

# Liberalizing the Authentication of Private Writings

John William Strong

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

## Recommended Citation

John William Strong, *Liberalizing the Authentication of Private Writings*, 52 Cornell L. Rev. 284 (1967)  
Available at: <http://scholarship.law.cornell.edu/clr/vol52/iss2/5>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# LIBERALIZING THE AUTHENTICATION OF PRIVATE WRITINGS

John William Strong†

*Despite frequently reiterated questions concerning its wisdom and necessity, the long-standing requirement that private writings must be authenticated prior to their admission into evidence continues to possess great vitality. The author summarizes and evaluates the justifications which have been offered for the orthodox rule and examines the relative desirability of various possible approaches to its relaxation. He suggests that the concept of self-authentication be expanded and that a presumption technique of self-authentication be used to permit the admission of a private writing which purports to show its origin on its face.*

One can only speculate as to the amount of testimony elicited annually for the purpose of "authenticating" private writings which are ultimately to be offered in evidence. It can hardly be doubted, however, that the total is substantial. Much of this testimony is of a purely pro forma nature and will never be contested. Moreover, it is frequently of a type so demonstrably unreliable that it has been questioned whether it should be admitted even for ritualistic purposes.<sup>1</sup> The underlying compulsion for the production of such evidence is, of course, supplied by the familiar doctrine that "a writing does not speak for itself," but must be authenticated by extrinsic evidence.<sup>2</sup> This rule has been the object of frequent and sometimes heated criticism for over a hundred years,<sup>3</sup> yet it still enjoys almost universal recognition.

## SCOPE AND PURPOSE OF AUTHENTICATION

It may be noted at the outset that the concept of authentication, although continually employed by the courts without apparent difficulty, seems almost to defy precise definition. McCormick discusses authentication in its proper but limited sense as proof of authorship, noting that it may have a wider meaning.<sup>4</sup> Morgan, on the other hand, suggests that authenticity of a writing is the quality of its "being what it purports to be or what its proponent claims it to be."<sup>5</sup> Wigmore attempts to be more

---

† Assistant Professor, University of Kansas School of Law. Visiting Assistant Professor, Duke University Law School, 1966-1967. A.B. 1957, Yale University; LL.B. 1962, University of Illinois.

<sup>1</sup> Inbau, "Lay Witness Identification of Handwriting," 34 Ill. L. Rev. 433, 441 n.13 (1939).

<sup>2</sup> See, e.g., *Hartzell v. United States*, 72 F.2d 569, 578, cert. denied, 293 U.S. 621 (1934); see also Annot., 131 A.L.R. 301 (1941) for a collection of cases on the doctrine.

<sup>3</sup> See the quotation of Jeremy Bentham in 7 Wigmore, *Evidence* § 2148, at 606 n.1 (3d ed. 1940).

<sup>4</sup> McCormick, *Evidence* § 185 (1954).

<sup>5</sup> 2 Morgan, *Basic Problems of Evidence* 378 (1961).

precise about what types of claims by the proponent of a writing will necessitate authentication, stating that "when a claim or offer involves impliedly or expressly any element of *personal connection with a corporeal object*, that connection must be made to appear . . . ."<sup>6</sup>

Wigmore also asserts that the requirement of authentication, *i.e.*, of making any claim of personal connection with a corporeal object "appear," rests upon inherent logical necessity.<sup>7</sup> Certainly it may be conceded that the relevancy of a writing to a particular material issue raised in litigation will frequently be logically dependent upon the existence of some connection between that writing and a particular individual. If *A* sues *B* for libel and attempts to introduce into evidence a writing containing libelous statements, it will readily appear that the writing is relevant only if some connection between the writing and *B* exists, as where *B* authored or published it. The real question, however, is not whether there is any logical necessity for the connection, but rather what standards shall be applied to determine when some connection with *B* has been made to appear.

If the fact that the writing in question bears *B*'s name is added to the hypothetical situation above, it might then be suggested that *B*'s connection with the writing does appear. Even Wigmore concedes that "in the vast majority of transactions in everyday life, persons do act upon just such evidence of authenticity and no more."<sup>8</sup> On what grounds, then, do the courts refuse to act upon this same "evidence" of authenticity? Essentially two justifications, compounded by a third, are frequently suggested or implied.

The first and principal justification for what has appropriately been termed "this common law attitude of agnosticism as to the authorship of documents,"<sup>9</sup> is that to abandon or relax it would open the gates to potential fraud. Thus, it is conceivable that the libelous writing previously adduced by way of example represents not the work of *B* but that of some third person who, for reasons of his own, wishes to embroil *B* in difficulties,<sup>10</sup> or to libel *A* without suffering any adverse consequences. In addition, there is the possibility that *A* has himself fabricated the letter in order to afford himself the basis for a suit.

A second justification, rarely mentioned explicitly but arguably supporting the position that some authentication of private writings should be

---

<sup>6</sup> 7 Wigmore, *supra* note 3, § 2129, at 564.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Id.* § 2148, at 606.

<sup>9</sup> McCormick, *Cases and Materials on the Law of Evidence* 388 n.4 (3d ed. 1956).

<sup>10</sup> See *Hughes v. Samuels Bros.*, 179 Iowa 1077, 159 N.W. 589 (1917) in which an undertaker mailed the business card of a competitor to a man whose wife was seriously ill.

required, is that such a requirement prevents not only fraud but also mistake. Mistake is not used here in McCormick's sense, as applicable to the instance in which a fraudulent writing is offered by a proponent ignorant of the fraud;<sup>11</sup> rather it is used to designate the possibility of mistake resulting simply from a confusion of individuals and not from fraud on the part of anyone. For example, *A* offers in evidence a writing bearing the name of *B*. It is possible, as already suggested, that the writing is the fraudulent product of *A* himself, or of *X*, a third person. But it is also possible that the writing is legitimately connected with *some B* (*i.e.*, an individual with *B*'s name) other than the one against whom it is offered.

