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SUGGESTED REVISION OF WISCONSIN STATUTES PERTAINING TO THE SHOP BOOK RULE AND REGU- LAR ENTRY DOCTRINE

GEORGE J. LAIKIN

WISCONSIN lawyers experience considerable difficulty in introducing business entries into evidence.¹ Their admission is governed by section 327.24 and 327.25 of our Statutes.²

These sections originate in the common law shop book doctrine and regular entry exception to the hearsay rule.³ The hearsay rule "prohibits the use of a person's assertion, as equivalent to testimony to the

¹ See opinion of Justice Marshall in *F. Dohmen Co. Ltd. v. Niagara Fire Ins. Co.*, 96 Wis. 38, 71 N.W. 69 (1897); Wigmore and others, "Law of Evidence, Some Proposals For Its Reform;" Aron's "Notes on Proof, the Probative Law," (N.Y. 1932) page 46; Wigmore, "Evidence," Second Edition, Sec. 1521.

² 327.24 "Account Books. (1) Proved by Party. The account books of a party to an action or proceeding shall be received as prima facie proof of the charges therein contained, if he shall testify and it shall satisfactorily appear from his testimony, that the same are his account books; that they contain the original entries of charges for goods or other articles delivered, or services performed or materials furnished; that such entries are just to the best of his knowledge and belief; that said entries are in his own handwriting; and that they were made at or about the time said goods or other articles were delivered, said services were performed or said materials were furnished. The party offering such books shall be subject to cross-examination.

(2) Proof by Bookkeeper. When the original entries are in the handwriting of an agent, servant, or clerk of the party, the testimony of such agent, servant or clerk may, with like effect and in like manner, be admitted to verify the same.

(3) Cash Items; Rent Charge. Such books shall not be admitted as proof of any item of money delivered at one time exceeding five dollars, or of money paid to third persons, or of charges for rent.

(4) Ledger. Where a book shows that the items have been transferred to a ledger, the book shall not be evidence unless the ledger be produced.

(5) Bookkeeper Deceased. Book entries made by an authorized person, he being dead, may be received in evidence, in a case proper for the admission of the books as evidence."

327.25 "Other Book Entries. Entries on cards, sales slips, loose leaf sheets or in a book or other permanent form (other than those mentioned in sections 327.24 and 328.24), in the usual course of business, contemporaneous with the transactions to which they relate, and as part of or connected with such transactions, made by persons authorized to make the same, may be received in evidence when shown to have been so made upon the testimony either of the person who made the same, or if he be beyond the jurisdiction of the court or insane, of any person having custody of the entries, and testifying that the same were made by a person authorized to make them in whose handwriting they are, and that they are true and correct to the best of his knowledge and belief. In case such entries are, in the usual course of business, also made in other books and papers as a part of the system of keeping a record of such transactions, it shall not be necessary to produce all of the persons who were engaged in the making of such entries; but before such entries are admitted, the court shall be satisfied that they are genuine and in other respects within the provisions of this section."

³ Wigmore, Sec. 1517; see *Radtke v. Taylor*, 105 Or. 559, 210 Pac. 863, 27 A.L.R. 1423 (1922) for excellent discussion of history of this problem an annotated discussion.

fact asserted unless the asserter is brought to testify in Court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it."⁴ The business entries exception to the hearsay rule was predicated upon the *necessity* of admitting regular entries⁵ and account books,⁶ because other evidence was unavailable.⁷ Strictly speaking, the shop book rule is not an exception to the hearsay rule. The shop book rule was based on the *incompetency of a party to an action as a witness in his own behalf* so that unless a party's account book was admitted in evidence he could not prove his case.⁸ Only the regular entry doctrine developed as an exception to the hearsay rule. Since under the shop book rule, a party's books could not be introduced in evidence if he employed a clerk, because the clerk could be called to testify as to the transaction, if the clerk were dead, no means existed to introduce his entries in evidence. This necessitated an exception to the hearsay rule permitting the entries of a deceased clerk shown to have been made in the regular course of business to be admitted. Both the shop book and the regular entry doctrines, however, are loosely treated as belonging to the same exception to the hearsay rule.

Modern legislation has tended to obliterate the original purpose of the shop book rule to the extent that some jurisdictions now allow the admission of books kept by a deceased clerk under this rule.⁹ This, our Wisconsin Statute, (section 327.24 [2] Stats. [1933]) provides that, when the original entries are in the handwriting of an agent, servant, or clerk of the party, the testimony of such agent, servant or clerk, may with like effect and in like manner be admitted to verify the same." And section 327.24 (5) provides that "book entries made by an

⁴ Wigmore, Sec. 1521.

