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## The Hearsay Rule in Federal Criminal Cases - Part Two

### Cover Page Footnote

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# THE HEARSAY RULE IN FEDERAL CRIMINAL CASES—PART TWO†

, LESTER B. ORFIELD\*

## X. BUSINESS RECORDS

Business records may sometimes come in as records of past recollection, in which case there is involved no distinctive principle peculiar to business records.<sup>479</sup>

A court has stated:

Original entries of transactions made in the regular course of business when the entrant is dead or otherwise unavailable upon being identified are admissible. Such entries are also admissible when the entrant is present, identifies them and testifies that they are true, although they do not refresh his memory and he has no independent recollection of the truth of the transactions which they record. This rule grew up as a matter of convenience, but, under the exigencies and complexities of modern business, it has become a rule of necessity without which the administration of justice in many matters would be difficult or impossible.<sup>480</sup>

The first requirement is that the entry must have been made in the regular course of business.<sup>481</sup> That is to say the entry must have been in the way of business. But there is no special limitation as to the nature of the occupation. On a prosecution for unlawful acquisition, concealment and sale of heroin, memoranda of government chemists were admitted.<sup>482</sup> A court has stated that "notations of events outside the operation of the business are not the recordation contemplated."<sup>483</sup>

There is considerable indication that if the entry is in preparation for litigation it is not made in the regular course of business. The Supreme Court so regarded a statement of an engineer involved in a railroad ac-

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479. *Jewett v. United States*, 15 F.2d 955 (9th Cir. 1926). See McCormick § 281; Laughlin, *supra* note 453, at 278. On business records, see generally 2 Jones §§ 289-94; McCormick §§ 281-90 (1954); 2 Morgan 265-76; 1 Underhill §§ 108-09; 1 Wharton §§ 267-72; 5 Wigmore §§ 1517-61; 6 *id.* § 1707; Ginsburg, *The Admissibility of Business Records in Evidence*, 29 *Neb. L. Rev.* 60 (1948); Green, *The Model and Uniform Statutes Relating to Business Entries As Evidence*, 31 *Tul. L. Rev.* 49 (1956); Laughlin, *supra* note 453; Selby, *Official Records and Business Entries: Their Use as Evidence in Courts Martial and the Limitations Thereon*, 11 *Military L. Rev.* 41 (1961); Tracy, *The Introduction of Documentary Evidence*, 24 *Iowa L. Rev.* 454 (1939); Note, 48 *Colum. L. Rev.* 920 (1948); Note, 31 *Ind. L.J.* 312 (1956); Comment, 46 *Mich. L. Rev.* 802 (1948).

480. *Singer v. United States*, 58 F.2d 74, 76-77 (3d Cir. 1932). See McCormick § 288; 5 Wigmore § 1521; Green, *supra* note 479, at 55-56; Laughlin, *supra* note 453, at 294-96.

481. See 5 Wigmore § 1522.

482. *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957).

483. *Clainos v. United States*, 163 F.2d 593, 596 (D.C. Cir. 1947). See also Palmer v. Hoffman, 318 U.S. 109 (1943).

cident, furnished to the company as part of its normal procedure.<sup>484</sup> Worksheets prepared by an internal revenue agent recording information from a defendant's personal records were held inadmissible since made in preparation for criminal prosecution and since no internal check on the reliability of the agent's work was present.<sup>485</sup> Notations made by government agents on envelopes formerly containing heroin were not admissible as they were made primarily for prosecution.<sup>486</sup>

The entry offered must be a part of a series of entries, not a casual one.<sup>487</sup> There must be regularity. On a tax evasion prosecution certain "settlement sheets" with pencil entries made by persons not identified and, not representing the final entries, were not admitted.<sup>488</sup> But in a subsequent case, a memorandum of a telephone call was held admissible even though there was very little showing of regularity.<sup>489</sup> The Supreme Court in a civil case held that the records must be routine reflections of the day to day operations of the business.<sup>490</sup> A subsequent criminal case took the same view.<sup>491</sup>

Proper foundation is not laid by proving merely that documents were kept in the regular course of business. It must also be shown that it was the regular course of such business to make a memorandum or record at the time.<sup>492</sup>

The entry must have been made at or near the time of the transactions recorded.<sup>493</sup> This time limitation has been interpreted as applying to the making of the original report by the observer.<sup>494</sup> Entries which satisfy the statutory requirements are admissible although made after the criminal proceeding commenced. A memorandum of disbursements made by the operators of an illicit still was held to be a business entry, as an entry made of acts or transactions "then occurring."<sup>495</sup> On a rape prosecution, a manifest kept by the taxi driver was held admissible, the court noting that the entry was made within a "reasonable time" after the event in issue.<sup>496</sup>

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484. *Palmer v. Hoffman*, *supra* note 483, at 113.

485. *Hartzog v. United States*, 217 F.2d 706 (4th Cir. 1954). But see *Zacher v. United States*, 227 F.2d 219 (8th Cir. 1955), cert. denied, 350 U.S. 993 (1956); *United States v. Mortimer*, 118 F.2d 266 (2d Cir.), cert. denied, 314 U.S. 616 (1941).

486. *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957).

487. 5 *Wigmore* § 1525.

488. *Singer v. United States*, 58 F.2d 74 (3d Cir. 1932).

489. *United States v. Moran*, 151 F.2d 661 (2d Cir. 1945).

490. *Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943).

491. *Clainos v. United States*, 163 F.2d 593 (D.C. Cir. 1947).

492. *United States v. Rappy*, 157 F.2d 964 (2d Cir.), cert. denied, 329 U.S. 806 (1947).

493. *Ibid.* See 5 *Wigmore* § 1526.

494. *United States v. Mortimer*, 118 F.2d 266 (2d Cir. 1941).

495. *United States v. Quick*, 128 F.2d 832, 837 (3d Cir. 1942).

496. *Hines v. United States*, 220 F.2d 381 (D.C. Cir. 1955).

There are decisions seeming to hold that records made with a peculiarly powerful motive to misrepresent should not be admitted in evidence.<sup>497</sup> But the Business Records Act contains no such provision. In fact, it provides that all circumstances other than those mentioned in the act shall not affect admissibility.<sup>498</sup>

The chief foundation of the special reliability of business records is the requirement that they must be based upon the first hand observation of someone whose job it is know the facts recorded.<sup>499</sup> A collector's entries, based on a bill of lading or a captain's verbal reports, where neither the collector nor the captain saw the goods, were held not admissible. The Supreme Court stated:

And that rule, with some exceptions not including the present case, requires, for the admissibility of the entries, not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead, or insane, or beyond the reach of the process or commission of the court.<sup>500</sup>

In one case, it appeared that the marshal's office kept a record of measurements of convicted persons, the clerk writing down the measurements as they were called out by the subordinate who was taking it. The clerk alone was called to the stand. The testimony of the clerk was held admissible. "In a complicated transaction in which two persons participate, we do not think that it is essential that each one should have personal knowledge of all the steps in the transaction."<sup>501</sup> But the court also relied on the exception as to public records. In another case the majority of the court ignored the principle. Bankbooks showing the accounts of the defendants with the bank were proved by the chief bookkeeper, although he had no personal knowledge, without calling or accounting for the thirteen under-bookkeepers.<sup>502</sup>

While books of account may be inadmissible as evidence so far as they relate to accounts between the parties,<sup>503</sup> they may be admissible as

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497. *New York Life Ins. Co. v. Taylor*, 147 F.2d 297, 305 (D.C. Cir.), cert. denied, 328 U.S. 781 (1945), citing 5 Wigmore § 1527; *Hoffman v. Palmer*, 129 F.2d 976 (2d Cir. 1942), aff'd, 318 U.S. 109 (1943).

498. 28 U.S.C. § 1732 (1958), as amended, 28 U.S.C. § 1732 (Supp. IV, 1963).

499. McCormick § 286. See 5 Wigmore § 1530, 1530a, 1555.

500. *Chaffee & Co. v. United States*, 85 U.S. (18 Wall.) 516, 541 (1873). See also *Osborne v. United States*, 17 F.2d 246 (9th Cir.), cert. denied, 274 U.S. 751 (1927); *Grunberg v. United States*, 145 Fed. 81, 97 (1st Cir. 1906).

501. *United States v. Cross*, 20 D.C. 365, 380, writ of error dismissed, 145 U.S. 571 (1892).

502. *Greene v. United States*, 154 Fed. 401, 414-15 (5th Cir. 1907). One judge dissented, citing 2 Wigmore, Evidence § 1530 (1st ed. 1907). He asserted that all precedents were contrary. *Id.* at 415 (dissenting opinion).

503. See *Crawford v. United States*, 30 App. D.C. 1, 20 (1907), rev'd, 212 U.S. 183 (1909).

written corroborative evidence, and as part of a transaction, to be submitted to the jury for what they are worth.<sup>504</sup>

In a prosecution for wrongful use of the mails to defraud in the sale of corporate stock by false representations, the books of the corporation regularly kept in due course of business are admissible on the issue of the financial condition of the corporation, without verification of the entries by employees, in the absence of any contention that the books were not accurately kept.<sup>505</sup> There was no violation of the privilege to confront the witnesses or of the hearsay rule. Weighers' records and "pink books" were admitted in one case.<sup>506</sup> The entries, where possible, were authenticated by the persons who made them.