Obviously, the possibility of this type of mistake is much greater in some cases than in others. If a letter is received whose authorship is suggested simply by the initials "J. S.," or even by the signature "John Smith," there is appreciably more danger that the recipient will attribute authorship to the wrong J. S. or John Smith than if the same letter had arrived on letterhead stationery indicating, for example, the address, business, and names of the associates of a particular John Smith. Of course, the presence of such particularizing indices in the writing is of no logical significance where authentication is accomplished by the traditional means of proving the signature to be that of a particular individual; such proof will logically exclude the possibility of mistake as well as of fraud.

However, if, for example, letters written on letterhead stationery are admitted without formal proof of authenticity by the party offering the letter into evidence,<sup>12</sup> then the same problem is raised as in the case of writings traditionally viewed as "self-authenticating;" no matter how many indicia are contained in the letter, it may logically be argued that proof is still lacking that the party against whom the letter is offered possesses the specified characteristics.<sup>13</sup> Should formal proof of those facts be required? If so, relatively little has been gained by calling the letter "self-authenticating."<sup>14</sup>

Wigmore suggests a final justification for maintaining some requirements of proof of authenticity. Judicial emphasis of such requirements is

<sup>11</sup> Cf. McCormick, *supra* note 4, at 396.

<sup>12</sup> See Ehrlich, "Unnecessary Difficulties of Proof," 32 Yale L.J. 436, 443 (1923).

<sup>13</sup> *Whitelocke v. Musgrove*, 1 Cr. & M. 511, 522, 149 Eng. Rep. 502, 506 (Ex. 1833): I quite agree that it is not necessary to prove the hand-writing of the defendant; but if you do not prove that, you must prove something else to connect the party sued with the instrument . . . . [I]n most cases you can either shew some acknowledgement, or prove that the party, from his residence or other circumstances, answers the description on the face of the note . . . .

[Emphasis added.]

<sup>14</sup> See text accompanying notes 23-49 *supra* for a proposal that the class of "self-authenticating" writings be broadened.

EA

necessary to combat a psychological tendency to assume the connection of a writing with a particular individual when such a connection is suggested, no matter how inconclusively, by the writing itself.<sup>15</sup> Such a tendency might, of course, obscure recognition by the trier of fact of the two possibilities previously described—fraud and mistake.<sup>16</sup>

#### LIBERALIZATION THROUGH LIMITED "SELF-AUTHENTICATION"

It cannot be denied that fraud, mistake, or undue jury credulity are omnipresent possibilities, nor can it be denied that effective measures are desirable to minimize or eliminate the possible effect of these factors on the litigation process. However, rules supposedly designed to further such ends should be sufficiently necessary and efficacious to justify the expenditures of time, trouble, and money required to comply with them. The legislative evaluation of these competing considerations has on occasion been at odds with the judicial evaluation, and scattered statutes are presently to be found which in effect provide for the "self-authentication" of particular limited types of writings.<sup>17</sup>

A more general approach to the problem is suggested by the 1963 Report of the New Jersey Supreme Court Committee on Evidence.<sup>18</sup> In the comment appended to its proposed revision of Uniform Rule 67, the Committee stated:

In cases that justify it, the trial judge should be free to use the presumption technique, whereby a writing in some cases is considered to be presumptively authentic, the burden of going forward with evidence attacking its authenticity as a preliminary matter shifting to the opponent.<sup>19</sup>

<sup>15</sup> 7 Wigmore, *supra* note 3, § 2130.

<sup>16</sup> It may be noted that this argument, somewhat difficult to assess, would seem to some extent contradicted by Wigmore's own example of the Salem trial for blasphemy of the Quaker Thomas Maule. The allegedly blasphemous book bearing Maule's name having been introduced, and the defendant having argued in his own behalf:

[T]he jury returned a verdict of Not Guilty. The Court, "after expressing much dissatisfaction at the result, asked the jury how they could return such a verdict with the book before them," and was answered by the jury, "The book was not sufficient evidence, for Thomas Maule's name was placed there by the printer."

<sup>17</sup> Wigmore, *supra* note 3, § 2149, at 608. See also Ehrlich, *supra* note 12, at 451: "If spurious evidence is admitted, its authenticity can generally be met by a direct denial, and the jury has an uncanny instinct for apprehending the truth in these matters."

<sup>17</sup> Cal. Labor Code § 973; N.C. Gen. Stat. § 55-36(c) (1955); Okla. Stat. Ann. tit. 68, § 245 (1959); Ore. Rev. Stat. § 377.275(6) (1965).

<sup>18</sup> Report of the New Jersey Supreme Court Committee on Evidence 223 (1963).

<sup>19</sup> *Ibid.* It is not precisely clear from the committee's sketchy summary of the suggested presumption technique whether utilization of the technique will result in the admission of the writing, leaving the trier of fact ultimately to determine the question of authenticity in light of any rebuttal evidence offered by the opponent, or whether it will result in shifting the burden of going forward with evidence of nonauthenticity immediately to the opponent with the judge then to make a preliminary determination of fact as he would of a fact conditioning admissibility under a technical exclusionary rule. Questions of authenticity are usually handled in the former manner. See McCormick, *supra* note 4, § 53, at 125-26. The merit of this methodology where rebuttal evidence of authenticity is to be offered, however, has been questioned. Maguire & Epstein, "Preliminary Questions of Fact in Determining the Admissibility of Evidence," 40 Harv. L. Rev. 392, 399-400 (1927).

