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BUSINESS RECORDS—A PROPOSED RULE
OF ADMISSIBILITY*

Roy R. Ray†

THE proof of business records is controlled in Texas, as in most states, by common law principles which were developed in a time when most business transactions were simple and the number of persons who participated in any one transaction was small. As a matter of fact the first rules peculiar to entries in account books were those created to permit merchants to prove their just claims when they were disqualified as witnesses because they were parties. When a small shopkeeper sued for goods sold and he alone had personal knowledge of the transaction, he could not testify. This was manifestly so unjust that the courts permitted him to put his account book in evidence and take an oath to the correctness of the entries. This became known as the "Shopbook Rule" and was recognized in Texas. Since it was clearly an evasion of the rule of incompetency of parties, the courts felt it necessary rigidly to restrict this kind of evidence. The usual requirements for the admission of the party's account books were: that he had no clerk, that the entry must not be one as to a cash transaction (which could be evidenced by a note or receipt), that the party had a good reputation for honest and correct dealing and that the books bore an honest appearance. Some courts added the requirement that the entry must have been made reasonably near the time of the delivery of the goods or rendition of the services covered by the entries. It is at once apparent that under the most

*This paper has been deliberately prepared without any footnotes for several reasons: (1) It is not intended for reference by an attorney preparing or trying a case. (2) There is adequate authority for all statements made in the paper. (3) An attempt has been made to put the material in a form in which it can be understood by business men as well as lawyers. (4) It is believed that the paper can be read more easily if not interrupted by constant reference to cases and other materials.

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liberal view the "Shopbook Rule" is not suitable to modern business conditions. This is nowhere better demonstrated than in an Oregon case where the supreme court of that state used 27 pages in collecting the cases and comments which show the confusion of the courts as to the scope of the rule and its relation to the regular entry principle.

In England, sometime prior to 1700, the courts began to admit in evidence entries made by a deceased clerk in the regular course of his duties if they were made in books of persons not parties to the suit. This rule was soon extended to include entries in a party's books by a deceased clerk and later to cover all entries made by a person since deceased in the regular course of his duties whether the entrant was a party, a clerk of a party or wholly unconnected with either of the parties to the suit. The broadening of the rule as to regular entries eliminated the need for any special rule to cover a party's books, and since late in the 19th century England has had no separate shopbook exception to the hearsay rule.

In this country, although the "Shopbook Rule" had existed from colonial days, no general rule for regular entries seems to have been developed until the early 1800s. As business grew out of the "one-man shop" stage, the need for a broader rule was recognized, and once the "business entry" rule was established, it came to assume far more practical importance than the "Shopbook Rule." However, as distinguished from the English rule, the regular entry rule, for the most part, was not applied to records of a party to the suit, the admissibility of these still being determined by the old "Shopbook Rule." Later statutes abolished the incompetency of parties as witnesses in civil cases, and this would seem to have done away completely with any necessity of preserving the "Shopbook Rule" or its restrictions. Fortunately, we had never codified the rule in Texas, and although some references may be found to it in the decisions, it is believed that the modern Texas cases have abandoned the "Shopbook Rule" and apply only the general rule as to regular entries in the course of business.

As in the "Shopbook Rule," the courts also required much preliminary proof before records could be admitted under the "regular entries" rule. The chief requirements were: the entry must have been made in the regular course of business by a person in the discharge of his duties or in the course of his employment, and by a person who had personal knowledge of the facts recorded or to whom the information recorded had been communicated by one who knew the facts and reported them in the course of his employment. The entry must also have been made within a short time after the transaction occurred. Another restriction was that the entries must be original entries as distinguished from transcribed records or copies. It is obvious that if this requirement had been strictly enforced, proof of business transactions would have been difficult indeed. In many businesses the daily transactions are noted on slips, memoranda, *etc.* by the employee concerned, and these are promptly collected and entries made therefrom in a permanent book or ledger. It is now generally held that entries in the first permanent records comply with the requirement of original entries. Furthermore, today the courts seem to admit the first slips or memoranda made at the time of the transaction. Another restriction found in the older cases was that the entries must relate only to goods sold or services rendered. This limitation was certainly inappropriate to the rule admitting book entries, and, fortunately, our courts have extended the rule to cover "any matter pertinent to the business in question" and customarily recorded. In earlier days of the rule the courts confined the operation of the rule to business records in the strict sense, *i.e.*, those of a commercial nature. Thus, until comparatively recent times many courts did not allow proof of records of professional people such as doctors, lawyers, *etc.* nor records of institutions such as hospitals, under the business entries rule. Fortunately, the present day scope has been broadened to include establishments and books of a non-commercial nature, such as church and hospital records.