In 1912, a court of appeals stated:

The admission in evidence of books of account of private parties constitutes one of the exceptions to the rule of evidence which excludes hearsay testimony. The exception was born of necessity, and the courts have always required, in the absence of statutory provision, that before private books of account can be admitted in evidence, over the objection of the opposing party, some evidence must be introduced as to their trustworthiness.<sup>507</sup>

There should be testimony by some person who has knowledge either of the correctness of the entries in the books or some knowledge of the transactions on which the entry was founded. "If this rule obtains in civil cases, it should not be relaxed in criminal cases."<sup>508</sup>

The records of a telephone company are admissible where the local manager testified that the records of long distance calls were correct and made under this supervision, the records being made in the due course of the daily business in a quasi-public office.<sup>509</sup> The operators were not called. Circuit Judge Rogers stated:<sup>510</sup> "There is no doubt that books of account, kept in the usual and regular course of business, may be admitted in evidence when supplemented by the oath of the party who kept

504. *Crawford v. United States*, 212 U.S. 183, 207 (1909).

505. *Wilson v. United States*, 190 Fed. 427, 437 (2d Cir. 1911).

506. *Heike v. United States*, 192 Fed. 83, 95-98 (2d Cir. 1911), *aff'd*, 227 U.S. 131, 144 (1913). The Supreme Court cited 2 Wigmore, *Evidence* §§ 1521, 1530 (1st ed. 1907).

507. *Phillips v. United States*, 201 Fed. 259, 265 (8th Cir. 1912). As to national banks, see *Bacon v. United States*, 97 Fed. 35, 40 (8th Cir. 1899). See also *Reincke v. United States*, 278 Fed. 724 (8th Cir. 1922); *Granzow v. United States*, 261 Fed. 173 (8th Cir. 1919).

508. *Phillips v. United States*, *supra* note 507, at 269. See also *Beck v. United States*, 33 F.2d 107, 113 (8th Cir. 1929).

509. *Robilio v. United States*, 291 Fed. 975 (6th Cir.), *cert. denied*, 263 U.S. 716 (1923), 22 Mich. L. Rev. 266. See also *Valli v. United States*, 94 F.2d 687 (1st Cir. 1938); *Legislation*, 47 Harv. L. Rev. 1044 (1934). See generally, 24 Mich. L. Rev. 721 (1926); *Annot.*, 27 A.L.R. 1439 (1923).

510. *Rumely v. United States*, 293 Fed. 532, 551 (2d Cir.), *cert. denied*, 263 U.S. 713 (1923).

them." The records of a bank were admitted, verified only by the secretary, who made some of the entries.<sup>511</sup>

A court has stated:

As we gather from the briefs and arguments, the point made is that the government got in evidence facts appearing in the bankruptcy records; that these records are the unsworn statements of third parties, and therefore hearsay. In the first place, the rule against the admission of unsworn statements has many exceptions. Book entries, made in the regular course of business at the time by one whose duty it is to make them, are a familiar exception. For stronger reasons the solemn findings and recitals of fact in judicial or semijudicial proceedings should be held to be evidence of the facts so found and recited.<sup>512</sup>

On a prosecution for fraudulent sale of mining stock, bank ledger sheets of the defendant's accounts with deposit slips were admitted on testimony that "the ledgers were kept by a system likely to insure accuracy, and that they appear to be regular on their face."<sup>513</sup> Judge Hand pointed out: "The law has much changed as to such documents; it is no longer always necessary to produce the original entrants and make a complete chain of direct proof."<sup>514</sup> In one case, express company way-bills and other routine records were held admissible over the objection that they must be proved by the entrants.<sup>515</sup> Where documents involve multifarious transactions and are prepared by numerous employees, objection to admissibility must be directed to methods insuring accuracy, and if challenged, the party offering documents must prove the prima facie reliability of the system.

Offering sheets, which the Securities and Exchange Commission requires registered dealers in oil royalties to file, describing wells in which the dealer is offering to sell a royalty interest, are not admissible under the statute.<sup>516</sup> The sheets did not become competent evidence merely because it was the course of the dealers business regularly to record information which they got from others. The transaction which the entrant records must be one of which either he has knowledge or which he learns from a declarant who shall "in the course of the business transmit the information for inclusion in the memorandum."<sup>517</sup>

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511. *Wilkes v. United States*, 291 Fed. 988 (6th Cir. 1923). See also *United States v. Mammoth Oil Co.*, 14 F.2d 705, 732 (8th Cir. 1926).

512. *Tank v. United States*, 8 F.2d 697, 700 (7th Cir. 1925).

513. *United States v. Cotter*, 60 F.2d 689, 693 (2d Cir. 1932).

514. *Ibid.*

515. *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933).

516. *United States v. Grayson*, 166 F.2d 863 (2d Cir. 1948). There is a contrary dictum in *McKee v. Jamestown Baking Co.*, 198 F.2d 551, 556 (3d Cir. 1952), but this was restricted to its facts in *Gordan v. Robinson*, 210 F.2d 192 (3d Cir. 1954).

517. The court cited Model Code of Evidence rule 514(1) and Comment (1942). 166 F.2d at 869. See the criticism of this case in *Matthews v. United States*, 217 F.2d 409, 415 (5th Cir. 1954). See also Note, 48 Colum. L. Rev. 920, 924-25 (1948).

Under similar principles, charts and tables prepared from regular entries in records and books under the supervision of an accountant are admissible.<sup>518</sup> The adoption of the Business Records Act certainly did not change the rule.

On June 30, 1936, Congress passed a statute on the admissibility of books and entries.<sup>519</sup> It has been called the most significant federal statute on evidence.<sup>520</sup> The statute,<sup>521</sup> entitled "Records made in regular course of business," provides in subsection (a):

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 such act, transaction, occurrence or event, if made in regular course of any business, and if 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 such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

Mr. Justice Douglas, speaking for the Supreme Court, has stated:

Thus the report of the Senate Committee on the Judiciary incorporates the recommendation of the Attorney General who stated in support of the legislation, "The old common-law rule requires that every book entry be identified by the person making it. This is exceedingly difficult, if not impossible, in the case of an institution employing a large bookkeeping staff, particularly when the entries are made by machine. In a recent criminal case the Government was prevented from making out a prima-facie case by a ruling that entries in the books of a bank, made in the regular course of business, were not admissible in evidence unless the specific bookkeeper who made the entry could identify it. Since the bank employed 18 bookkeepers, and the entries were made by bookkeeping machines, this was impossible."<sup>522</sup>

Other parts of this decision laid down a narrow view of the act which has been widely criticized.<sup>523</sup> The matter recorded will not be under the statute unless it is related to the inherent nature of the business in ques-

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518. *United States v. Mortimer*, 118 F.2d 266 (2d Cir. 1941) (Clark, J.). The court (at 270) cited 5 *Wigmore* § 1530.

519. 28 U.S.C. § 695 (1958). It was based on the model act drafted by the Commonwealth Fund of New York in 1927.

520. Note, 62 *Colum. L. Rev.* 1049 n.1 (1962).

521. 28 U.S.C. § 1732 (1958), as amended, 28 U.S.C. § 1732 (Supp. IV, 1963).

522. *Palmer v. Hoffman*, 318 U.S. 109, 112-13 n.3 (1943).

523. The case is criticized in *Morgan, The Law of Evidence, 1941-1945*, 59 *Harv. L. Rev.* 481, 566-67 (1946). See also *McCormick* §§ 287-88, at 604-05; 2 *Morgan* 273-74; *Laughlin, Business Entries and the Like*, 46 *Iowa L. Rev.* 276, 288-91 (1961); Note, 48 *Colum. L. Rev.* 920, 925-26 (1948); 43 *Colum. L. Rev.* 392 (1943); 31 *Geo. L.J.* 338 (1943); Note, 56 *Harv. L. Rev.* 458 (1942); 41 *Mich. L. Rev.* 996 (1944); Comment, 17 *So. Cal. L. Rev.* 165 (1943).



tion. There must be a specific connection between the memorandum and the type of business conducted. But in 1961, a writer concluded that "there are more recent decisions following the doctrine of *Palmer v. Hoffman* than there are distinguishing that case."<sup>524</sup> The Supreme Court reaffirmed its views four years after its decision.<sup>525</sup> A recent civil case pretty much confined *Palmer v. Hoffman* to its own narrow facts.<sup>526</sup>

An air mail stamp affixed by a bank in the regular course of business is admissible. The court stated:

The appellant Thomas argues that the records in question would not be admissible under the early common law rules and that the recent judicial and statutory changes we have referred to are in contravention of the Sixth Amendment. But statements by relatives as to pedigree, declarations against interest, and most important of all in criminal trials, dying declarations, have long been recognized as admissible. It is not necessary to say what limits the Sixth Amendment may set to the extension of exceptions to the rule against hearsay. Probably the permissible extension is a question of degree. We think that business records kept as a matter of ordinary routine are often likely to be more reliable than dying declarations. It cannot be reasonably argued that the extension of the common law book entry rule [or the Federal Business Records Act] . . . involve any violation of the Sixth Amendment [as to confrontation of witnesses].<sup>527</sup>

In 1944, a court pointed out that the purpose of the Business Records Act "was to eliminate the technical requirement of proving the authenticity of business records . . . the mere fact that the paper offered in evidence is taken from a business file . . . does not establish its competency."<sup>528</sup> The same year, another court took the same view of the purpose of the Act. The records offered "were not hearsay but constituted proof of the condition of the company."<sup>529</sup> On an income tax fraud prosecution, a transcript of bank records of the wife of the defendant, prepared by another, but checked by the witness, was admitted.<sup>530</sup>

The Business Records Act "provides for the admissibility of books and records made in the regular course of business, but does not require that they be correct in all respects."<sup>531</sup>

524. Laughlin, *supra* note 523, at 291.

525. *Hickman v. Taylor*, 329 U.S. 495, 518-19 (1947).