The comment, however, is not overly specific in describing which cases are those "that justify" use of the presumption technique, stating only that it would have been ideally suited to the circumstances in the widely-criticized case of *Keegan v. Green Giant Co.*<sup>20</sup>

With respect to specifics, then, a few suggestions should be made. Though private writings vary tremendously—deeds, contracts, letters, memoranda, signs, brochures, advertisements, newspapers, receipts, tickets, and labels being only a few of the types which may be sought to be introduced—nevertheless all writings may be roughly classified in one of three categories. *First*, there are writings the relevancy of which is dependent upon a connection with one or more of the parties to the suit in which they are offered. *Second*, there are those writings whose relevancy is dependent upon a connection with someone other than a party. *Third*, there are writings the relevancy of which does not depend upon a connection with anyone in particular,<sup>21</sup> or at least not upon such a connection as is generally thought to require "authentication."<sup>22</sup> Writings falling in the latter category of course are of no significance to the present question.

With respect to the first category, it should perhaps be inquired whether a case can be made for allowing such writings to be admitted without preliminary authentication. Abandonment or relaxation of current authentication for writings in this category (as well as for other private writings) might raise the possibility of mistake, which is logically if not realistically precluded by the use of existing methods of authentication. Thus it would appear reasonable to deny admissibility to a postcard signed with the initials "W. C.," even when it is offered against a party possessing those initials.<sup>23</sup> The possibility of mistake, however (though not that of fraud), is substantially reduced in the case of a writing bearing either a distinctive name, or a nondistinctive name coupled with other data reasonably referable to a single individual or one of a limited class of individuals. But as previously suggested, there is a further question of

---

<sup>20</sup> 150 Me. 283, 110 A.2d 599 (1954); see discussion at text accompanying notes 40-41 *infra*.

<sup>21</sup> See 7 Wigmore, *supra* note 3, § 2132. Where the relevancy of a writing depends upon a connection with the proponent, the problems raised are of a somewhat different nature than those considered here. The proponent of a writing may of course testify to its authenticity in many cases. *Jones v. Liberty Mut. Fire Ins. Co.*, 90 Ga. App. 667, 83 S.E.2d 837 (1954). The most difficult problem likely to arise in situations where the connection is with the proponent will occur when all of those persons who have contributed to the writing are unavailable.

<sup>22</sup> See the venerable case of *Winslow v. Bailey*, 16 Me. 319 (1839). There the defendants offered in evidence the certificate of one Jameson concerning the extent and quality of certain timber land, on the theory that the certificate had been used by the plaintiffs to induce the defendants to purchase. The fact conditioning relevancy here then was not Jameson's authorship, but whether the certificate had been used for the purpose contended. See also *People v. Adamson*, 118 Cal. App. 2d 714, 258 P.2d 1020 (1953).

<sup>23</sup> See *Covington v. State*, 15 Ga. App. 513, 83 S.E. 867 (1914).

whether avoidance of mistake would still require formal proof (or establishment by some other means) that the distinguishing characteristics attributed to its author by a writing are in fact possessed by the party against whom the writing is offered.<sup>24</sup>

The leading case of *Mancari v. Frank P. Smith, Inc.*<sup>25</sup> illustrates the nature of this problem. There the plaintiff sought to introduce into evidence a printed flier apparently designed to promote the sale of men's shoes and bearing the name "Frank P. Smith, Inc." The trial court excluded the flier for want of authentication, and the appellate court affirmed. In dissent, Judge Rutledge was at some pains to point out that the defendant had admitted by its pleading that it was in the business of retailing men's shoes, and it was therefore likely to have been responsible for the flier.<sup>26</sup> Judge Rutledge's emphasis on defendant's admission might suggest that, had an admission of the identifying nature of defendant's business not been elicited by a routine allegation of the plaintiff, the latter would then have been obliged to produce proof of the fact. The principal significance of the defendant's business, however, would seem to be to strengthen the inference, which could possibly be drawn from defendant's name alone, that it was the Frank P. Smith, Inc. with which the flier purported a connection. Of course, the same fact would have little, if any, tendency to eliminate the possibility that someone had fraudulently caused the defendant's name to appear on the flier. If such possibilities of fraud are considered too minimal to warrant rejection of a writing (a position which Judge Rutledge apparently espoused in the *Mancari* case), it would seem appropriate, in cases where the writing carries sufficient indicia of the particular individual to whom it relates, to follow the practice common with respect to writings long recognized as probably free from fraudulent preparation. Thus when a properly certified record of conviction or judgment is offered as relating to a party or person possessing the same name as appears in the record, identity of parties is frequently presumed from the identity of names.<sup>27</sup> There would appear to be little possibility that such a presumption, if applied in a case like *Mancari*, would result in injustice through mistake. In the unlikely event that the plaintiff had chosen to sue a Frank P. Smith, Inc. engaged in the used car business, that fact could easily have been presented by the defendant.<sup>28</sup> If use of the concept

---

<sup>24</sup> See text accompanying note 13 supra.

<sup>25</sup> 114 F.2d 834 (D.C. Cir. 1940).

<sup>26</sup> *Id.* at 838 (dissenting opinion).

<sup>27</sup> See cases collected in 9 Wigmore, supra note 3, § 2529, at 456 n.5. The presumption was relied upon, inter alia, to uphold the admission of a letter signed "Gus Guasti," against a defendant of that name in *People v. Guasti*, 110 Cal. App. 2d 456, 243 P.2d 59 (Dist. Ct. App. 1952).