From this brief recital of some of the most important limita-

tions placed by the courts on this rule, it must be obvious that proof of business transactions became both a burdensome and expensive process. This emphasis on form and refinements, with little or no attention to the needs of modern business practice, brought only ridicule and contempt from business men who daily conducted their businesses on the basis of records which the courts were too pedantic to receive in evidence. But the chief problem in connection with the book entries is that of authentication. It is clear that the entries do not prove themselves and should not be admitted in the absence of some preliminary showing as to what the books and entries are and under what circumstances they were kept. How may this showing be made? Where the person who made the entries to be offered has personal knowledge of the facts recorded, is produced as a witness and testifies to the correctness of the entries, they are admissible as records of his past recollection. They may also be used to refresh his present recollection if examination of the entry has that effect, in which case they would not be introduced in evidence. The same principles will apply where the witness called did not make the entries but had personal knowledge of the correctness of the entries and supervised the keeping of the books. In these cases there is no real difficulty and no need to resort to any special rules regarding book entries, since these principles apply to any memoranda. But under modern business conditions the above situations seldom exist because the various persons who participated in the transaction usually cannot all be produced as witnesses.

The normal case is one where either the entrant or the one upon whose knowledge the entry was based or both are unavailable as witnesses. It is here that we find the most serious objection to the common law business entry exception to the hearsay rule. Assuming that all of the other requirements are met, the common law rule (in force in Texas and most states) requires that the person who made the entry and all persons upon whose information it was based be produced as witnesses or shown to be

unavailable by reason of death or other cause before the entry can be admitted. This indicates a lack of understanding as to how modern business operates. The average accounting system used by business firms requires numerous entries in a series of records to record a transaction from beginning to end. Many business entries are made on loose leaf sheets or cards and are typewritten rather than in longhand. They are made by various entrants upon information furnished from many sources. It is frequently impossible to identify the person who made a particular entry or who reported the information upon which it was based. Even where this is possible, the location and production of the entrant may prove an insurmountable task. With the large employee turnover in the average establishment and the moving away of former clerks it will often be extremely difficult and sometimes impossible to establish positively that a particular entrant is dead, out of the jurisdiction or otherwise unavailable. But the real point overlooked too often by the courts is that even if all the persons who had a part in the transaction could be produced as witnesses, nothing would be accomplished if the entry is the usual routine one. The maker of the final entry normally has no personal knowledge of the transaction recorded, and the persons who reported the information and who did have personal knowledge will almost inevitably have no recollection about the particular transaction. Their testimony will invariably be merely a statement that they correctly reported and/or recorded the matter in question.

The rigid requirements of the common law necessitating production of the entrant and reporter or proof that they are dead or otherwise unavailable serve no useful purpose and actually prevent or discourage the proof of just claims. They must be eliminated as prerequisites of admissibility. After all, the mere admission of such records as evidence does not mean that they are to be accepted as conclusive. They are open to attack like all other evidence. All that should be required for the admission of an entry is testimony by any competent witness that it was made in the regular course of business as a part of the record of

some establishment and near enough to the time of the act recorded to have been fresh in the memory of those participating in the transaction. All other matters, including non-production of the entrants and reporters, should affect only the weight to be given to the entry.

The call for reform in this field has been echoed time and again by leading lawyers, judges, legal writers and businessmen. In 1923, in the second edition of his monumental treatise, Wigmore wrote:

“...[S]uch entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation, investment, and general confidence in every business enterprise. Nor does the practical impossibility of obtaining constantly and permanently the verification of every employee affect the trust that is given to such books. It would seem that expedients which the entire commercial world recognizes as safe could be sanctioned, and not discredited, by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the court-room. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who as attorneys have already employed and relied upon the same methods. In short, courts must here cease to be pedantic and endeavor to be practical.”

Only a few courts have accepted Mr. Wigmore's theory and frankly recognized that the courts have lagged far behind business practice in the credence attached to business records. Decisions from Kentucky, Georgia, North Carolina, Michigan, Minnesota, Washington and New Hampshire have adopted a liberal enough construction of the business entry rule to receive records in evidence where the inconvenience of producing the witnesses or accounting for their non-production clearly outweighed any advantage to be gained from insisting on the technical requirements of the rule. And in an excellent decision in 1922 the Texas

Commission of Appeals admitted in evidence the ledger sheets of a bank upon the testimony of the president who identified them as a part of the bank's permanent records and affirmed the general correctness of such records. The court did not require testimony from the bookkeeper who made the entries, saying,

“At most, he could only testify that the entries made by him are true entries of transactions reported to him by others. In other words, he could only testify that he wrote down what others told him.”

While this is sound as far as it goes, it does not go far enough.

