal. App. 601, 607, 224 Pac. 777.

¹¹⁷ See p. 273 et seq.

the contents of A's report. There can be no objection on principle to proving the contents of A's lost report by an entirely admissible written record of it; the sworn copy used in case "a" is little if any more trustworthy than an entry in the course of business and no more admissible. Dean Wigmore agrees with this conclusion.¹¹⁸ Such evidence was admitted in the California case of *People v. Leonard*.¹¹⁹ It must be admitted that the reasoning of the court is not very helpful.

d. Here A made a written report, now lost, which B entered and *B alone* is available. If A's report was made in the regular course of business, this is simply case "c" reversed. The report is admissible under the hearsay exception and B's testimony to its contents is admissible under the principle of supplementing recollection. Copies of entries in the course of business are admissible if the original entry, as here, is unavailable.¹²⁰ The present copy is well proved. The evidence should be held admissible.¹²¹ Two California cases admit it.¹²² An earlier dictum to the contrary¹²³ may be ignored.

e. In this case A makes an *oral* report which B promptly enters and *B alone* is available. This case differs from case "d" in exactly the same way that case "b" differs from case "a", the original report instead of being a written report, now lost, is an oral one necessarily unavailable. Since A is by supposition unavailable, his report must come in as made in the course of business.¹²⁴ But are oral statements made in the course of business admissible? In general, no. When, however, you have a satisfactory written record of such statement made promptly while the matter is fresh in the recorder's mind, there is no reason for excluding the evidence. To exclude is to ignore the fact that many trustworthy business records are thus made. The evidence should be admitted.¹²⁵ It is difficult to say what the California view is. The early case of *People v. Ah*

¹¹⁸ Wigmore on Evidence (2d ed.) § 1530 (a).

¹¹⁹ (1895) 106 Cal. 302, 313, 39 Pac. 617.

¹²⁰ That when the original shop book entry is unavailable, a copy may be used, see p. 270 above. No doubt the same rule would be applied to entries in the course of business. It conforms to the general rule allowing secondary evidence of a lost original.

¹²¹ Wigmore on Evidence (2d ed.) § 1530 (b).

¹²² *Mercantile Trust Co. v. Doe* (1914) 26 Cal. App. 246, 256, 146 Pac. 692; *Koeberle v. Friganza* (1924) 66 Cal. App. 323, 329 (vague reasoning).

¹²³ *San Francisco Teaming Co. v. Gray* (1909) 11 Cal. App. 314, 104 Pac. 999.

¹²⁴ Unless it complies with some other exception to the hearsay rule.

¹²⁵ See Wigmore on Evidence (2d ed.) §§ 1530, 1555.

Yute¹²⁶ excluded the shorthand reporter's transcript of the testimony of a foreigner given through an interpreter at a preliminary examination because the reporter alone without the interpreter was called.¹²⁷ The case is certainly no longer law on its exact facts.¹²⁸ Probably it should be ignored in considering our present problem. *San Francisco Teaming Company v. Gray*¹²⁹ raised the exact question except that the original oral reporters (teamsters) were not shown unavailable. The court relies upon this, insisting that they should have been called to the stand. This objection was abundant ground for exclusion unless the size of the business and the rapid change of teamsters (the original report makers) should have created a presumption that they were unavailable.¹³⁰ This was not discussed at all by the court. In the absence of such a discussion, it is difficult to tell what the case holds. Is it a ruling that there can be no presumption of unavailability? Or does it hold that a combination of an oral report in the course of business with proof of such report by a contemporaneous entry verified by the entrant is inadmissible? Either position is indefensible on principle. The case should not be followed. A dictum favoring exclusion is found in *People v. Petruzo*.¹³¹ *People v. Ong Git*¹³² excluded the shorthand reporter's testimony verifying his record of evidence given through an interpreter at a coroner's inquest. The interpreter was not called and apparently was not shown to be unavailable. The case is thus weakened as an authority in identically the same way as the Gray case. Also, unless there is a difference between proving testimony at a preliminary hearing and testimony at a coroner's inquest,¹³³ it is directly contrary to *People v. Lopez*¹³⁴ decided earlier in the same

¹²⁶ (1880) 56 Cal. 120.

¹²⁷ But is the interpreter's oral report sufficiently "made in the course of business"? Yes. The rule is liberal. Any entry made as a record of business or for use in one's business by one's self or agent is admissible. See Wigmore on Evidence (2d ed.) § 1523. The government is in the business of administering justice and by its agents, the interpreter and the court reporter, keeps a record of the testimony for use in its business. Compare a weather record kept at an insane asylum. *De Armond v. Neasmith* (1875) 32 Mich. 231; *Hart v. Walker* (1894) 100 Mich. 406, 410, 59 N. W. 174.