<sup>28</sup> This view is suggested by the dissent in *Keegan v. Green Giant Co.*, 150 Me. 283, 288,

of self-authentication were to be extended, then it is suggested that adequate protection against mistake would be afforded by limiting the applicability of the concept to writings which on their face suggest a connection with a single or limited class of reasonably identifiable individuals.

The principal justification which has been offered in support of maintaining current modes of authentication is that they are essential for the prevention of fraud.<sup>29</sup> However, it has frequently been observed that existing standards of authentication create only a slight obstacle to the witting or unwitting presentation of forged writings.<sup>30</sup> One approach to the existing situation, then, would be to raise required standards to the point where the obstacle becomes a significant one. The difficulty with this approach, which no one appears to have recommended, is that a disposition toward "fraud" is not limited solely to the proponents of writings. Thus to raise the standards for proof of authenticity would appear inadvisable in light of the fact, which even Wigmore concedes, that "the difficulty of authenticating . . . is sometimes taken advantage of by those who wish to be able to disavow their authorship."<sup>31</sup> In light of this ambivalent situation, several considerations would seem to warrant the greater use of "self-authentication" or a "presumption technique" of authentication with respect to a number of private writings.

The first of these considerations is that of probability. Of course, probability has frequently been urged to warrant the free admission of private writings, based on the observation drawn from ordinary experience that most private writings, and even most private writings offered into evidence, are not in fact the products of fraud but are connected with those with whom they purport to be connected. This consideration alone would appear to some extent applicable to most, if not all, private writings which purport to show their origin on their faces. But though recognition of this fact might arguably be justified by the saving of the time, trouble, and expense necessary to authenticate the majority of writings which are genuine,<sup>32</sup> the courts have not considered it sufficient.

It has been noted, however, that most recognized presumptions are sup-

---

110 A.2d 559, 601 (1954), discussed at notes 40-41 *infra*, in which the plaintiff unsuccessfully sought to introduce a can labeled with the words "Distributed by Green Giant Company Le Suer, Minn." Justice Williamson stated: "Surely we may assume that the defendant does in fact distribute a product of the type described in the label. If this were not so, it could readily have disposed of the case." *Id.* at 289, 110 A.2d at 602 (dissenting opinion).

<sup>29</sup> See, e.g., *United Factories, Inc. v. Brigham*, 117 S.W.2d 662 (Mo. App. 1938). The leading exponent of the fraud theory is of course Wigmore. See 7 Wigmore, *supra* note 3, § 2148.

<sup>30</sup> McCormick, *supra* note 4, § 185, at 395-96; Levin, "Authentication and Content of Writings," 10 Rutgers L. Rev. 632, 637 (1956).

<sup>31</sup> 7 Wigmore, *supra* note 3, § 2149, at 608.

<sup>32</sup> See McCormick, *supra* note 4.

ported by two or more justifications,<sup>33</sup> and perhaps a presumption technique of authentication in the case of certain types of private writings may be justifiable upon a ground additional to probability. When a private writing is introduced against a party with whom it purports to be connected, that party will generally possess superior access to proof concerning whether or not that connection in fact exists. Superior access is often asserted as a basis for many recognized presumptions,<sup>34</sup> and may similarly be urged as an additional justification for an expanded use of self-authentication in the case of private writings. The proponent of a writing, unless he is a party to its fraudulent manufacture, will rarely have definite personal knowledge concerning the writing's authenticity, a fact to which most of the present problems of authentication are attributable. Therefore, the expedient available to the opponent of a challenged writing in a great number of instances is simply to take the stand and, as the person in the best position to know the fraudulent nature of the writing, deny its authenticity under oath.<sup>35</sup> As a method of preventing fraud, of course, this expedient may be somewhat less than totally effective. The trier of fact may give little weight to the testimony, cynically believing that a denial is to be expected in any event, or he may succumb to the psychological tendency cited by Wigmore to let writings, being tangible, speak louder than words.<sup>36</sup> Other factors, too, may render the expedient of denial unavailable. Where the opponent is a natural person, uncertain memory may preclude a categorical denial; where a corporation, the *loci* of knowledge may be too diffused for convincing denial by a single or limited number of witnesses.

However, the generally superior knowledge relating to authenticity possessed by a party with whom a writing purports to be connected is not limited solely to that which will enable him to make a bald denial. Information that merely concerns or describes his own whereabouts and activities will frequently provide the basis for a more colorable denial of authenticity. Suppose a writing purports to have been written by the opponent to its authenticity in his home town on a certain date. Basis for a denial of authenticity and a claim of fraud would appear if the opponent

---

<sup>33</sup> Morgan, "Presumptions," 12 Wash. L. Rev. 255, 259 (1937).

<sup>34</sup> Morgan lists superior access to proof as one of seven justifications which may be said to support the recognition of the various existing presumptions. *Id.* at 258; see also McCormick, *supra* note 4, § 309, at 641.

<sup>35</sup> Failure to adopt this expedient under circumstances suggesting it would have been readily available has been noted by some courts which have refused to reverse for the admission of improperly authenticated writings. *Richmond Dredging Co. v. Atchison, T. & S. F. Ry.*, 31 Cal. App. 399, 160 Pac. 862 (1916) (purported author, in court, failed to deny authenticity); see also *Dierks Lumber & Coal Co. v. Kull*, 176 Ark. 966, 4 S.W.2d 926 (1928).