Reform in this field has been exceedingly slow, and it has long been recognized by authorities that sporadic judicial decisions liberalizing the rule here and there are not the answer. Needed improvement will come only through the legislature or through the rule-making power of the courts. Fortunately, there have been several outstanding movements for reform. The first one on a broad scale was the work of the special committee of the Commonwealth Fund named to study and report on needed reforms in the law of evidence. One of the matters it considered was business entries. This committee included such eminent lawyers and scholars as Professors Morgan and Sunderland, the late Professors Wigmore and Hinton and the late Judge Hough. After more than five years of research, a study of over eighteen hundred decisions and replies to a questionnaire sent to a large number of business firms, the committee's report was published in 1927. It recommended the adoption of several statutes. The text of the one on business entries is as follows:

“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."

This statute was adopted verbatim in New York in 1928 and served as the model for the statute adopted by Congress in 1936 for the federal courts. It has also been adopted in modified form in several other states including Connecticut, Maryland, Michigan, Rhode Island and Maine. Oregon adopted it but later changed to the Uniform Act. Massachusetts amended its statute to bring it into agreement with the model statute of the Commonwealth Fund committee.

In 1936 the National Conference of Commissioners on Uniform State Laws, after several years of study, approved and promulgated an act designed to achieve the same ends. It was entitled "Uniform Business Records as Evidence Act" and its text is as follows:

"Definition. The term 'business' shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

"Business Records. A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

It will be seen that this act is quite similar to the Commonwealth Fund Statute. It appears that the Commissioners used it as a model and intended to make no real significant change. In their prefatory note they say, "The Conference in the present act has attempted to devise a standard wording, which will serve to uniformize its provisions as it is adopted from time to time in other states." Aside from the change and reduction in verbiage the only significant differences between the two acts are: (1) The

inclusion of the term "condition" in the Uniform Act. (2) A requirement in the Uniform Act that the record must be testified to on the stand by some appropriate person. (3) In the Commonwealth Statute after the trial judge finds that the record was made "in the regular course of any business" and that it was the regular course of the business to make such a memorandum or record, all other circumstances such as lack of personal knowledge by the entrant of the facts affect only the weight. In the Uniform Act there is no such limit on the judge's discretion. Even after the foundation is laid, the judge does not have to admit the entry unless "in the opinion of the court, *the sources of information, method and time of preparation were such as to justify its admission.*" (Italics added.)

The Uniform Act has now been adopted in some sixteen states including: California, Delaware, Florida, Idaho, Minnesota, Montana, New Jersey, North Dakota, Ohio, Oregon (it replaced the Commonwealth Fund Statute), Pennsylvania, South Dakota, Vermont, Washington and Wyoming.

In 1942 the American Law Institute approved and published its Model Code of Evidence. Its reporter was Professor Edmund M. Morgan, who was chairman of the Commonwealth Fund committee. Its business-entry rule was admittedly based on the Commonwealth Statute. The text is as follows:

"BUSINESS ENTRIES AND THE LIKE.

"(1) A writing offered as a memorandum or record of an act, event or condition is admissible as tending to prove the occurrence of the act or event or the existence of the condition if the judge finds that it was made in the regular course of a business and that it was the regular course of that business for one with personal knowledge of such act, event or condition to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record, and for the memorandum or record to be made at or about the time of the act, event or condition or within a reasonable time thereafter.

"(2) Evidence of the absence of a memorandum or record of an

asserted act, event or condition from the memoranda or records of a business is admissible as tending to prove the non-occurrence of the act or event or the non-existence of the condition in that business, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events, or conditions at the time thereof or within a reasonable time thereafter, and to preserve them.

“(3) The word ‘business’ as used in Paragraphs (1) and (2) includes every kind of occupation and regular organized activity, whether conducted for profit or not.”

The rule differs from the Commonwealth Statute in four respects: (1) It applies to conditions as well as to acts and events. (2) It includes every kind of institution, making clear that conduct for profit is not essential. (3) It provides that the person having knowledge of the act, event or condition, either must make the entry or in the course of business transmit the information to be included in the entry. (4) The rule makes evidence of absence of a memorandum receivable to show the non-occurrence of any act or event or the non-existence of a condition. These two latter features are not in the Uniform Act.