526. *United States v. New York Foreign Trade Zone Operators*, 304 F.2d 792 (2d Cir. 1962), 51 Geo. L.J. 390 (1963); 2 Washburn L.J. 176 (1962).

527. *United States v. Leathers*, 135 F.2d 507, 511 (2d Cir. 1943). See also *United States v. Rose*, 113 F. Supp. 775 (M.D. Pa. 1953), *rev'd on other grounds*, 215 F.2d 617 (1954). See generally Green, *supra* note 479, at 54-55.

528. *Schmeller v. United States*, 143 F.2d 544, 550 (6th Cir. 1944).

529. *Harper v. United States*, 143 F.2d 795, 806 (8th Cir. 1943). But see criticism by Green, *supra* note 479, at 49.

530. *Zacher v. United States*, 227 F.2d 219, 228 (8th Cir. 1955), *cert. denied*, 350 U.S. 993 (1956).

531. *United States v. Wicoff*, 187 F.2d 886, 889 (7th Cir. 1951). See also *United States v. Bernard*, 287 F.2d 715, 721 (7th Cir. 1961).

In a prosecution for aiding and abetting the assistant cashier of a national bank in embezzlement of the bank's funds, records of the bank and of a corporation were admissible under this statute.<sup>532</sup> The statute applied to criminal cases.<sup>533</sup> It does not violate the right of the defendant to confront the witnesses against him. It makes hearsay evidence admissible.<sup>534</sup> The statute applied to unlawful business as well as to lawful.<sup>535</sup> It is enough that the records are a part, although only a minor part, of a regular system of keeping records.<sup>536</sup> The records offered must be relevant and competent and should not be offered en masse.<sup>537</sup> Photostats of invoices made in the regular course of business may be introduced where the original invoices are not available.<sup>538</sup> The statute is not subject to the best evidence rule.<sup>539</sup>

Notes and records which were customarily and routinely kept by government agency offices and which recorded the date and time of visits by the defendant and other callers to the office were business entries under the statute, and were admissible on the question of when the defendant made alleged visits to the government office.<sup>540</sup> The term "business" applies to government agencies.<sup>541</sup>

In a prosecution for illegal distilling it was held that sales records, which the seller of the sugar was required to make and submit to the government, were not official records and were not admissible, nor were they admissible as records kept in the regular course of business. The latter was true because the reports were not made in connection with the seller's own operations but at the behest of the Director of Internal Revenue under sanction of a federal statute. Even if the statute let in such evidence, the question might well be posed whether or not the statute would then violate the right of a defendant to confront the witnesses against him.

While the Sixth Amendment does not prevent creation of new exceptions to the hearsay rule based upon real necessity and adequate guarantees of trustworthiness, it does embody those requirements as essential to all exceptions to the rule, present or

532. *United States v. Thompson*, 27 F. Supp. 905, 906 (M.D. Pa. 1939). See also *Cornes v. United States*, 119 F.2d 127, 130 (9th Cir. 1941).

533. *United States v. Dewinsky*, 41 F. Supp. 149 (D.N.J. 1941).

534. *Olender v. United States*, 237 F.2d 859 (9th Cir. 1956), cert. denied, 352 U.S. 982 (1957).

535. *United States v. Quick*, 128 F.2d 831 (3d Cir. 1942).

536. *Zimberg v. United States*, 142 F.2d 132 (1st Cir. 1944).

537. *United States v. Michener*, 152 F.2d 880 (3d Cir. 1945); *Schmeller v. United States*, 143 F.2d 544 (6th Cir. 1944).

538. *United States v. Kaibney*, 155 F.2d 795 (2d Cir. 1946).

539. *United States v. Vandersee*, 279 F.2d 176 (3d Cir. 1960); *United States v. Kimmel*, 274 F.2d 54 (2d Cir. 1960).

540. *Finnegan v. United States*, 204 F.2d 105 (8th Cir. 1953).

541. *Id.* at 112. See also Comment, 46 Mich. L. Rev. 802, 807-08 (1948).

future. To hold otherwise would be to hold that Congress could abolish the right of confrontation by making unlimited exceptions to the hearsay rule.<sup>542</sup>

On a prosecution for failure to submit to induction in the armed forces, an objection was raised that although the draft file was produced by the secretary of the board, no member of the board testified. On appeal, the court simply affirmed by holding that the file was properly received into evidence "under the federal business document rule."<sup>543</sup> Selective Service files may be admitted under the statute, as well as under the official statements statute and under Rule 26.<sup>544</sup>

The general rule that statements compiled from voluminous records according to practicable and reliable methods are admissible on the testimony of the supervising agent, even though he had not examined each record himself, is reinforced by the statute of 1936 on business records.<sup>545</sup> An accountant's aides whose job it is to take off material from the public records so that the chief may construct his tables and charts accurately are acting in the regular course of business within the statute. Under this case, summaries of records may be introduced. The court approved charts summarizing a large number of tax record books in a prosecution for using the mails to defraud. In another case, a transcript of the defendant's bank record prepared by an internal revenue agent was admitted upon his supervisor's verification.<sup>546</sup> The agent had not been required to exercise discretion in the preparation of the transcript, and the supervisor personally checked the defendant's account. In an income tax evasion prosecution in which the Government relied on the net worth and expenditures method, a written summary of deposits made in and checks drawn on bank accounts, which summary was based on records of business by a bank, which records were identified by bank officials, was admissible as a summary or tabulation of the results of such records.<sup>547</sup>

In a tax prosecution, the worksheets of the defendant's financial and tax status were prepared by an internal revenue agent who was dead at the time of the trial. The worksheets were held inadmissible.<sup>548</sup> The

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542. *Matthews v. United States*, 217 F.2d 409, 418 (5th Cir. 1954). The court followed *Palmer v. Hoffman*, 318 U.S. 109 (1943).

543. *United States v. Borisuk*, 206 F.2d 338, 340 (3d Cir. 1953). The court also cited *Fed. R. Crim. P. 27*, and *Fed. R. Civ. P. 44*, both covering proof of official records.

544. *LaPorte v. United States*, 300 F.2d 878 (9th Cir. 1962).

545. *United States v. Mortimer*, 118 F.2d 266 (2d Cir. 1941). See generally, Comment, 37 *Mich. L. Rev.* 449 (1939).

546. *Zacher v. United States*, 227 F.2d 219, 227 (8th Cir. 1955), cert. denied, 350 U.S. 993 (1956).

547. *Papadikis v. United States*, 208 F.2d 945 (9th Cir. 1953).

548. *Hartzog v. United States*, 217 F.2d 706 (4th Cir. 1954). The case is distinguished in *United States v. Mack*, 249 F.2d 321 (7th Cir. 1957), and in *United States v. Bernard*, 287 F.2d 715 (7th Cir. 1961).

*Mortimer case*<sup>549</sup> was distinguished on the grounds that the agent's work was not the product of "an efficient clerical system" and lacked the degree of supervision present in that case.

In a narcotics prosecution, there was no reversible error in the admission of a long distance telephone toll ticket dated three days prior to the defendant's mother-in-law's receipt through mail of a package of narcotics, in view of all the circumstances in evidence and of the trial judge's instruction explaining the Government's purpose in producing such evidence and directing that rules of circumstantial evidence be applied by the jury.<sup>550</sup> Judge Rives, specially concurring, thought that the record of a transaction must not only come within the statute, but must also be relevant to the issue on trial to be admissible. But the admission had but slight, if any, effect and was harmless error under Rule 52(a) of the Federal Rules of Criminal Procedure.

In a prosecution of a stevedoring corporation and three involved in its management, for attempted evasion of the corporation's income taxes, a memorandum of a telephone call to the shipper from an employee of the stevedoring corporation, stating that one of the individual defendants had stated that the shipper was not to use any of the figures furnished regarding the men used in loading, although it was hearsay of such individual defendant's instruction, was admissible as a recorded entry of the employee who made the call.<sup>551</sup> Rule 26 gave such latitude. A transcript of telephone conversations kept in a log in a government office was held admissible.<sup>552</sup> A memorandum of a telephone conversation had with the defendant by a bank employee who is not available as a witness at the trial, made by the employee as a routine record in the regular course of business and with no motivation to prepare for litigation, and produced from the bank's records, is admissible.<sup>553</sup>

Freight bills prepared by the defendant's traffic departments, are admissible in evidence.<sup>554</sup> A taxpayer's application to a bank for a loan is admissible as a record kept by the bank in the ordinary course of its business.<sup>555</sup>

In a prosecution of a truck driver for theft of an interstate shipment of cigars, bills of lading were admissible without the Government producing a witness who actually checked the cigar packages as they were

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549. *United States v. Mortimer*, 118 F.2d 266, 269 (2d Cir. 1941).

550. *Duncan v. United States*, 197 F.2d 935, 937 (5th Cir. 1952).