<sup>36</sup> See text accompanying notes 15-16 *supra*.

could show that on that date he was in the middle of a European tour.<sup>37</sup> The ease with which such proof might be made by the opponent stands in marked contrast to the difficulty facing a proponent in a case such as *Gartrell v. Stafford*.<sup>38</sup> There the plaintiff sought to rely upon an alleged contract arising from a series of letters purporting to have been signed by the defendant in California. Rejecting an attempted invocation of the reply doctrine,<sup>39</sup> the court held that the alleged letters of the defendant were improperly authenticated in the absence of proof that the defendant actually was in California on the date of the first letter of the series. Had the defendant not been in California on the crucial date, that fact would certainly have been some indication of a possible attempt at fraud. Yet it would seem eminently more sensible to follow a practice of compelling the opponent to come forward with proof of such a fact, as to which he will almost invariably possess superior knowledge.

Facts of which the opponent of a writing may have superior knowledge, and which if demonstrated will lend support to a contention of fraud, are of unlimited variety. In the case of *Keegan v. Green Giant Co.*,<sup>40</sup> for example, the plaintiff had suffered personal injuries after eating the contents of a can of peas. She offered in evidence the can from which the offending peas had come, labeled with the defendant's name, and bearing on the can itself the imprinted letters and numbers "ACFC5" "3LY." Dissenting from an opinion which upheld the trial court's exclusion of the can from evidence, Justice Williamson noted that "They [the imprints] have no meaning to the purchaser. A distributor can readily tell us whether they identify its own product."<sup>41</sup>

Still another type of proof which may lead to the revelation of attempted fraud, and which the party allegedly responsible for a challenged writing may frequently be in a superior position to provide, is that available by

<sup>37</sup> See Swett, "The Dating of Typewriting," 50 J. Crim. L., C. & P.S. 86, 88 (1959).

<sup>38</sup> 12 Neb. 545, 11 N.W. 732 (1882).

<sup>39</sup> *Gartrell v. Stafford*, 12 Neb. 545, 553-54, 11 N.W. 732, 735 (1882).

<sup>40</sup> 150 Me. 283, 110 A.2d 599 (1954).

<sup>41</sup> *Keegan v. Green Giant Co.*, 150 Me. 283, 289, 110 A.2d 599, 602 (1954) (dissenting opinion). The most satisfactory approach, to the present writer, to the frequently arising problem of authenticating a trade-marked article is succinctly stated by the court in the unusual case of *Weiner v. Mager & Throne, Inc.*, 167 Misc. 338, 3 N.Y.S.2d 918 (N.Y.C. Munic. Ct. 1938):

Did Mager and Throne, Inc., manufacture this loaf of bread? . . . This defendant's trade label, affixed to the loaf, is some evidence that it manufactured the bread; and unless rebutted, or at least contested by evidence, gives rise to a reasonable inference that the owner of the trade label manufactured the article to which it was affixed . . .

In the absence of any evidence tending to show that this defendant's trade name or label was being wrongfully used by others, the inference is drawn that the name and label were used by it, and that this defendant was the manufacturer of the bread.

*Id.* at 340, 3 N.Y.S.2d at 920-21. Another decision which less clearly intimates that the owner of a trade name reasonably may be expected to know and demonstrate that others are utilizing it is *Curtiss Candy Co. v. Johnson*, 163 Miss. 426, 141 So. 762 (1932). But cf. *Murphy v. Campbell Soup Co.*, 62 F.2d 564 (1st Cir. 1933).

virtue of the increasingly sophisticated techniques for examination of questioned documents.<sup>42</sup> As is true with respect to the face of writings, of course, the physical characteristics of a writing may be insufficient to enable even a highly skilled examiner to demonstrate its fraudulent nature.<sup>43</sup> Nevertheless, in many instances, such techniques can undoubtedly be very effective in the detection of fraud, and their very existence may have a deterrent effect. Though such techniques will not deter the proponent of a writing who is unaware that he proposes to introduce a forgery or is either ignorant of modern techniques or skeptical of their efficacy, nevertheless writings are ultimately offered by attorneys who, at least since 88 A.D., have been exhorted in the interest of their own professional reputations to ascertain the authenticity of writings in advance where any question appears.<sup>44</sup>

It might appear that the proponent of a writing, since he will in perhaps a majority of cases be in possession of it, would have a superior opportunity to provide scientific proof of authentication. In line with this theory, Wigmore suggests that there is little need for liberal allowance of authentication by content in the case of typewritten documents, in view of the development of typewriter identification.<sup>45</sup> Both handwriting and typewriting identification, however, proceed largely by sample or "standard,"<sup>46</sup> with the possibility of positive identification increasing in direct proportion to the number of standards. Furthermore, for positive typewriter identification it is desirable that the standards be as close in time to the questioned writing as possible.<sup>47</sup> It may be suggested, then, that Wigmore is overly sanguine concerning the ease of the task facing the proponent of an entirely typewritten letter purporting to have emanated from a large business office.<sup>48</sup> In comparison, it may be easier for a party allegedly connected with such a writing to procure it for comparison with standards on file from various machines available to him than it is for the

---

<sup>42</sup> See generally, Baker, *Law of Disputed and Forged Documents* (1955).

<sup>43</sup> Ashton, "Questioned Documents and the Law," 1 *J. For. Sci.* 101, 108-09 (1956).

<sup>44</sup> See the often-cited statement of Quintilian quoted in Osborn, *Questioned Documents* xvi (2d ed. 1929):

We may often, too, find a thread broken, or wax disturbed, or signatures without attestation; all which points, unless we settle them at home, will embarrass us unexpectedly in the forum; and evidence which we are obliged to give up will damage a cause more than it would have suffered from none having been offered.

For a more modern statement to the same effect, see Moore, "The Questioned Typewritten Document," 43 *Minn. L. Rev.* 727, 752 (1959).