One further significant effort for reform in this field is worthy of attention. In 1945 the Integrated Bar of Missouri created an Evidence Code Committee charged with the task of formulating a Code of Evidence for that state. After several years of research and study this committee, composed of representatives from the various courts, professors from the law schools in Missouri, and practicing attorneys, published in 1948 a printed pamphlet of the Proposed Missouri Evidence Code. This code was amended after suggestions were received from the bar and has now been approved by a large majority of the lawyers of Missouri. It will be submitted to the state legislature in January, 1951. The code contains a section on business entries modeled after the several acts mentioned above but is not quite as liberal in some respects as those acts. I quote from a comment on this section by Charles L. Carr, Chairman of the Code Committee:

“This section recognizes that business entries today are made by numerous and varying clerks knowing little or nothing about the items recorded, that other (and often numerous) employes or former employes have a composite knowledge of the transaction recorded and that the evidence rules relating to the authentication of business entries and their admissibility in evidence have to be modified accordingly.”

This is the general picture. Now what of the situation in Texas? Attention was called to the need for liberalization of this rule in 1937 in the treatise, *Texas Law of Evidence*, and the desirable change was pointed out. But so far as I know, no serious effort at remedial legislation has been made by the bar or any segment of it. However, I believe this to be due chiefly to the *laissez faire* attitude of the profession generally where improvement in procedure is concerned. There would appear to be no reason why our legislature should not adopt a sensible, modern rule on this subject, but it will not be likely to take any action unless a large percent of the profession actively advocates it. It seems to me that a much more feasible way to bring about this much needed liberalization in the admissibility of business records in Texas is through the promulgation by our supreme court of a rule to be followed by all the courts of this state. That the Texas Supreme Court has the necessary authority under its rule-making power cannot be seriously questioned. In connection with the Rules of Civil Procedure it has already adopted a highly desirable rule of evidence concerning Judicial Notice of Laws of Other States (Rule 184a). The source of this rule was the American Law Institute's Code of Evidence, Rules 801-806. In my judgment a liberal rule as to business entries is just as important and the need is equally great. I cannot conceive of any substantial opposition from the Bar to such a rule, and I think it would be a step in the direction of convincing the lay public that the courts are more interested in dispensing justice than in holding on to technical rules which have no sound basis in reason.

I propose the adoption by the Supreme Court of Texas of the following rule:

ADMISSIBILITY OF BUSINESS RECORDS

- (A) A memorandum or record of an act, event or condition shall, in so far as relevant, be competent evidence of the occurrence of the act or event or the existence of the condition if the judge finds that:
- (1) It was made in the regular course of business
 - (2) It was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event or condition to make such memorandum or record or to transmit information thereof to be included in such memorandum or record
 - (3) It was made at or near the time of the act, event or condition or reasonably soon thereafter.
- (B) The identity and mode of preparation of the memorandum or record in accordance with the provisions of paragraph (A) may be proved by the testimony of the entrant, custodian or other qualified witness even though he may not have personal knowledge as to the various items or contents of such memorandum or record. Such lack of personal knowledge may be shown to affect the weight and credibility of the memorandum or record but shall not affect its admissibility.
- (C) Evidence to the effect that the records of a business do not contain any memorandum or record of an alleged act, event or condition shall be competent to prove the non-occurrence of the act, or event or the non-existence of the condition in that business if the judge finds that:
- It was the regular course of that business to make such memoranda or records of all such acts, events or conditions at the time or within reasonable time thereafter and to preserve them.
- (D) "Business" as used in this rule includes any and every kind of regular organized activity whether conducted for profit or not.

This proposed court rule is based in part on the several model statutes discussed above. I have attempted to incorporate the best features of the several proposals and to make the provisions as

definite as possible. For example, in paragraph (A) I have made it clear that the rule includes a memorandum as well as a record in a book. The term "condition," which did not appear in the Commonwealth Fund Statute but is in the Uniform Act, is included. This is especially important in connection with hospital records of a patient's condition. Sub-paragraph A(2) follows the Commonwealth Fund Statute but goes further and requires that the person having personal knowledge of the act, event or condition must either make the memorandum or record or in the regular course of business transmit the information to be included in the memorandum or record. Paragraph (A) requires specific findings by the trial judge as a condition precedent to the admissibility of the records instead of giving him broad discretion as to the "sources of information, method and time of preparation." Paragraph (B) permits proof of the identity and mode of preparation of the record by any qualified witness without the requirement of personal knowledge of the matters recorded. This is based both upon the Uniform Act and the American Law Institute Rule. Paragraph (C) extends the rule beyond either the Commonwealth Statute or the Uniform Act in providing that the absence of an entry may be used to prove the non-occurrence of the act or event or the non-existence of the condition. Here again specific findings by the trial judge are mandatory before such evidence is admissible. This is in accord with the American Law Institute Rule. It is believed that this is an important part of the rule and within the spirit of the general principle. Finally, as in all of the model acts, paragraph (D) makes it clear that the rule is not limited to commercial businesses. Instead of using the phrase "business, profession, occupation or calling" I have used the broad term "regular organized activity whether conducted for profit or not."