⁵ Wigmore, Sec. 1521.

⁶ Wigmore, Sec. 1527; Jones, "Evidence," (Civil cases, 3rd edition) Sec. 575. "To qualify an entry under this exception, there must be a necessity for its admission into evidence * * *" *Lebrun v. Railroad*, 83 N.H. 293 (1928).

⁷ See discussion, *post.*; Wigmore, Sec. 1517. The admission of regular entries in evidence has also been upheld on the ground that they were a part of the *res gestae*. Jones, Sec. 568; Chamberlayne, "Modern Law of Evidence," Sec. 2870; *Lassone v. Railroad*, 66 N.H. 345, 358 (1890); *Robinson v. Smith*, 111 Mo. 205, 20 S.W. 29, 33 Am. S. Rep. 510 (1905) " * * * to constitute part of the *res gestae*, they (entries) must have been made contemporaneously with the principal fact, and must have formed a link in the chain of events, and belonged ordinarily and naturally to the present thing." 53 L.R.A. 521, 543. It is submitted that the foregoing prerequisites qualify an entry as a regular entry, and admissible as such without reference to the *res gestae* doctrine.

⁸ The common law shop book rule required that a party be his own bookkeeper and that he have no clerk.

The English rules are more restrictive. "The requirement that the declarant should not only be acting in the course of his duty or business in doing the very act stated, but it should also be the duty imposed upon him by some superior authority to make an entry of it at the time when it was made, does not obtain in the United States." Chamberlayne, Sec. 2876.

⁹ Wigmore, Sec. 1538.

authorized person, he being dead, may be received in evidence in a case proper for the admission of the books in evidence."

Section 327.25 of our Statutes¹⁰ relating to regular entries, and which originates in the common law exception to the hearsay rule,¹¹ permits the qualification of entries by the "testimony * * * of the person who made the same;" whereas under the common law, the entrant must have been dead or otherwise unavailable. Under section 327.25, the entrant must be produced unless he is insane or beyond the jurisdiction of the court.¹² This raises the problem of when for the purpose of this section is "a party beyond the jurisdiction of the court." Today, as under the common law, the reason for admitting regular entries is "the impossibility of obtaining the testimony, and the cause of such impossibility seems immaterial."¹³ "The practical impossibility on grounds of mercantile inconvenience of producing all the clerks, salesmen, teamsters, or the like, who have contributed their knowledge in making up the items of voluminous accounts, is by some courts considered as a sufficient ground for non-production."¹⁴ *It is submitted that a*

¹⁰ See Note 2 supra. The precise scope of the statutes in our jurisdiction is somewhat obscure. In *Kelly v. Crawford*, 112 Wis. 368, 88 N.W. 296 (1901) an early case to construe this statute, our court required a reasonably strict compliance with the terms of the statute, and inasmuch as there was no proof that any of the entries on the sheets of paper or the stub books were made in the usual course of business or were contemporaneous with the transaction to which they related, or were a part of such transaction, or that they were true and correct to the best of the knowledge and belief of the custodian of these entries, they were not admissible. See *Markgraf v. Columbia Bank of Lodi*, 203 Wis. 429, 233 N.W. 728 (1931); *Milwaukee Trust Co. v. Warren*, 112 Wis. 505, 87 N.W. 801 (1902); *Bazelon v. Lyon*, 128 Wis. 337, 107 N.W. 337 (1906). Entries are not admissible under both sections 327.24 and 327.25 and incompetency under 327.24 does not necessarily admit it under 327.25.

Thus, an entry, in an account book, in excess of \$5.00 incompetent under 327.24 was inadmissible as a regular entry under 327.25. "The appellant, however, contends, that the five dollar limitation above mentioned does not apply to books admissible under section 4189 Stats. (1898) (327.25) and that under the latter section the books in question were competent evidence. But the books could not come within both sections. Section 4189 renders competent only entries in a book or other permanent form other than those mentioned in section 4189 (327.24) * * * A book of the kind mentioned in 4189, produced as there provided, is not made competent by section 4189. The latter section refers to a different class of entries made in a book, or other permanent form, not strictly a book of account, and made by some person other than the party to the cause, his agent, servant, or clerk in his behalf. The books in question being identified as belonging to the class mentioned in section 4186, and having been produced by a party to a cause in his own behalf, were not made competent by section 4189. On the other hand, they were expressly excluded by the terms of section 4189. *Dohmen v. Estate of Blum*, 137 Wis. 560, 119 N.W. 349 (1908); *Estate of Wallschlager*, 187 Wis. 640, 205 N.W. 402 (1925).