<sup>45</sup> 7 Wigmore, *supra* note 3, § 2149, at 608.

<sup>46</sup> As to the importance of standards for examination of handwriting, see Packard, "Some Elementary Points in Document Examination," 1 *Crim. L.Q.* 219 (1958); for the same as to typewriting, see Moore, *supra* note 44.

<sup>47</sup> *Id.* at 735.

<sup>48</sup> A factual situation illustrating this problem is found in *Comanche Mercantile Co. v. McCall Co.*, 52 *Okla.* 782, 153 *Pac.* 675 (1915).

proponent to obtain leave to ransack those same files in search of appropriate standards.<sup>49</sup>

It is not suggested on the basis of the foregoing that in all cases involving writings which purport a connection with the party against whom they are offered are the factors of probability of authenticity and superior access to proof present in equal degrees.<sup>50</sup> On the other hand, in the case of third-party writings, the consideration of probability of authenticity alone might suggest that some capacity for self-authentication be extended to them.<sup>51</sup> Moreover, it may occasionally appear even with respect to a third-party writing that the opponent has greater access to proof of nonauthenticity than does the proponent to proof of authenticity.<sup>52</sup> As a generality, however, it would seem warranted to say that with respect to party writings, both probability of authenticity and superior access to proof by the opponent of the writing are usually present in varying degrees, while with respect to third-party writings, at least the factor of superior access to proof by the opponent is frequently absent.

#### ALTERNATIVE TECHNIQUES FOR LIBERALIZATION OF AUTHENTICATION REQUIREMENTS

If, as has been suggested by virtually every commentator who has dealt with the subject, the requirements of authentication of private writings

<sup>49</sup> It may be worthy of note that scientific exclusion of a particular author or typewriter may frequently be established more conclusively than a positive identification of a particular source. Unfortunately, the former sort of proof is not always as soul-satisfying as the latter. On these points see Harrison, "Aspects of Forensic Science," 1955 *Crim. L. Rev.* 407.

<sup>50</sup> Superior access to proof concerning the authenticity of a writing purporting a connection with the party against whom offered would, at least initially, appear equal where the nature of the writing itself indicates participation by some "neutral" third person such as a telegrapher or a printer. Wigmore suggests that "there is usually available as much evidence of the act of . . . handing to a printer as there would be of any other act, such as chopping a tree or building a fence." 7 Wigmore, *supra* note 3, § 2150, at 608. At the same time, printers and telegraphers are not immune to defects of memory. Cf. Tracy, "The Introduction of Documentary Evidence," 24 *Iowa L. Rev.* 436, 447 (1939). In this case the opponent would appear to have a superior position regarding production of proof.

<sup>51</sup> But see *Evola Realty Co. v. Westerfield*, 251 S.W.2d 298 (Ky. 1952) (denying admission of certain purported bulletins of the F.H.A. on grounds, *inter alia*, of lack of authentication in a case in which the probabilities of authenticity would appear fairly strong).

<sup>52</sup> Cases in which a writing purporting a connection with a decedent is offered against the latter's personal representative present some problem of classification as "party" or "third-person" writings. Frequently, of course, the personal representative will appear to have superior access to some of the types of proof available to a living party. In *Plunkett v. Simmons*, 63 S.W.2d 313 (Tex. Civ. App. 1933), a will contest case, the court held that testimony concerning certain letters purportedly authored by the decedent had been properly excluded by the trial court, noting among other considerations that the proponents offered no evidence concerning the location in Texas from which the letters had purportedly emanated. Had such evidence been offered, a personal representative might have been in a superior position to offer rebuttal evidence suggesting the possibility of fraud or mistake. Compare the discussion of *Gartrell v. Stafford* at text accompanying notes 38-39 *supra*. Since writings purportedly authored by decedents may involve somewhat greater than ordinary possibilities of fraud, perhaps they should be classified for present purposes as writings purporting a connection with one not a party.

are in need of liberalization,<sup>53</sup> there would appear to be essentially three possible techniques available for the purpose. The first, of course, is the formulation either legislatively or judicially, of an increasingly greater number of specialized rules governing the authentication of particular types of writings, or of particular types of writings as to which a relatively well-defined set of circumstances may be shown. The ancient documents rule<sup>54</sup> and the reply doctrine<sup>55</sup> are perhaps the most familiar examples of configurations of circumstantial evidence which are generally deemed sufficient to demonstrate authenticity for purposes of admission. These rules, particularly the latter, may be at least partially justified on the ground that once the requisite circumstances are shown concerning a particular writing, the probability of its authenticity is materially increased over that of private writings generally.<sup>56</sup>

Other sets of circumstances have also been recognized, although not with the same unanimity, as worthy of special consideration. Thus, it is said that required reports, even though purporting to be prepared by private individuals, are properly authenticated by their production from the official custody into which the law requires them to be delivered.<sup>57</sup> This view has found legislative approval in a frequently cited Oklahoma statute which provides that the "fact that an individual's name is signed to a filed [income tax] return shall be prima facie evidence for all purposes that the return was actually signed by him."<sup>58</sup> Probabilities again suggest that such writings are likely to be genuine, given the assumptions that public officials charged with the duty of receiving reports are not likely to fabricate or alter them, and that unauthorized persons are not likely to prepare and file reports bearing the names of those required by law to do so.

---

<sup>53</sup> E.g., McCormick, *supra* note 4; Levin, *supra* note 30, at 637; Ehrich, *supra* note 12. Even Wigmore suggests greater liberality in the acceptance of a wider range of circumstantial evidence to authenticate, 7 Wigmore, *supra* note 3, § 2131, at 573.