¹²⁸ *People v. Lewandowski* (1904) 143 Cal. 574, 577.

¹²⁹ (1909) 11 Cal. App. 314.

¹³⁰ Dean Wigmore presents a strong argument for this position in § 1530 of his Evidence and collects much authority. *Patrick v. Tetzlaff* (1920) 46 Cal. App. 243, and *Sugar Loaf Association v. Skewes* (1920) 47 Cal. App. 470, warrant an argument that such is the law in this state.

¹³¹ (1910) 13 Cal. App. 569, 574.

¹³² (1913) 23 Cal. App. 148, 155.

¹³³ See the discussion above p. 282.

¹³⁴ (1913) 21 Cal. App. 188, 131 Pac. 104.

year. The Lopez case is to be preferred. So much for the authorities for inadmissibility.

The authority in support of admissibility in case "e" may now be noted. *People v. Lewandowski*¹³⁵ admitted the evidence on the exact facts we are discussing. But since the court placed the result on the sections of the Penal Code providing for the report of testimony at the preliminary hearing, declaring that those sections made such a report a "deposition",¹³⁶ we cannot count that case as an authority on our general question. There are dicta favoring admission in *Chan Kiu Sing v. Gordon*¹³⁷ and *Montgomery and Mullen Company v. Railway Company*.¹³⁸ A decision directly admitting such evidence is found in *Sugar Loaf Association v. Skewes*.¹³⁹ This last mentioned case is the latest word from an appellate court on the problem. Foremen, receiving clerks and workmen orally reported the amount of work done to the manager, who acted also as bookkeeper; the manager made the entries. The subordinates were neither called nor shown unavailable. The case therefore, in admitting the evidence, holds that there is a presumed unavailability of subordinates in such a case and that when unavailable the entry made by the book-keeper who verifies it, is admissible. This is certainly a sensible result. It admits evidence which business men consider trustworthy. Many think that our legal rules are pedantic and stupid. Such a decision takes one step toward removing the causes of such a belief.

f. Finally if *neither* reporter nor entrant is available, may the entry be admitted? It should be. Here both parts of the transaction must be admitted as coming under the course of business exception. The oral report of A made in the course of business is admissible if promptly entered: the entry of B made in the course of business is admissible to prove the contents of A's report and satisfies the condition for immediate entry upon which the admissibility of A's report depends. If each step in the process leading to the final entry successfully meets the requirements for admissibility, whether as supplementing recollection or as made in the course of business or otherwise, then the union of these admissible steps should not render the whole inadmissible. On the contrary it may strengthen admissibility, as when an oral report, inadmissible

¹³⁵ (1904) 143 Cal. 574, 577.

¹³⁶ See the discussion above page 281.

¹³⁷ (1915) 171 Cal. 28, 31.

¹³⁸ (1916) 32 Cal. App. 32, 161 Pac. 1171.

¹³⁹ (1920) 47 Cal. App. 470.

in itself, is made satisfactory enough by being immediately reduced to writing. There is authority for admission in case "f".¹⁴⁰ The only California case on the exact facts is *People v. Lee Fat*¹⁴¹ which excludes the evidence. It was another of the cases dealing with the proof of testimony by a foreigner at a prior hearing. May we hope that its age, nearing fifty years, may induce the courts to let it enjoy a deserved retirement!

Such is the law of California, settled, and unsettled, concerning one exception to the rule against the admission of hearsay evidence.¹⁴² I have done what I could to minimize its intricacies. I am sure the reader will agree with me that it is too complex. May there be much power in the arm of the Legal Research Committee of the Commonwealth Fund to accomplish its aim of clarifying and simplifying this small portion of our greatly over-refined law of evidence!

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¹⁴⁰ Wigmore on Evidence (2d ed.) § 1530.

¹⁴¹ (1880) 54 Cal. 527, 531.

¹⁴² Certain cases in which business entries were admitted, but on principles quite outside the exception under consideration, have not been discussed or cited. They are added here. Admitted by stipulation: *Roberts v. Eldred* (1887) 73 Cal. 394, 396, 15 Pac. 16; *Riley v. Brown* (1925) 47 Cal. App. Dec. 59, 237 Pac. 833, 836. Admission affirmed because harmless: *Lake Shore Co. v. Modoc Co.* (1900) 130 Cal. 669, 672, 63 Pac. 72. Admitted because offered, not to prove the truth of the entries, but to show with whom the entrant thought he was dealing: *Sanborn v. Cunningham* (1893) 4 Cal. Unrep. 95, 101, 33 Pac. 894. Admitted because statements in issue: *Ross v. Brusie* (1886) 70 Cal. 465. Admitted as admissions: *Clark v. Gridley* (1874) 49 Cal. 105; *Banning v. Marleu* (1898) 121 Cal. 240, 242, 53 Pac. 692. There may be other such instances.