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Admissability of Book Entries as an Exception to the Hearsay Evidence Rule

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NOTES AND COMMENT

Admissibility of Book Entries as an Exception to the Hearsay Evidence Rule

Under certain circumstances a litigant may offer the books kept and prepared by him or others as proof of the facts contained therein. Such declarations, though hearsay, are admissible as an exception to the hearsay evidence rule on the ground of necessity and because records made in the regular course of business carry some guarantee of trustworthiness. The exception embraces two classes of book entries:

1. Shop book entries, which are made in the books of the parties to the action by the parties themselves;
2. Entries made in the regular course of business by those not parties to the action.

New York Common Law

The shop book rule was adopted to permit small shop keepers, who ran an individual enterprise to prove their cases in court against their customers. To aid this type of shop keeper in his proof this rule was adopted permitting him to put his books in evidence provided that:

1. The party kept no clerk;
2. Some of the articles charged had been delivered, or some of the services charged had been performed;
3. The books produced were the account books of the party;
4. He had kept fair and honest accounts as testified to by those who had dealt and settled with him.[1]

The rule as to entries made in the regular course of business permits the admission into evidence of books prepared by persons other than the litigants and was designed to serve the needs of larger enterprises where record clerks were employed. To permit book entries to be introduced in evidence under this rule it must appear that the entries were made:

1. In the regular course of business;
2. By one in the discharge of his duty or in the regular course of his employment or business;

[1] Vosburgh v. Thayer, 12 Johns. 461 (N. Y. 1815).

3. At or reasonably near the time when the recorded transaction or event occurred;
4. By one who had personal knowledge of the facts recorded, or to whom the information was communicated by some one who had such personal knowledge and whose duty it was to make such report to the entrant.[2]

New York Statute

Because of the difficulty inherent in complying with this preliminary proof, the recommendations of the Legal Research Committee of the Commonwealth Fund were enacted in full by the New York State Legislature, in Section 374-a of the Civil Practice Act.[3] The statute was intended to secure a more workable rule of evidence in the proof of business transactions under existing business conditions.[4] The New York statute provides:

Admissibility of certain written records. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation and calling of every kind.

As the section is written, it would appear that the following proof is now required:

1. That the entry was made in the regular course of business;
2. That it was in the regular course of business to make such entry; *and*
3. That the memorandum or record was made at the time of the transaction, occurrence, or event, or within a reasonable time thereafter.[5]

The first case involving the interpretation of the statute to come before the Court of Appeals was the important case of *Johnson v.*

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[2] Mayor v. Second Avenue R. R., 102 N. Y. 572, 7 N. E. 905 (1886).
[3] L. 1928, c. 532.
[4] Shea v. McKeon, 264 App. Div. 573, 35 N. Y. S. (2d) 962 (1st Dep't 1942).
[5] Publishers' Book Bindery, Inc. v. "Harry" Ziegelheim, N. Y. L. J., May 3, 1945, p. 1679, col. 4.

Lutz.[6] In that case a police blotter containing the report of a policeman who did not see the accident, but who based his report upon hearsay statements of third persons, was held inadmissible. The court said: "The memorandum in question was not made in the regular course of any business, profession, occupation or calling." Although not necessary to the decision, the court stated that the statute was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto. Much confusion resulted from the *dicta* in this case, but under the statute as interpreted by the courts, the test still is "was the entry made in the regular course of business, was it in the regular course of business to make such entry and was the entry made at the time of the transaction, occurrence, or event, or within a reasonable time thereafter?"

The Appellate Division in *Geroeami v. Fancy Fruit and Produce Corp.*[7] held that the admission in evidence of a hospital record to the effect that plaintiff, in an action for injuries suffered when struck by an automobile truck, was intoxicated at the time of the accident, is incompetent. From the decision in the *Geroeami* case and that in a later opinion of the Appellate Division in the *Roberto v. Nielson* case,[8] it is apparent that the difficulty facing the courts in deciding on the admissibility of hospital records is that it is the business of those connected with hospitals to make some ascertainment of the facts bearing upon the nature of the injuries which the patient has sustained to guide doctors in their diagnosis and treatment. In the *Roberto* case, which was an action for personal injuries resulting from an automobile accident, the hospital records were held admissible except for the portion reading "but evidently, after a day of beer and wine drinking, he was somehow involved in an auto accident." The Court of Appeals in *People v. Kohlmeyer*[9] held that hospital records containing the diagnosis made by a doctor were admissible. The court in holding that hospital records are included under Section 374-a stated that "it was error, therefore, to exclude, from evidence, the parts of the hospital records *which were not hearsay*."[10] The court also held that any portion of the hospital record or death certificate is admissible including the history portion of the hospital record or the cause of the death stated in the death certificate, if the person who made the entry in the hospital record or death certificate could testify to the entry he made if called personally

[6] 253 N. Y. 124, 170 N. E. 517 (1930).
[7] 249 App. Div. 221, 291 N. Y. Supp. 837 (1st Dep't 1936).
[8] 262 App. Div. 1035, 30 N. Y. S. (2d) 334 (2d Dep't 1941).
[9] 284 N. Y. 366, 31 N. E. (2d) 490 (1940).

to the witness stand. Pursuant to this rule the cases uniformly hold that the admissibility of the history portion of the hospital record depends upon whether the plaintiff gave the history or not. Where the history is given by the plaintiff the person making the entry could testify to it if called to the stand; if it is not given by the plaintiff, he could not.[11]

In *Del Re v. City of New York*,[12] an action for injury to a passenger riding on a subway, the Appellate Term held that the hospital record, reading "patient was riding in a subway when it came to a sudden stop" was inadmissible as hearsay on the vital issue in the case. The decision was based upon the ground that "it was the business of the hospital to diagnose the patient's condition and to treat him, not to record a statement derived from an unidentified source describing the manner in which the patient's injuries were sustained." This decision is sound, for it is not the business of a hospital to make a record of the manner in which accidents occur. The influence of the *dicta* in the *Johnson v. Lutz*[13] case is apparent for it is submitted that under Section 374-a it would have made no difference whether or not the identity of the source is established or whether the source was the patient himself.