551. *United States v. Allied Stevedoring Corp.*, 241 F.2d 925, 931 (2d Cir. 1957).

552. *Connelly v. United States*, 249 F.2d 576, 587 (8th Cir.), cert. denied, 356 U.S. 921 (1957).

553. *United States v. Moran*, 151 F.2d 661 (2d Cir. 1945).

554. *West Coast Fast Freight, Inc. v. United States*, 205 F.2d 249 (9th Cir. 1953).

555. *United States v. Morris*, 205 F.2d 828 (2d Cir. 1953).

loaded on the truck.<sup>556</sup> A waybill is admissible, after extensive testimony taken from a terminal manager concerning it, even though no official or employee of the carrier at the city where the waybill was drawn testified as to such matters.<sup>557</sup> A ledger is admissible.<sup>558</sup>

In a rape prosecution, a manifest kept by a taxi driver was held admissible.<sup>559</sup>

In a prosecution for violation of the National Stolen Property Act by various acts including purchase in Illinois of jewelry stolen in Michigan from the hotel room of a jewelry firm representative, a letter by the representative to his brother, an officer of the firm, giving a highly personal account of the robbery, is not admissible as a report made in the regular course of business.<sup>560</sup>

In a narcotics prosecution an exhibit consisting of envelopes in which the government agent allegedly purchased heroin from the defendant together with memoranda on the envelopes reciting the details of purchase was inadmissible, and there was reversible error particularly because the jury was allowed to take the exhibits into the jury room.<sup>561</sup> However, an exhibit consisting of envelopes on which a chemist recorded his analysis of the heroin, was admissible, although one judge disagreed.<sup>562</sup>

In an extortion prosecution, vouchers which included money paid to the defendants and which had been made in the regular course of business of the victim company and as a standard part of the voucher system were admissible as corroboration of the Government's testimony.<sup>563</sup> Checks made payable to a defendant in an extortion prosecution are admissible.<sup>564</sup> In an income tax evasion prosecution, checks made out to cash, and tied in with check stubs, a cash disbursements journal, and settlement sheets were held admissible. It made no difference that the notations on check stubs were made by a third party. Such circumstances affect only the weight of such evidence.<sup>565</sup>

In an income tax evasion prosecution, purchase journals and other written documents kept by used-car dealers were properly admissible as

556. *United States v. Kessler*, 63 F. Supp. 964 (E.D. Pa. 1945), *aff'd*, 153 F.2d 224 (3d Cir. 1946). See also *Robertson v. United States*, 263 F.2d 872 (5th Cir. 1959); *United States v. Eisenberg*, 238 F.2d 143 (2d Cir. 1956).

557. *United States v. Olivo*, 278 F.2d 415 (3d Cir. 1960).

558. *Mende v. United States*, 282 F.2d 881 (9th Cir. 1960).

559. *Hines v. United States*, 220 F.2d 381 (D.C. Cir. 1955).

560. *Gordon v. United States*, 164 F.2d 855 (6th Cir.), *cert. denied*, 333 U.S. 862 (1947).

561. *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957).

562. *Id.* at 701 (concurring opinion).

563. *United States v. Varlack*, 225 F.2d 665 (2d Cir. 1955).

564. *United States v. Palmiotti*, 254 F.2d 491 (2d Cir. 1958).

565. *Bodnar v. United States*, 248 F.2d 481 (6th Cir. 1957).

records kept in the regular course of business, or as documents corroborating testimony of witnesses.<sup>566</sup>

Police records limited to records of the internal operations of the police, showing convictions of a person, are not admissible under the federal statute.<sup>567</sup> The decision seems wrong. There was no motive on the part of the police department to misrepresent. The record is in no way affected by bias, judgment or memory. A better basis for the decision is the best evidence rule. In a bank robbery case a court seemed to hold that reports of a state highway patrol might be admissible; but the defendant failed to prove prejudice from their exclusion.<sup>568</sup> In 1959, a district court stated broadly that "the reports and memoranda of officers and agents investigating an alleged crime are not admissible in evidence under the Federal Business Records Act."<sup>569</sup> State police reports were involved, and the defendant wished to use them.

It has been stated that navy hospitals are engaged in conducting a "business" within the statute; hence a routine record of what is done to a patient is admissible.<sup>570</sup> But a document consisting of the defendant's account of his past life is hearsay and not admissible. Documents consisting of opinions of individual physicians based on the defendant's history, and their own experience with him were not contemporaneous records, and were not admissible. The defendant was trying to get the above into evidence to prove want of mental capacity. The court pointed out that the Government could not have used such evidence either.<sup>571</sup>

The statute has even been used in a carnal knowledge case to provide identification of a microscope slide containing sperm on a vaginal smear when the examining physician could not identify the slide.<sup>572</sup> The statute does not require that the person testifying as to the records have personal knowledge of their contents. The statute embraces hospital records. The case is different from one involving a specimen of urine not taken in the regular course of business of the laboratory involved.<sup>573</sup>

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566. *United States v. Bernard*, 287 F.2d 715 (7th Cir. 1961).

567. *Clainos v. United States*, 163 F.2d 593 (D.C. Cir. 1947), 31 Marq. L. Rev. 306 (1948), 22 So. Cal. L. Rev. 190 (1949), 26 Texas L. Rev. 669 (1948).

568. *Hunt v. United States*, 231 F.2d 784 (8th Cir. 1956).

569. *United States v. Rothman*, 179 F. Supp. 935, 938 (W.D. Pa. 1959).

570. *England v. United States*, 174 F.2d 466 (5th Cir. 1949) (dictum). See generally McCormick § 290; 6 Wigmore § 1707. See also Braham, *Case Records of Hospitals and Doctors as Evidence Under the Business Records Act*, 21 Temp. L.Q. 113 (1947); Laughlin, *supra* note 523, at 299-305; McCormick, *Use of Hospital Records as Evidence*, 26 Tul. L. Rev. 371 (1952).

571. See *Mullican v. United States*, 252 F.2d 398 (5th Cir. 1958).

572. *Wheeler v. United States*, 211 F.2d 19, 22 (D.C. Cir. 1953), cert. denied, 347 U.S. 1019 (1954). See also *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957). See generally Green, *The Model and Uniform Statutes Relating to Business Entries as Evidence*, 31 Tul. L. Rev. 49, 50 (1956).

573. *Novak v. District of Columbia*, 160 F.2d 588 (D.C. Cir. 1947).

The Court of Appeals for the District of Columbia held that while a hospital record is evidence of the medical data entered therein, it could not be used to show that a patient told a nurse that her husband had pushed her through a window, in a subsequent prosecution of the wife for the death of her husband.<sup>574</sup>

Where the defendant pleaded insanity the trial court properly refused to admit the naked record of a psychiatrist's opinion that the defendant was suffering from a mental disease at a date prior to the offense.<sup>575</sup> The psychiatrist was not present. Opinion, not fact, was involved. In a prosecution under the Federal Escape Act in which the defendant pleaded insanity as a defense, government hospital records offered by the Government as to the defendant's mental condition were not admissible even though authenticated by the hospital.<sup>576</sup>

On a prosecution for rape, the prosecutor's remark to the jury as to the defendant's objection to admission of hospital records of physical examination of the victim of the alleged rape was improper and required a new trial where the records were not admitted and examination in fact showed no evidence of rape.<sup>577</sup>

In a prosecution for using the mails to defraud, corporate books failing to show that the corporation executed a note were held not admissible to show that the corporation executed no note. The court conceded that "under some circumstances it may be proper to show that books, particularly public records, or account books required by law to be kept by public utilities, banks, etc., may sometimes be admissible to prove a negative . . . ."<sup>578</sup> Subsequently, a civil case let in such evidence.<sup>579</sup> The writers have favored the latter view.<sup>580</sup> In 1952, a federal criminal case let in such evidence.<sup>581</sup>

One case seemed to accept the general rule requiring the production of the original of a writing.<sup>582</sup> There are cases holding that the Business Records Act is not subject to the best evidence rule.<sup>583</sup>

574. *Simms v. United States*, 248 F.2d 626, 630 (D.C. Cir.), cert. denied, 355 U.S. 875 (1957).

575. *Lyles v. United States*, 254 F.2d 725, 731 (D.C. Cir. 1957), cert. denied, 356 U.S. 961 (1958) (5-to-4 decision). For the dissent see 254 F.2d at 736-41, 743. The case was followed although criticized in *Polisnik v. United States*, 259 F.2d 951, 952 n.3 (D.C. Cir. 1958). See *Laughlin, Business Entries and the Like*, 46 Iowa L. Rev. 276, 304-05 (1961).

576. *Mullican v. United States*, 252 F.2d 398 (5th Cir. 1958).

577. *Smith v. United States*, 312 F.2d 867 (D.C. Cir. 1962).

578. *Shreve v. United States*, 77 F.2d 27 (9th Cir. 1935), cert. denied, 296 U.S. 654 (1936).

579. *Zurick v. Wehr*, 163 F.2d 791 (3d Cir. 1947).

580. *McCormick* § 289, at 609; 5 *Wigmore* § 1531; 2 *Morgan* 275-76. See also *Model Code of Evidence* rule 514(2) (1942); *Uniform Rules of Evidence* rule 63(14).

581. *McDonald v. United States*, 200 F.2d 502 (5th Cir. 1952).