<sup>54</sup> Under this rule, the genuineness of ancient documents is established by circumstantial evidence, e.g., age, place of custody, etc. The rule enables such documents to be admitted though testimonial proof is unavailable because of the lapse of time. See 7 Wigmore, *Evidence* § 2137, at 581 (3d ed. 1940).

<sup>55</sup> The reply doctrine is stated by Wigmore as follows: "These facts, namely, the arrival by mail of a reply purporting to be from the addressee of a prior letter duly addressed and mailed, are sufficient evidence of the reply's genuineness to go to the jury." *Id.* § 2153, at 612.

<sup>56</sup> See *Whelton v. Daly*, 93 N.H. 150, 37 A.2d 1 (1944):

It is a fair inference, considering the habitual accuracy of the mails, that the letter addressed to B reached the real B and that an answer, referring to the tenor of A's letter and coming back in due course of mail, leaves only a negligible chance that any other than B has become acquainted with the contents of A's letter so as to forge a reply.

*Id.* at 154, 37 A.2d at 4.

<sup>57</sup> *Sternberg Dredging Co. v. Moran Towing & Transp. Co.*, 196 F.2d 1002 (2d Cir. 1952); McCormick, *Evidence* § 191 (1954).

<sup>58</sup> Okla. Stat. Ann. tit. 68, § 245 (1959).

It would seem permissible to go even further. Statutes can be found which provide for the admissibility of instruments bearing what purports to be a corporate seal and create the additional "presumption" that any person whose signature appears on the writing shall prima facie be deemed to have possessed authority to execute the writing in the corporation's behalf.<sup>59</sup> Such statutes are justified by the improbability that many persons would go to the extent of procuring spurious corporate seals in order to execute forgeries of such instruments. Further, it may be assumed that if the seal upon a corporate instrument is genuine, it is unlikely that a person unauthorized to execute sealed instruments will have had access to it.<sup>60</sup>

The same type of considerations might to a lesser degree support the recognition of a "letterhead doctrine," the possibility of which has been suggested, if not recognized.<sup>61</sup> The impediment to fraud here may be somewhat less, since printing is less costly than seal-manufacture and access to the genuine article is more widespread. But the possibility of fraud is at least relatively reduced. Again, the frequently recurring problem of the trade-marked item might present a legitimate situation for a specialized presumption of authenticity, as infringement of trade-marks is prohibited and the theft of the genuine article constitutes a crime.<sup>62</sup> Such a list of possibilities might be extended *ad infinitum*. It has been said, however, that "most modern commentators are agreed that modes of authentication are, by and large, unrealistically technical."<sup>63</sup> Certainly this fault will not be properly remedied by the indefinite proliferation of even more technical and specialized doctrines.

A second method of approach to the liberalization of existing modes of authentication is to proceed essentially on an *ad hoc* basis. A significant number of courts have displayed considerable willingness to view a wide variety of circumstantial evidence, when produced by the proponent of a writing, as sufficient to authenticate, even though such evidence does not fall within any recognized formal rule.<sup>64</sup> Despite this willingness, however, the burden still rests upon the proponent of a private writing to exercise his ingenuity in obtaining and producing circumstantial evidence of authenticity. A suggestion of the New Jersey Committee on Evidence, dis-

<sup>59</sup> E.g., N.C. Gen. Stat. § 55-36(c) (1955); Cal. Corp. Code § 833.

<sup>60</sup> Without benefit of statute, some courts have been willing to accept the latter proposition, but not the former. See *Robertson v. Burstein*, 105 N.J.L. 375, 146 Atl. 355 (1929).

<sup>61</sup> See Ehrich, *supra* note 12, at 443.

<sup>62</sup> These considerations in the case of a trade-marked and labeled item are extensively set forth in Note, 103 U. Pa. L. Rev. 1095, 1097 (1955) (commenting upon *Keegan v. Green Giant Co.*, 150 Me. 283, 110 A.2d 599 (1954) discussed at text accompanying notes 40-41 *supra*).

<sup>63</sup> Report of the New Jersey Supreme Court Committee on Evidence 224 (1963).

<sup>64</sup> E.g., *Champion v. Champion*, 368 Mich. 84, 117 N.W.2d 107 (1962).

cussed previously,<sup>65</sup> goes somewhat further in its recognition of the possibility that particular cases may arise in which a trial court might appropriately "presume" authenticity, either by automatically admitting the writing into evidence, or admitting it if the opponent does not present counter evidence.<sup>66</sup>

These two manifestations of what has been called the *ad hoc* approach to authentication, and particularly the latter, would appear to possess considerable potential in minimizing one danger attendant upon too rigorous standards of authentication, *i.e.*, that genuine and otherwise admissible writings will be excluded from evidence for lack of "proper" authenticating proof. However, neither the liberal allowance of authentication by circumstantial evidence, nor a presumption of authenticity utilized in cases where the trial court deems it warranted, appear completely satisfactory as devices for avoiding the current necessity of accumulating proof of the authenticity of authentic writings. Even when a writing is to be offered before a court "free" to presume its authenticity in cases that "warrant it," few proponents will care to gamble upon the favorable exercise of the court's discretion if any possibility for obtaining conventional proof of authenticity exists.<sup>67</sup>

It may be suggested, of course, that even this latter objection is not crucial in the now significant number of jurisdictions which have adopted a request for admissions procedure similar to that embodied in Federal Rule 36.<sup>68</sup> Ideally, where available and fully utilized, such a procedure should serve to eliminate the necessity for procuring and producing proof of the authenticity of writings whose authenticity will not ultimately be contested. However, it may be open to some question whether this desirable result will obtain in light of current requirements of authentication, or even under the New Jersey suggestion of recognition of presumptive authenticity on a selective basis. The sanction provided by the Federal Rules to prevent frivolous denials of facts which are not contested is, of course, the imposition upon the recalcitrant party of costs of proof.<sup>69</sup> In the case of many writings such as those on labeled and trade-marked

---

<sup>65</sup> See text accompanying notes 18-20 *supra*.