The report of the Legal Research Committee of the Commonwealth Fund, "The Law of Evidence—Some Proposals for Its Reform," published in 1927 by the Yale University Press, dealt with the question of book entries under the heading of "Proof of Business Transactions to Harmonize with Current Business Practice." It explained and illustrated the great need of a more "practical, workable and uniform rule, adapted to modern business conditions and practices." The report is devoted to a discussion of the pressing need of a rule of evidence which would "give evidential credit to the books upon which the mercantile and industrial world relies in the conduct of business." The statute as interpreted by the courts has been applied in a variety of situations. It has been held proper to admit, under this section, a ledger containing business entries, in an action for the agreed price and reasonable value of goods;[14] the minute and cash books of a congregation, in an action to impress a trust upon

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[10] *Italics added.* A great deal of confusion has resulted from the use of the word *hearsay*. It seems that the courts, in certain instances, regard *hearsay* made admissible for one reason or another, as no longer *hearsay*, as in the *Kohlmeyer* case, cited *supra* note 9.

[11] N. Y. L. J., April 24, 1945, p. 1548, col. 1.

[12] 180 Misc. 525, 42 N. Y. S. (2d) 825 (1943).

[13] See note 6 *supra*.

[14] Warner Quinlan Co. v. Ben Charat, Inc., 143 Misc. 443, 257 N. Y. Supp. 722 (1932).

money deposited with the congregation;[15] the ledger and monthly statements prepared by plaintiff's agent who managed the property, in an acton to recover rent;[16] corporate books as *prima facie* evidence of the correctness of the assets and liabilities of the corporation, in a proceeding for a judicial settlement of the accounts of an administratrix.[17] Once the proper foundation has been laid the records should be treated as original evidence and should be weighed like all other evidence.[18]

Federal Statute

In 1936 Congress enacted a statute,[19] which is substantially the same in form and content as the Civil Practice Act § 374-a. The United States Supreme Court was first called to pass upon the scope of the federal statute in *Palmer v. Hoffman.*[20] The Court took the position that legislation that tends to liberalize the admission of hearsay evidence is to be strictly construed. In that case, plaintiff sued to recover damages for injuries arising out of a grade-crossing accident. Two days after the accident, as required by the defendant railroad company's rules, the engineer of the train involved reported the circumstances of the accident to an official of the company. The engineer having died before trial, the railroad offered his statement in evidence, contending that it was made in the regular course of business, and therefore was admissible by virtue of the statute. The trial court excluded the statement. The Supreme Court affirmed, saying, "But we do not think that the statement was made 'in the regular course' of business within the meaning of the Act. The business of the petitioner is the railroad business. That business like

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[15] Zinaman v. Stivelman, 246 App. Div. 851, 285 N. Y. Supp. 20, *aff'd,* 272 N. Y. 580, 4 N. E. (2d) 813 (1936).

[16] Funk v. Modo Lora Realty, Inc., 145 Misc. 805, 260 N. Y. Supp. 844 (1932).

[17] Matter of Auditore's Estate, 136 Misc. 664, 240 N. Y. Supp. 502 (1930).

[18] See note 14 *supra.*

[19] Act of June 20, 1936, c. 640, § 1, 49 STAT. 1561, 28 U. S. C. A. 685, provides: "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was in the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."

[20] 318 U. S. 109, 63 Sup. Ct. 477, 87 L. ed. 645 (1943).

other enterprises entails the keeping of numerous books and records essential to its conduct or useful in its efficient operation . . . The engineer's statement which was held inadmissible in this case falls into quite a different category. It's not a record made for the systematic conduct of the business as a business." In brief, the Court ruled that, within the contemplation of the statute, the business of a railroad is railroading and not causing accidents. The decision of the Court is sound in principle for it is a reaffirmance of the Commonwealth Fund proposal. As Professor Maguire stated in a note in the *Harvard Law Review*,[21] "The majority opinion in the *Hoffman* case quite correctly emphasizes the morbid judicial fear of deliberate falsification expressed by the early English formulations of the hearsay rule and its exceptions. Correctly again, the opinion speaks of the judicial effort to indicate guaranties of trustworthiness connected with the documents admitted as business entries . . ."

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TAX AVOIDANCE BY THE FEDERAL GOVERNMENT

Tax avoidance, customarily associated with private firms and individuals, is applied on by far the largest scale of all—by our own Federal Government. This is not to imply, however, that the Government has thereby breached any ethical standards, for it is now well recognized that despite the evils which result from the promiscuous application of dubious tax reduction practices, the use of sound legal principles for reducing taxes is "above reproach" [1] and not even "mildly unethical".[2]

Since 1819, when Chief Justice Marshall in *McCulloch v. Maryland* [3] expounded the principle that the Constitution of the United States implies that properties, functions, and instrumentalities of the Federal Government are immune from taxation by its constituent parts, the Government has attempted to obtain the maximum possible exemption from all state and local taxes.

However, although the doctrine of implied immunity appeared to be clear when applied to direct taxes levied on the Government, its precise reach became obscure when applied to indirect taxes.

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[21] (1942) 56 HARV. L. REV. 464.

[1] *See* PAUL, STUDIES IN FEDERAL TAXATION (1937) 85.
[2] Rands, Inc., 34 B. T. A. 1094.
[3] 4 Wheat. 316, 4 L. ed. 579 (U. S. 1819).