582. *O'Shea v. United States*, 93 F.2d 169 (6th Cir. 1937) (semble). See *McCormick* § 284, at 600; 5 *Wigmore* § 1532; *Green*, supra note 572, at 64.

583. *United States v. Vandersee*, 279 F.2d 176 (3d Cir. 1960), cert. denied, 364 U.S. 943

One court stated: "In laying a proper foundation for the admission of a record of original entry, it is not necessary to prove that such record contains the first memorandum or entry of a transaction. It is sufficient if it contains the first permanent entry of the transaction."<sup>584</sup>

A statute provides for the use of photographic copies of business records.<sup>585</sup> In an income tax evasion prosecution, microfilm copies made by a bank of checks of the defendant were properly admitted.<sup>586</sup>

Professor Green has concluded that the opinion rule applies to business entries.<sup>587</sup> A number of federal civil cases support this view.<sup>588</sup> In a civil case, excluding psychiatric reports, the court stated:

To admit this potpourri on the sole tests of regular recording and absence of motive to misrepresent would be a drastic impairment of the right of cross-examination. In a criminal case it is doubtful whether such a deprivation of the right of the accused to be confronted with the witness against him would be constitutional.<sup>589</sup>

A party's own statements may be used against him as admissions. It follows that the opponent may offer the party's books as containing admissions favoring the opponent's assertion of facts.<sup>590</sup> One court stated: "Were the corporation the opposite party here, entries on its books would be competent evidence when in the nature of admissions, and without the necessity of strict authentication beyond establishing the identity of the books."<sup>591</sup> They are not competent against a codefendant. Account books of the defendant were admitted for the Government, when kept "with the knowledge and under the general direction of the defendant."<sup>592</sup>

Corporate books of account are not competent against a stranger. They are not competent against shareholders as such. Where an officer has control over the corporate books, they are competent against him on the footing of admissions.<sup>593</sup> Different rules apply to partnership books

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(1961); *United States v. Kimmel*, 274 F.2d 54 (2d Cir. 1960). See *Laughlin*, *supra* note 575, at 292-94.

584. *Somberg v. United States*, 71 F.2d 637 (7th Cir. 1934). See *Osborne v. United States*, 17 F.2d 246 (9th Cir. 1927).

585. 28 U.S.C. § 1732(b) (1958).

586. *Beard v. United States*, 222 F.2d 84, 91 (4th Cir.), cert. denied, 350 U.S. 846 (1955). The court cited *United States v. Manton*, 107 F.2d 834 (2d Cir. 1938), cert. denied, 309 U.S. 664 (1940). See 34 *Iowa L. Rev.* 83 (1948); 48 *Mich. L. Rev.* 489 (1950).

587. *Green*, *supra* note 572, at 63. See 5 *Wigmore* § 1533.

588. E.g., *Schering Corp. v. Marzall*, 101 F. Supp. 571 (D.D.C. 1951); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 349, 355 (D. Mass. 1950). But see *Gordon v. Robinson*, 109 F. Supp. 106 (W.D. Pa. 1952), rev'd, 210 F.2d 192 (3d Cir. 1954).

589. *New York Life Ins. Co. v. Taylor*, 147 F.2d 297, 306 (D.C. Cir. 1945).

590. *McCormick* § 281, at 596; 5 *Wigmore* § 1557.

591. *Worden v. United States*, 204 Fed. 1, 6 (6th Cir. 1913). The court cited *Foster v. United States*, 178 Fed. 165, 175 (6th Cir. 1910). See also *Battman v. United States*, 224 Fed. 819, 832 (6th Cir. 1915).

592. *Preeman v. United States*, 244 Fed. 1, 11 (7th Cir. 1917).

593. *United States v. Feinberg*, 140 F.2d 592 (2d Cir.), cert. denied, 322 U.S. 726



because the partners have access to them, and because of their supervision and control over them.

#### XI. OFFICIAL WRITTEN STATEMENTS

Rule 27 of the Federal Rules of Criminal Procedure provides: "An official record or an entry therein or the lack of such a record may be proved in the same manner as in civil cases." Rule 44 of the Federal Rules of Civil Procedure deals with the subject in considerable detail.<sup>594</sup>

Congress has been legislating on the subject of official records from the beginning of the United States.<sup>595</sup> In 1789, an act<sup>596</sup> provided that copies of records in the office of the State Department should be admissible. In 1797 there was a similar act<sup>597</sup> as to the Treasury Department.

A court has stated that official records "are not covered by the hearsay rule. It is elementary that they are prima facie evidence of what they purport to record."<sup>598</sup> The right of confrontation is not violated as official records were admissible prior to the adoption of the Constitution. But later, a federal district court pointed out that a statute providing for use of copies of official records,

merely codifies a common-law exception to the hearsay rule, that where the person whose statement is offered is unavailable for adequate reason and where there is circumstantial probability of the truthfulness of the evidence offered then the evidence is admissible even though hearsay. . . . However, even this statute does not permit the contents of government records to be proved by parol testimony as was here done.<sup>599</sup>

In 1916, a district court stated as to confrontation of witnesses:

True, decisions of the Supreme Court and other courts have sustained apparent exceptions to this constitutional rule, such, for example, as cases . . . where certain records and public documents and registers were admitted, although there was no

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(1944). See also *Cornes v. United States*, 119 F.2d 127 (9th Cir. 1941); *Somberg v. United States*, 71 F.2d 137 (7th Cir. 1934); *McDonald v. United States*, 241 Fed. 793 (6th Cir. 1917).

594. Orfield, *Proof of Official Records in Federal Cases*, 22 *Mont. L. Rev.* 137 (1961). On official written statements see 3 *Jones* §§ 544-53 (5th ed. 1958); *McCormick* §§ 291-95; 2 *Morgan* 277-84; 1 *Underhill* § 109; 4 *Wigmore* § 1346(a); 5 *id.* §§ 1630-84; 1 *Wharton* § 272; 2 *id.* §§ 634-45; *Selby*, *Official Records and Business Entries: Their Use as Evidence in Courts-Martial and the Limitations Thereon*, 11 *Military L. Rev.* 41 (1961); *Wallace*, *Official Written Statements*, 46 *Iowa L. Rev.* 256 (1961); *Note*, 1954 *U. Ill. L.F.* 336.

595. See also *Cohn v. United States*, 258 Fed. 355, 361 (2d Cir. 1919).

596. 1 *Stat.* 69 (1789).

597. 1 *Stat.* 512 (1797).

598. *Helke v. United States*, 192 Fed. 83, 94 (2d Cir. 1911). The Supreme Court affirmed without considering the point. 227 *U.S.* 131 (1913). The case held that the person making the record need not be called.

599. *United States v. Campanaro*, 63 *F. Supp.* 811, 815 (E.D. Pa. 1945). The Court cited 5 *Wigmore* § 1420. See also *Olender v. United States*, 210 F.2d 795, 800 (9th Cir. 1954), cert. denied, 352 *U.S.* 982 (1957).

witness, except such documents, with which there could be confrontation. But those apparent exceptions are not real ones, and where the facts constituting the offense itself are necessary to be proved they must primarily be proved by living witnesses, who must confront the accused.<sup>600</sup>

As late as 1954, a court of appeals pointed out that care must be used in pushing the official records exception so far as to violate the right to confrontation.<sup>601</sup> The same year, Professor McCormick pointed out that the exception existed before the adoption of the Constitution and that use by the prosecution of official statements is "frequent and approved."<sup>602</sup>

In an early civil case, the Supreme Court indicated that official statements are admitted under an exception to the hearsay rule, because it may reasonably be expected that an official, in fulfilling the functions of his office will make truthful statements. Mr. Justice Wayne stated that official statements,

are entitled to this extraordinary degree of confidence, partly because they are required by law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under the sanction of an oath of office, or at least under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in them are entries of a public nature, it would often be difficult to prove them by means of sworn witnesses.<sup>603</sup>

The theory of the rule has been well stated by Circuit Judge Bone:

The reason of the rule is that it would be burdensome and inconvenient to call public officials to appear in the myriad cases in which their testimony might be required in a court of law, and that records and reports prepared by such officials in the course of their duties are generally trustworthy.<sup>604</sup>

It is not the function of Rule 27 of the Federal Rules of Criminal Procedure to reveal when a fact must be proved by an official record.<sup>605</sup>

The federal statute on official records<sup>606</sup> and Rule 27 of the Federal Rules of Criminal Procedure deal primarily with the method of proof and are of no aid in determining what kind of records are admissible.<sup>607</sup> That question must be worked out in consonance with common-law principles in the light of reason and experience.<sup>608</sup> Documents of state and local governments are treated like federal documents.<sup>609</sup>

600. *United States v. Elder*, 232 Fed. 267, 269 (W.D. Ky. 1916).

601. *Matthews v. United States*, 217 F.2d 409, 418 (5th Cir. 1954).

602. McCormick § 231, at 486 (1954).

603. *Gaines v. Relf*, 53 U.S. (12 How.) 472, 569-70 (1851) (dissenting opinion).

604. *Olender v. United States*, 210 F.2d 795, 801 (9th Cir. 1954), cert. denied, 352 U.S. 982 (1957), citing 5 *Wigmore* §§ 1631-32.

605. *United States v. Scoblick*, 225 F.2d 779 (3d Cir. 1955).

606. 28 U.S.C. § 1773.