¹¹ Wigmore, Sec. 1521.

¹² In *Beilke v. Knaack*, 207 Wis. 490, 242 N.W. 176 (1932), the court would have rejected the records involved if they had been prejudicial because "the sisters who nursed the plaintiff, and who in a large part, kept daily records were not produced on the trial, nor was it shown that they were beyond the jurisdiction or insane as provided by section 327.25 Stats."

¹³ Chief Justice Shaw quoted by Wigmore, Sec. 1521.

¹⁴ Wigmore, Sec. 1521.

party should be considered "beyond the jurisdiction of the court" when he is unavailable.

Now the complexity of modern accounting systems is in a measure recognized by section 327.25 when it provides¹⁵ that where entries are part of a regular system of bookkeeping, it shall not be necessary to produce all of the persons engaged in keeping such bookkeeping system, but allows admission if the court is satisfied that such entries are genuine and within the statute.¹⁶ Where an entry was made as a part of the regular bookkeeping system of a business, the production of the entrant or an explanation of his absence ought to be unnecessary. Such treatment is persuasively suggested by Wigmore: "Why should this conclusion not be adopted by the courts? Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation 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 such books. It would seem that expedients which the entire commercial world recognizes as safe should be sustained and not discredited by the courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot be profitably and sensibly one rule for the business world and another for the court room. The merchant and manufacturer must not be turned away remediless because methods in which the entire commercial world places a just confidence are a little difficult to reconcile with the 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 cease to be pedantic and endeavor to be practical."

If we re-examine sections 327.24 and 327.25 in the light of the above discussion, we find that the reason for the account book rule no longer exists because the original disqualification of the party as a witness has quite generally been removed by statute.¹⁷ True, the party verified the books under oath, but this did not make him a witness,

¹⁵ See Note 2, *supra*.

¹⁶ This is in harmony with the treatment suggested by Wigmore, namely, "That where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception, verified by the testimony of the former person only, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so." Wigmore, Sec. 1530.

¹⁷ "No person shall be disqualified as a witness * * * by reason of his interest * * *" 325.13 Stats. (1931).

though subjection to cross-examination tended in that direction.¹⁸ Since a party is now free to take the stand and "relate as a witness, all his knowledge on the subject of the transaction * * * there is no excuse for offering his extra-judicial entries, not tested by cross-examination, while his infra-judicial testimony given under oath and subject to cross-examination is available. Section 327.24 further destroyed the common law shop book rule, in permitting the party to have a clerk, allowing the clerk to qualify his books, and in permitting introduction of the entries of a deceased clerk, *the latter being the very basis and purpose of the common law regular entry doctrine*. Similarly, the statutory statement of the latter doctrine, in section 327.25, has destroyed its common law purpose for now the entrant need not be deceased, but he may be produced to qualify the entries; nor, under section 327.25, need the entrant be introduced at all, even though he is not dead. Our statutes in obliterating the common law features of these doctrines, overlap and merge considerably, giving rise to ambiguity and conflict. For example, the first portion of section 327.25 requires the production of the party making the entry, or the person having custody of it and is inconsistent with and unnecessary in view of the latter portion of this section, which makes unnecessary the production of all the persons engaged in keeping a bookkeeping system to verify the entries.

The purpose of admitting either a shop book, or a regular entry, is to show the amount owing from the adverse party. Only those entries are relevant which pertain to such balance. Now, in a bookkeeping system, an account is composed of one or more entries made in the regular course of business so that when shop books are introduced, the relevant portions of it are really regular entries. Admittedly, under the account book doctrine the entries must have been made by the party or his agent or servant; but, is an entry so made not in reality a regular entry? If an entry appears to have been made in a regular course of business, and the court is satisfied as to its genuineness, the fact that a third person made such entry ought not alter the mode of admitting it into evidence. Since the basis of account book doctrine has been removed by making the party a competent witness and since when account books are admitted into the evidence and relevant features thereof partake of the nature of regular entries, and since there is considerable overlapping between sections 327.24 and 327.25, *quaere* ought not both sections be repealed and a new statute drafted to cover the field of business entries?