<sup>66</sup> See note 19 *supra* and accompanying text.

<sup>67</sup> Authentication even of writings presenting the most difficult problems has on occasion been accomplished by a determined accumulation of circumstantial evidence. See, e.g., *DeGroat v. Ward Baking Co.*, 102 N.J.L. 188, 130 Atl. 540 (1925); *Cheli v. Cudaby Bros. Co.*, 267 Mich. 690, 255 N.W. 414 (1934).

<sup>68</sup> Fed. R. Civ. P. 36 provides in part:

After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request.

<sup>69</sup> Fed. R. Civ. P. 37(c).

articles, however, the opponent, despite the probabilities inherent in the situation, may with some legitimacy claim an inability to admit or deny. In such a situation no sanction is available even though satisfactory and uncontested proof of authenticity is subsequently offered.<sup>70</sup> In addition, where a request for admission of genuineness involves a writing which is potentially pivotal to the litigation, there would appear to be a substantial temptation for the opponent to deny the request and incur the somewhat problematic risk of imposition of costs,<sup>71</sup> even though authenticity would not be contested if the proponent could find satisfactory proof. From the standpoint of the opponent there exist the not insubstantial possibilities that the proponent may fail to exhibit the requisite ingenuity in unearthing satisfactory proof, or may find that advancing the costs of such proof burdensome or prohibitive,<sup>72</sup> or finally, possessing both ingenuity and money, may still be unable to authenticate satisfactorily. The mere chance that the trial court may in its discretion indulge in a presumption of authenticity and admit the writing would not appear materially to lessen the possible temptation to gamble upon the occurrence of these possibilities by denying a request for admission of authenticity.

A third possibility for the liberalization of existing modes of authentication is that which has been set forth here, *i.e.*, the positive extension of the capacity for self-authentication to a broadly defined class of private writings. The division here suggested, between writings which on their face purport a connection with the party against whom offered, and writings purporting a connection with some third person, admittedly is not completely satisfactory. Nevertheless, such a division would at least possess the virtue of simplicity and of corresponding ease of application. In addition, the fact that superior knowledge and access to proof of nonauthenticity are attributed to a party with whom a writing purports a connection should in many cases minimize the possibilities of fraud and mistake. These possibilities are in any event not entirely eradicable short of the adoption of unrealistically rigorous standards of authentication.

If the possibilities of fraud and mistake attendant upon the allowance of party writings as self-authenticating are deemed minimal, the principal objection to the adoption of a positive view concerning the presumptive

---

<sup>70</sup> This "loophole" in rule 37(c) is pointed out in Finman, "The Request for Admissions in Federal Civil Procedure," 71 Yale L.J. 371, 427 (1962).

<sup>71</sup> Ultimately to obtain reimbursement of his costs, the party whose request for an admission under rule 36 has been denied must surmount two hurdles. First, he must prove the truth of the matter concerning which the admission was sought, and second, it must appear to the court that there were no good reasons for the denial. See Fed. R. Civ. P. 37(c).

<sup>72</sup> Rule 37(c) does not provide for the prospective assessment of costs of proof; see *United States v. Watchmakers of Switzerland Information Center, Inc.*, 25 F.R.D. 197 (S.D.N.Y. 1959).

authenticity of these writings may be that no limits, however broad, should be imposed upon the capacity of private writings to authenticate themselves. It has been suggested that cases may arise in which a presumption of authenticity might well be indulged even as to third-party writings,<sup>73</sup> and any judicial disposition to indulge such a presumption even in seemingly appropriate instances might well be inhibited by a rule which could implicitly be viewed as limiting the capacity of self-authentication to a broadly defined class of writings.<sup>74</sup> As against this objection, it should be noted that the fear of over-specificity may well lead to the fault of over-generality. The orthodoxy concerning the general incapacity of private writings to authenticate themselves is well entrenched, and it may be conjectured that a trial court might experience some reasonable misgivings in departing from that orthodoxy with any frequency on the basis of a mandate phrased in the general terms of the proposed New Jersey revision of Uniform Rule 67.<sup>75</sup> Such misgivings, it is suggested, may not be entirely dispelled by a committee comment that freedom to depart from the orthodoxy is afforded "in cases that warrant it." Thus it would appear that some specificity is needed if any escape from the orthodox rule is to be effected. A more positive direction for exercising the new freedom to depart from orthodoxy might well be considered by future draftsmen addressing themselves to the problem of authentication.

---

<sup>73</sup> See text accompanying note 51 *supra*.

<sup>74</sup> Ehrich, "Unnecessary Difficulties of Proof," 32 *Yale L.J.* 436, 451 (1923): "The truth cannot safely be determined if evidence which common experience indicates to be almost certainly genuine is excluded from consideration. Regular patterns are not essential. Their undue preservation is the bane of the law."

<sup>75</sup> Report of the New Jersey Supreme Court Committee on Evidence 222 (1963). As adopted by the New Jersey Supreme Court (effective date postponed to Jan. 31, 1967), N.J. Rule of Evidence 67 reads: "Authentication of the original or a copy of a writing is required before it may be received in evidence. Authentication may be by evidence sufficient to sustain a finding of its authenticity or by any other means provided by law."