607. *Olender v. United States*, 210 F.2d 795 (9th Cir. 1954), cert. denied, 352 U.S. 982 (1957); *United States v. Grayson*, 166 F.2d 863 (2d Cir. 1948).

608. *Olender v. United States*, supra note 607, at 801.

609. *Ibid.*

Where a legitimate purpose exists for recording information in official records wholly apart from criminal prosecution, the fact that the record may contain matters useful in a criminal prosecution will not render the record inadmissible. A draft file was held admissible without discussion of the point.<sup>610</sup> In other cases, entries specifically prepared for possible litigation have been disposed of under the Federal Business Records Act,<sup>611</sup> and admission denied.<sup>612</sup>

No express statute is needed to create the duty to keep records.<sup>613</sup> A court stated:

There can be no doubt that official records kept by persons in public office, which records are required to be kept either by statute or by the nature of the office, are admissible to prove transactions occurring in the course of official duties, within the personal observation of the official recording the transactions, without any further guarantee of their accuracy.<sup>614</sup>

It is reversible error not to allow the defendant to introduce into evidence the Commissioner's report of the preliminary examination to show that a witness testified differently at the trial from at the preliminary examination as to a material point.<sup>615</sup> As a public record is involved, there is an exception to the hearsay rule. Hence, there need be no opportunity to cross-examine the commissioner. Rule 55 of the Federal Rules of Criminal Procedure provides for the keeping of records by the commissioner.

Logically, if a duty exists to record certain matters when they occur, and if no record of such matters is found, then the absence of any entry about them is evidence that they did not occur.<sup>616</sup> Many federal criminal cases both before and after the adoption of Rule 27 of the Federal Rules of Criminal Procedure have so held. In a prosecution for embezzlement while acting as a paymaster clerk, admission for the Government of evidence that certain pay rolls did not contain receipt signatures after the mass of fifty-six employees was held not reversible error.<sup>617</sup> But there

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610. *Kariakin v. United States*, 261 F.2d 263 (9th Cir. 1958). See also *LaPorte v. United States*, 300 F.2d 878 (9th Cir. 1962).

611. 28 U.S.C. § 1732.

612. *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957) (identifying data written by federal agents on envelopes containing narcotics); *Hartzog v. United States*, 217 F.2d 706 (4th Cir. 1954) (work sheets prepared by internal revenue agent from records of defendant).

613. *White v. United States*, 164 U.S. 100, 103 (1896) (records of state jails); *Evanston v. Gunn*, 99 U.S. 660 (1878); *McInerney v. United States*, 143 Fed. 729, 736 (1st Cir. 1906) (ship's manifest). See 5 Wigmore § 1633.

614. *Greebaum v. United States*, 80 F.2d 113, 126 (9th Cir. 1935).

615. *Howard v. United States*, 278 F.2d 872 (D.C. Cir. 1960). The court cited 5 Wigmore § 1633.

616. 5 Wigmore § 1633, at 519.

617. *Gurinsky v. United States*, 259 Fed. 378 (5th Cir. 1919). See also *Stern v. United States*, 18 F.2d 465 (4th Cir. 1927); *Petersen v. United States*, 287 Fed. 17, 24 (9th Cir. 1923).

was also testimony by witnesses in position to know. Furthermore, the loss was established independently of the witness' evidence that the payrolls were not receipted. In a prosecution for violation of the Tariff Act, allowing an inspector of customs to testify that the customs house records disclosed no permit to import liquor was not error as against the objection that the records were the best evidence.<sup>618</sup> The inspector was in charge of the records and was familiar with them. In a prosecution for fraudulent use of the mails in selling and delivering and conspiracy to violate the Securities Act it was held proper to admit as an official record in support of the contention of the Government that the securities were not registered, authenticated certification that a search of the Commissioner's office failed to disclose that any registration certificate had been filed.<sup>619</sup> In addition there was testimony of one of the defendant's employees that he had asked the defendant about registration and had been told that it was unnecessary. Furthermore, the defendant did not controvert the allegation or evidence of nonregistration.

When Rule 27 of the Federal Rules of Criminal Procedure was being discussed before its adoption the proposal as to proof of lack of record was attacked on the ground, that it violated the defendant's right of confrontation and cross-examination.<sup>620</sup> However in a case arising in 1957, the Fifth Circuit denied this.<sup>621</sup> The same court three years earlier had indicated that care must be taken in applying the business records exception lest the right to confrontation be violated.<sup>622</sup> In 1957, the Ninth Circuit stated: "The nonexistence of such documents was testified to by two custodial agents, the thoroughness of their search being tested by cross-examination. This was far more than required by Rule 44 . . . incorporated by reference in Rule 27 of the Federal Rules of Criminal Procedure . . . ."<sup>623</sup>

Proof of lack of official record under Rule 44 of the Federal Rules of Civil Procedure is not the only way to prove lack of record. "To establish the fact that there is no record as to a particular matter or thing parol evidence may be given. The proof may be made by any qualified person who has examined the record as well as by the custodian."<sup>624</sup>

Logically it would seem that required statements by nonofficial persons

618. *Shore v. United States*, 56 F.2d 490 (D.C. Cir. 1932). See also *Randall v. United States*, 148 F.2d 234 (5th Cir.), cert. denied, 325 U.S. 885 (1945).

619. *United States v. Sussman*, 37 F. Supp. 294 (E.D. Pa. 1941).

620. Orfield, *supra* note 594, at 138.

621. *T'kach v. United States*, 242 F.2d 937 (5th Cir. 1957).

622. See note 601 *supra* and accompanying text.

623. *De Casaus v. United States*, 250 F.2d 150, 152 (9th Cir. 1957), cert. denied, 356 U.S. 949 (1958).

624. *Jackson v. United States*, 250 F.2d 897, 901 (5th Cir. 1958).

may sometimes be regarded as official written statements.<sup>625</sup> A person may be an officer for the purpose of doing a single specific class of acts. This principle has been applied to a ship's manifest.<sup>626</sup> On a prosecution for violation of the oleomargarine law, the court did not seem to notice the point. To show the amounts received by the defendant, the Government offered the monthly returns made by a manufacturer who sold to the defendant. By statute these returns were required to be filed with the collector of internal revenue. The returns were held not admissible as official statements.<sup>627</sup> The public could not inspect the returns; only internal revenue agents could. To use the returns would violate the constitutional right of the defendant to confront the witnesses against him. The persons who made the returns were not dead and could testify. Sales records which a seller of sugar was required to make and submit to government officers were not official records within the official records statute,<sup>628</sup> nor business records under the Federal Business Records Act.<sup>629</sup>

In England, the official statement must be open to inspection by the public at large.<sup>630</sup> A federal case has offered this as a reason for not applying the official statement exception.<sup>631</sup>

In a liquor prosecution the Government may offer in evidence a petition to suppress evidence made by defendant containing a statement that the automobile he was driving contained alcohol. Such evidence was not privileged, and being a court record it was open to all.<sup>632</sup> Nor did it violate the privilege against self-incrimination. It made no difference that the petition was self-serving when made. In a prosecution for using the mails to defraud, capital stock returns made by the president of the corporation and filed with the Internal Revenue department were held admissible as official records although such returns were not generally open to inspection.<sup>633</sup>

In many cases, official statements may be made on the faith of the acts of a subordinate.<sup>634</sup> A marshal's record of measurements of convicted persons was admitted although the measurements were taken by an un-

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625. 5 Wigmore § 1633a.

626. *McInerney v. United States*, 143 Fed. 729, 736-37 (1st Cir. 1906).

627. *United States v. Elder*, 232 Fed. 267 (W.D. Ky. 1916).

628. 28 U.S.C. § 1733 (1958).

629. *Matthews v. United States*, 217 F.2d 409 (5th Cir. 1954).

630. 5 Wigmore § 1634. Wigmore regards the English rule as too narrow.

631. *United States v. Elder*, 232 Fed. 267 (W.D. Ky. 1916). See also *Evanston v. Gunn*, 99 U.S. 660, 666 (1878).

632. *Kaiser v. United States*, 60 F.2d 410 (8th Cir. 1932).

633. *Lewy v. United States*, 29 F.2d 462 (7th Cir. 1928), cert. denied, 279 U.S. 850 (1929). See also *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438, 446 (2d Cir. 1940).

634. 5 Wigmore § 1635.

known subordinate.<sup>635</sup> In other cases, there may be exclusion of statements not based on personal knowledge. For example, statements on documents of a county welfare department were excluded as not within the knowledge of the officials.<sup>636</sup>

Where the documents offered as official records are submitted by individuals pursuant to statute, they are admissible if authenticated by the custodian thereof, and the documents on their face purport to bear the signatures of the persons required to submit them.<sup>637</sup> In a prosecution for using the mails to defraud by a stock-selling scheme, unsigned and uncertified cards from the Internal Revenue office in Arizona, purporting to transcribe certain income tax returns were held not admissible.<sup>638</sup> The defendants could not cross-examine the unknown writer nor could they obtain the original return or a copy thereof. Even assuming that the cards were public records, this would not cure violations of the hearsay and best evidence rules. Possibly the cards were not accurately transcribed from the income tax returns.