Wisconsin could very well follow New York's new statute on this

¹⁸ Wigmore, Sec. 1559. Cross-examination extended only to matters connected with the entries.

subject.¹⁹ It reads: "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 in the regular course of such business to make such memoranda or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other considerations 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 call of every kind."

This statute solves the problem of introducing the entries of a complicated accounting system into evidence, and such a statute would probably have satisfied Justice Marshall in *F. Dohmen Co., Ltd. v. Niagara Fire Ins. Co.*²⁰ Perhaps the tests suggested by him in that decision could be used to qualify the entries admitted under it.²¹

The New York courts in their recent decision upon this matter have attempted to interpret the statute in accordance with its liberal purpose. Thus, in *Neglia v. Shadrow*,²² the court implied that entries

¹⁹ Sec. 374-A New York Civil Practice Act. (Cahill's Sixth Edition) (added by laws, 1928, Chapter 532, September 1.)

²⁰ 96 Wis. 38, 71 N.W. (1897).

²¹ "Just how to proceed in such a case (to admit an entry arising out of a complicated accounting system) is by no means free from difficulty. In a large business, obviously it is impossible to produce witnesses to testify of their personal knowledge respecting the amount of stock on hand, or to the purchases and sales that may have occurred during a long period of time. The bookkeeper cannot obviously be expected to testify to more than that the entries were made by him and are correct, according to the facts as reported to him in the regular course of business. Such information must necessarily come in to him from a variety of sources; and to verify the same except in the most important transactions, in a large business, would be utterly impossible * * * "such being the case upon such books being reasonably verified as correct records of the daily transactions in the business as transactions were regularly reported to the office to be recorded in such books, with proof that the books were relied upon by the plaintiff solely as a repository of facts in regard to the business, and that they were uniformly found to be correctly kept, a witness who had occasion to refer to them from time to time, and had thereby, and through a general knowledge of the business, been convinced of their correctness, might properly testify by their aid, to their contents as facts, without having personal knowledge of such facts independent of the books, and without even having had any other knowledge of all the individual transactions than such as one might reasonably be expected to have been generally over-seeing the business. Such evidence would not be conclusive by any means, but would constitute evidence bearing on the question in suit proper to be submitted to the jury with all other evidence in the case." *F. Dohmen Co., Ltd. v. Niagara Fire Ins. Co.*, note 1, supra.

Certain voluminous accounts testified to by the bookkeeper and a party who had personal knowledge of most of the transactions were admitted in *Lynch v. State*, 15 Wis. 40 (1862).

²² 237 N.Y.S. 200 (1929). This was an action for damages caused by an explosion of gas, resulting from the failure of the gas company to inspect its pipes.

and notations so long as they are properly authenticated ought to be admitted. In *Needle v. N. Y. Rys. Corp.*²³ the court refused to admit a policeman's "blotter" in a personal injury action, pointing out that while "this section was enacted in order to do away with the archaic rules of procedure in relation to book entries," "it is to be noted, however, that in every case where the section applies, the fact must be found by the trial judge that the entry 'was made in the regular course of business' * * * " "In the case at bar, to show that this record is inadmissible, it is only necessary to point out that the statements made to the policeman, upon which he based his report, were not made by any person in the regular course of any business, but, on the contrary, the report of the policeman was made upon the irresponsible gossip of bystanders and the even more unreliable conclusions of the interested motorman, who, instead of being so placed as to be presumed to be without a motive to falsify in helping to make the record, had every reason to give a biased false report. The police blotter was erroneously admitted." In *Hofstetter v. Goldenberg*²⁴ admission in evidence without proper authentication of so-called minutes taken in an action between the same parties in another court was held to be error. In *In Re Auditor's Estate*²⁵ it was pointed out that the entries in books made in the usual course of business were prima facie proof of the correctness of assets and liabilities set forth, for the purpose of computing value of the corporation stock at a particular time. In *Johnson v. Lutz*,²⁶ the court referring to the old shop book and regular entry doctrine, said, "that the rule of evidence that was practical a century ago, had become obsolete,"²⁷ and that "an important consideration leading to the amendment was the fact that in the business world, credit is given to records made in the course of business by persons who are engaged in the business upon information given by others who are engaged in the

In the corroboration of certain testimony, there was an exhibit marked for identification which bore a notation on the reverse side, as follows: "M. Unlocked Oct. 3, 1925." "It is the claim of the plaintiff's counsel that the notation escaped his attention upon the trial. Such writing may become competent evidence in plaintiff's behalf against the defendant, gas company, at least, under the provisions of Sec. 374-A of the Civil Practice Act, (as added by laws of 1928 C.532).