It has been pointed out that when a properly authenticated document or admissible copy thereof appears on its face to satisfy the requisites of an official record, the presumption arises that the record was made by a person required by law or custom to do so, and that the entrant performed the duty properly.<sup>639</sup> Where copies of a secret decree and ministerial order of the Spanish Government were offered as official records, the court held that while it was conceivable that a custodian of records would perjure himself and falsify documents, the rule and statute presumes that such would not be the case, but that evidence rebutting the presumption would be received.<sup>640</sup> Likewise reports or documents submitted to federal agencies by nonofficial persons in compliance with statutes or regulations were held admissible as official records where the signatures thereto purported to be those of the proper persons, and no further proof was required.<sup>641</sup>

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635. *United States v. Cross*, 20 D.C. 365, 380, writ of error dismissed, 145 U.S. 571 (1892).

636. *Olender v. United States*, 210 F.2d 795, 801, cert. denied, 352 U.S. 982 (1957), citing 5 Wigmore § 1635. See also *Yaich v. United States*, 283 F.2d 613, 616 (9th Cir. 1960).

637. *Desimone v. United States*, 227 F.2d 864, 867 (9th Cir. 1955); *Holland v. United States*, 209 F.2d 516, 520 (10th Cir.), aff'd, 348 U.S. 121 (1954).

638. *Greenbaum v. United States*, 80 F.2d 113, 126 (9th Cir. 1935). It has been contended that the real question as to the effect of the error should have been whether in fact the defendants did dispute the correctness of the purporting copy. 5 Wigmore § 1680, at 776.

639. *Selby*, supra note 594, at 53.

640. *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438, 446 (2d Cir. 1940). See generally *Wynne v. United States*, 217 U.S. 234, 245 (1910).

641. *Desimone v. United States*, 227 F.2d 864, 867 (9th Cir. 1955); *Lewis v. United States*, 38 F.2d 406, 413 (9th Cir. 1930).

Income tax records and returns and certificates of assessments and payments of taxes are official records.<sup>642</sup>

At common law, a merchant ship's log-book was not admissible.<sup>643</sup> But federal statutes have provided for their admissibility. In an early case Mr. Justice Story stated while sitting as a Circuit Judge: "The log-book is in no just sense proof per se of the facts therein stated, except in certain cases provided for by statute. . . . It could not, if it had been produced by the prisoners, have been per se admitted (if objected to) as evidence of the facts stated therein. It would be mere hearsay not under oath."<sup>644</sup> A verified copy of a ship's manifest containing a list of its alien immigrant passengers delivered to the inspection officers of an American port and preserved in the immigration office is a public record.<sup>645</sup>

On a prosecution for failure to register under the Selective Service Act, the age of the defendant being in issue, a Catholic baptismal record, verified by the testimony of the priest, was admitted.<sup>646</sup> The fact was also proven by a pension application of his mother and by a petition by his mother for a homestead in the administration of her husband's estate, both referring to the date of birth of the defendant. On a similar prosecution, a certified copy of a birth record was held admissible.<sup>647</sup>

In a murder prosecution, in which the identity of the person shot with the person named as victim in the indictment was at issue, information furnished by a death certificate of the person named in the indictment, which certificate showed that his death was caused by a gunshot wound to the head, was necessarily hearsay as to the identity of the deceased body. It is, therefore, reversible error to admit the certificate.<sup>648</sup> On a prosecution for selling liquor, the defendant, in order to establish an alibi, introduced testimony of an undertaker that he was attending a funeral. It was held that copies of the death certificate and burial records were without probative value and should not have been received in rebuttal offered by the Government that burial was on another day.<sup>649</sup> It made no difference that a state statute made the death record prima facie evidence of the facts stated therein.

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642. *Desimone v. United States*, supra note 641 at 867-68; *Holland v. United States*, 209 F.2d 516, 520-21 (10th Cir.), aff'd, 348 U.S. 121 (1954); *Mansfield v. United States*, 76 F.2d 224, 231 (8th Cir.), cert. denied, 296 U.S. 601 (1935); *Lewis v. United States*, 38 F. 2d 406, 413 (9th Cir. 1930).

643. 5 Wigmore § 1641.

644. *United States v. Gilbert*, 25 Fed. Cas. 1287, 1308 (No. 15204) (C.C.D. Mass. 1834). See *McInerney v. United States*, 143 Fed. 729, 737-38 (1st Cir. 1906), citing Wigmore, *Evidence* § 1641. (1st ed. 1904).

645. *McInerney v. United States*, supra note 644.

646. *Phelan v. United States*, 249 Fed. 43 (9th Cir. 1918).

647. *Breitmayer v. United States*, 249 Fed. 929 (6th Cir. 1918).

648. *Austin v. United States*, 208 F.2d 420 (5th Cir. 1953).

649. *Passantino v. United States*, 32 F.2d 116 (8th Cir. 1929).

A certificate of registry is admissible to show the nationality of a ship.<sup>650</sup> In a prosecution for murder on a ship, a copy of the ship's certificate of enrollment certified under seal by the deputy collector of customs of the port where issued was held admissible to establish its national character.<sup>651</sup> The genuineness of the authentication of such a certificate, signed by a deputy collector of customs, apparently in order, was held to be a matter to be assumed, as was also the official character of the purported signer and the signing by him or one authorized to sign, where there was no evidence casting suspicion on the genuineness of the copy of the seal or the signature, and none which challenged in any way, the national character of the ship.

On a prosecution under the Espionage Act, the President's message to Congress asking for a declaration of war and stating the causes making such action desirable, was admitted as "an official public statement made in the course of official duty by the head of the government to Congress" as evidence of "the truth or falsity of the statements alleged to have been made by the defendant."<sup>652</sup>

The reports of an ordinary private stenographer are not admissible.<sup>653</sup> Where the stenographer is a witness the notes may be used by him as an aid to memory.

A Maryland statute book "published by authority" was admitted.<sup>654</sup>

On a prosecution for perjury as to citizenship in applying for a passport the main issue was whether the defendant was born in the United States or in Rumania. The Government offered a photographic copy of a municipal record of birth of a person under his name in a specific city of Rumania, purporting to be signed by the mayor and a notary; also an attestation by the prefect of the district; also attestations by the Minister of the Interior, the American consul at Bucharest and the American Secretary of State, with a sworn translation; and a certificate by the prefect reciting that the Mayor is officer of vital statistics under the law of Rumania. This was excluded on the ground that no evidence was offered of the terms of Rumania law, nor of the record being made "at the time it purported to be made, in conformity with the law then in force."<sup>655</sup>

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650. *St. Clair v. United States*, 154 U.S. 134, 151 (1894).

651. *Wynne v. United States*, 217 U.S. 234, 246 (1910). The Court relied on the federal statute on proof of federal records now incorporated into 28 U.S.C. § 1733 (1958).

652. *Shidler v. United States*, 257 Fed. 620, 623 (9th Cir. 1919).

653. *Sneierson v. United States*, 264 Fed. 268 (4th Cir. 1920). The court (at 275) cited 3 *Wigmore*, Evidence § 1669 (1st ed. 1904). While the notes were read to the jury, the court found it harmless error on the facts of the case.

654. *United States v. Johns*, 4 U.S. (4 Dall.) 412 (1806). See 5 *Wigmore* § 1684, at 846.

655. *Duncan v. United States*, 68 F.2d 136, 142 (9th Cir. 1933). See also *Mole v. United States*, 315 F.2d 156 (5th Cir. 1953).



The decision seems unduly strict.<sup>656</sup> The court, however, did rule that a mere general objection was properly overruled. The objection should be specific.

On a proceeding for extradition from the United States to India it was held that a warrant of arrest and copies of preliminary proceedings from Bombay, India, certified by the American consul general at Calcutta were admissible.<sup>657</sup>

On a prosecution for using the mails to defraud by securing contributions from American heirs to the alleged Sir Francis Drake estate in England, a document purporting to be a copy of the Drake will as adjudged for probate in London was authenticated by the certificate of the assistant registrar, Wilkinson, of the probate division of the High Court of Justice. There was a certificate of the American consul that Wilkinson was the assistant registrar duly authorized to give copies and that the seal was genuine. The court excluded the evidence. The consul had no authority to so certify. "[A] foreign judgment may be authenticated (1) by an exemplification under the great seal; (2) by a copy proved to be a true copy; (3) by the certificate of an officer authorized by law, which certificate must itself be properly authenticated."<sup>658</sup> The court did not rule on whether state law as to foreign records might apply, but found that even if it did, the requirements of the state law were not satisfied. The evidence was admitted over the defendant's objection, but the court found no prejudicial error.

Copies of British statutes identified by a London barrister as "being accepted as statute laws" of Great Britain, were held admissible.<sup>659</sup>

There may be situations in which neither foreign official records nor copies may be obtainable. In such cases secondary evidence should be admissible. In a prosecution under the Foreign Agents Registration Act, the admission of secondary evidence of the contents of letters which passed between the German consul general in New York and the German Charge d'Affaires in Washington was proper.<sup>660</sup> The court took judicial notice of the inviolability of diplomatic correspondence and the existence of a state of war with Germany.

In 1936, Congress passed a statute providing:

A copy of any foreign document of record or on file in a public office of a foreign country, or political subdivision thereof, certified by the lawful custodian of such

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656. Morgan, Maguire & Weinstein, *Cases on Evidence* 125-26 (4th ed. 1957); 5 Wigmore § 1644, at 572-73.