²³ 227 App. Div. 276, 237 N.Y.S. 547 (1929).

²⁴ 132 Misc. 722, 230 N.Y.S. 353 (1928).

²⁵ 136 Misc. 664, 24 N.Y.S. 502 (1930).

²⁶ 253 N.Y. 124, 170 N.E. 517 (1930).

²⁷ "Prior to the decision in the well known case of *Vosburgh v. Thayer*, 12 Johns 461, decided in 1815, shop books could not be introduced in evidence to prove an account. The decision in that case established that they were admissible where preliminary proof could be made that there were regular dealings by the parties; that the plaintiff keeps honest and fair books; that some of the articles charged had been delivered; and that the plaintiff kept no clerk * * * since the decision in that case, it has remained the substantial basis of all decisions upon the question in this jurisdiction prior to the enactment in 1928 of sec. 374-A Civil Practice Act." *Johnson v. Lutz*, note 33, supra.

business as a part of their duty." In *Warner Quinten Co. v. Ben Charat, Inc.*²⁸ the court points out that "the statute was designed to remove the restrictions created by the old rule upon the right to use books of account so as to 'give evidential credit to the books upon which the mercantile and industrial world relies in the conduct of business'." In *Funk v. Mode Lora Realty*²⁹ the court said that "the very purpose of the statute was to afford a more workable rule of evidence in the proof of business transactions under existing business conditions."

It is apparent from the foregoing that the New York statute has simplified procedure in enabling the business man to introduce his books in evidence without the hampering technicalities and qualifications that exist under the old rules.

Wisconsin attorneys, when they find difficulty in introducing evidence under sections 327.24 and 327.25, often place the party on the stand, and use his books or entries as memoranda of recollection.³⁰ As a recorded past recollection the party may swear to the accuracy of the book and use it to the fullest extent, incorporating it with his testimony and handing it to the jury as a part thereof. The entries are no longer hearsay; they are adopted by the witness on the stand³¹ and he is subject to full cross-examination on that as on all parts of his testimony. When a party uses his books as memoranda of recollection, which under existing law he may do, the books are subject to none of the restrictions of the statutes, regarding clerks, cash payments, credit

²⁸ 257 N.Y.S. 722 (1932).

²⁹ 143 Misc. 805, 260 N.Y.S. 844 (1932).

Here the court permitted the introduction in evidence of the original ledger and monthly statements prepared by the real estate agent who managed the property and rented the same, the action being one to recover rent on a written lease. The court said "it was error for the lower court to set aside the verdict of the jury and order a new trial, since the books and records of the plaintiff's agent made in the regular course of business were admissible under sec. 374-A of the Civil Practice Act."

³⁰ The modern use of account books under the statutes like those in Wisconsin, should be as memoranda of recollection, because the party is a competent witness. Account books are clearly such memoranda that may be so used. *Schettler v. Jones*, 20 Wis. 412 (1865). Account books not qualified for admission under Sec. 327.24, may nevertheless be used to refresh the memory of the party. *Estate of Wallschlagel*, 187 Wis. 640, 205 N.W. 402 (1925); *Ott v. Cream City Sand Co.*, 166 Wis. 228, 164 N.W. 1005 (1917). Though the witness has no present recollection of the matter, but he knows the memoranda were correct when made, he may testify from them. *Bourda v. Jones*, 110 Wis. 52, 85 N.W. 671 (1893). Present recollection of the transaction is not necessary. *Curran v. Witter*, 68 Wis. 16, 31 N.W. 705 (1887); *Hill v. State*, 17 Wis. 675 (1863). The memoranda may be introduced as a part of the evidence. *Campbell v. Germania Fire Ins. Co.*, 163 Wis. 327, 158 N.W. 63 (1916). For extended discussion on this subject, see Wigmore, Sec. 1560.

³¹ Tabular statements made from records, which were before the court, on proof that such statements were true were admitted not as original but as part of the witness' evidence. *Jordan v. Estate of Warner*, 107 Wis. 539, 83 N.W. 946 (1900).

guarantee, special contracts, kind of occupation, size of item, regularity of entries, reputation for correct bookkeeping and the like. The statutory method is simple and direct. The primary object is the admission of the books or entries into evidence. It is then up to the court or jury to pass upon their weight and sufficiency. It should be unnecessary to resort to the indirect method of using books and entries as memoranda of recollection.