657. *Collins v. Loisel*, 259 U.S. 309, 313-14 (1922). A statute was involved, 22 Stat. 215, 216 (1882).

658. *Hartzell v. United States*, 72 F.2d 569, 579 (8th Cir.), cert. denied, 293 U.S. 621 (1934), citing Wigmore, *Evidence* § 1681 (2d ed. 1923).

659. *Hartzell v. United States*, supra note 556, at 581. See 5 Wigmore § 1684, at 846.

660. *Viereck v. United States*, 139 F.2d 847 (D.C. Cir. 1944).

document, shall be admissible in evidence in any court of the United States when authenticated by a certificate of a consular officer of the United States resident in such foreign country, under the seal of his office, certifying that the copy of such foreign document has been certified by the lawful custodian thereof.<sup>661</sup>

In 1948, Congress passed a statute on foreign documents and their authentication.<sup>662</sup>

In 1938 Rule 44 of the Federal Rules of Civil Procedure provided:

An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or by a copy attested by the officer having the legal custody of the record, or by his deputy and accompanied with a certificate that such officer has the custody . . . . If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of office.

Rule 27 of the Federal Rules of Criminal Procedure is based on Rule 44.

In March 1963, the Commission on International Rules of Judicial Procedure transmitted to the President of the United States a proposed bill dealing with proof of foreign official documents.<sup>663</sup> It recommended amendments to Rule 44 of the Federal Rules of Civil Procedure, on which Rule 27 of the Federal Rules of Criminal Procedure is based. A new rule 26A would govern the determination of foreign law.

On a prosecution for fraudulent use of the mails a court martial record was excluded as irrelevant on the objection of the defendant. "It is apparent from the record offered that the court-martial proceedings did not result in a judgment either of guilt or acquittal and the issue of insanity was not decided."<sup>664</sup>

In a prosecution for aiding and abetting, the Government must prove not only the aiding and abetting but that the principal committed the offense. His prior conviction is some, but not conclusive, evidence of the principal's guilt.<sup>665</sup> Minutes of the clerk showing a plea of guilty are admissible.<sup>666</sup>

A person charged as an accessory after the fact is entitled to be con-

661. 28 U.S.C. § 1741 (1958). See 5 Wigmore § 1581a, at 837.

662. 18 U.S.C. §§ 3491-96 (1958).

663. 31 U.S.L. Week 2468 (March 19, 1963). See also 11 Am. J. Comp. L. 426-27 (1962). As to the Uniform Interstate and International Procedure Act, see 11 Am. J. Comp. L. 418, 433-36 (1962). On the existing defects see Orfield, Proof of Official Records in Federal Cases, 22 Mont. L. Rev. 137, 157-600 (1961).

664. *Lee v. United States*, 91 F.2d 326 (5th Cir.), cert. denied, 302 U.S. 745 (1937). See 1 Underhill §§ 215-29; Note, Judgments as Evidence, 46 Iowa L. Rev. 400, 410 (1961).

665. *Kirby v. United States*, 174 U.S. 47, 59 (1899); *Havener v. United States*, 48 F.2d 767, 771 (6th Cir. 1931). See 2 Wharton § 560; Orfield, Burden of Proof and Presumptions in Federal Criminal Cases, 31 U. Kan. City L. Rev. 30, 40 (1963).

666. *Colosacco v. United States*, 196 F.2d 165 (10th Cir. 1952).

fronted with the witnesses against him. Hence the principal offense cannot be proved by the introduction of the judgment of conviction of the perpetrators thereof.<sup>667</sup>

One important use of criminal judgments as evidence involves proof of prior conviction under habitual criminal statutes. The Government must prove the prior conviction and the identity of the defendant as the same person in each proceeding.<sup>668</sup> In one case it is said that identity of names is sufficient to establish *prima facie* that the defendant is the same person as the one previously convicted.<sup>669</sup> But a subsequent case required a greater showing and stated that there was no burden on the defendant to show that he is not the same person as the one convicted previously.<sup>670</sup> The Government must first introduce in evidence the indictment or information, the sentence, judgment and commitment and then prove that the present defendant is the same as the one previously convicted. There is sufficient proof where the Government offers a certified copy of his prior conviction together with his birth certificate and defense counsel states categorically that he did not object to the introduction of the documents.<sup>671</sup> A statement of defense counsel in his opening statement that there is no controversy about the defendant's prior conviction of selling liquor is an admission binding on the defendant, who remained silent, thereby obviating the necessity of additional evidence as to the exact nature of the first offense.<sup>672</sup> In the absence of such admission, proof of identity may be by the testimony of one who has personal knowledge of the prior conviction.<sup>673</sup>

A deposition taken in a criminal case may not be given in evidence in a civil action.<sup>674</sup> A civil judgment is not admissible though inconsistent with a criminal verdict even though it is the criminal defendant who seeks to introduce it. It is not admissible either on the theory of *res judicata* nor as presumptive proof of any facts determined by such judgment.<sup>675</sup>

It is reversible error to introduce in evidence in a criminal proceeding an order for a temporary injunction in a civil suit enjoining the defendant

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667. *Barone v. United States*, 205 F.2d 909 (8th Cir. 1953).

668. *Kubik v. United States*, 53 F.2d 763 (8th Cir. 1931); *Brown v. United States*, 43 F.2d 906 (9th Cir. 1930) (per curiam); *Powell v. United States*, 35 F.2d 941, 942 (9th Cir. 1929); *Dolan v. United States*, 4 F.2d 251 (6th Cir. 1925) (per curiam); *Singer v. United States*, 278 Fed. 415 (3d Cir.), cert. denied, 258 U.S. 620 (1922). See 2 Wharton §§ 568-70, at 538-41; Orfield, *supra* note 660, at 39.

669. *Hefferman v. United States*, 50 F.2d 554 (3d Cir. 1931).

670. *Gravatt v. United States*, 260 F.2d 498 (10th Cir. 1958).

671. *Rodriguez v. United States*, 292 F.2d 709 (5th Cir. 1961).

672. *Dick v. United States*, 40 F.2d 609, 611 (8th Cir. 1930).

673. *Klein v. United States*, 14 F.2d 35, 36 (1st Cir. 1926) (clerk).

674. *Gaines v. Relf*, 53 U.S. (12 How.) 472, 575 (1851) (dissenting opinion).

675. *United States v. Satuloff Bros.*, 79 F.2d 846, 848 (2d Cir. 1935).

and others from interfering with a Negro's rights. "The adjudication of a fact in a civil proceedings, [*sic*] in view of the difference of degree of proof in criminal and civil cases, can afford no basis for the doctrine of *res judicata*, when offered in a criminal cause . . ." <sup>676</sup> The constitutional right of confrontation of witnesses was violated. Neither the Model Code of Evidence nor the Uniform Rules of Evidence contains an exception to the general rule excluding civil judgments from criminal actions.

In a perjury prosecution the judgment in a civil case in which the perjury is alleged to have been committed is admissible in evidence to show the pendency of that action and the issue therein, but not for the purpose of establishing the truth or falsity of the testimony. <sup>677</sup>

A judgment of acquittal in a state court is not admissible where the defendant might have been innocent under state law and yet guilty under the federal statute. <sup>678</sup> A general verdict had been found in the state court. It should be noted that under existing constitutional law the federal government and the states may prosecute even though previously there has been an acquittal by the other sovereign. Where a defendant was acquitted in the federal court, it was held that Illinois could prosecute for the same offense. <sup>679</sup>

## XII. LEARNED TREATISES

Statements in medical books may not be introduced in evidence. <sup>680</sup> This is true even though a state statute permits it. A criminal defendant was not allowed to introduce into evidence his own book to show that he was a great scientist. <sup>681</sup> This could be established only by witnesses competent on the subject.

In 1947, a court stated in a libel by the Government under the Food and Drug Act: "While the authorities are not in complete accord, the

676. *United States v. Konovsky*, 202 F.2d 721, 726-27 (7th Cir. 1953). See 2 Morgan 280-81; 2 Wharton § 639; 4 Wigmore § 1346a; 5 *id.* § 1671a; Note, 46 Iowa L. Rev. 400, 411 (1961).

677. *United States v. Burkhardt*, 31 Fed. 141 (C.C.D. Ore. 1887). See 2 Wharton § 639.

678. *Martin v. United States*, 271 Fed. 685 (8th Cir. 1921).

679. *Bartkus v. Illinois*, 359 U.S. 121 (1958). See criticism by Perkins, *Collateral Estoppel in Criminal Cases*, 1960 U. Ill. L.F. 533, 568-69; Note, 35 Ind. L.J. 444 (1960); Note, 33 Ind. L.J. 409 (1958); Comment, 65 Yale L.J. 339 (1956).

680. *United States v. Perkins*, 221 Fed. 109 (E.D.S.C. 1915). The court (at 110) cited a civil case, *Union Pac. Ry. v. Yates*, 79 Fed. 584 (8th Cir. 1897). See also *Western Assur. Co. v. J. H. Mohlman Co.*, 83 Fed. 811, 820 (2d Cir.), cert. denied, 168 U.S. 710 (1897). On treatises, see McCormick § 296; 2 Morgan 276-77, 319-20; Orfield, *Expert Witnesses in Federal Criminal Procedure*, 20 F.R.D. 317, 344 (1958); 2 Wharton §§ 566-68, at 72; 5 Wigmore §§ 1690-1708; Note, 46 Iowa L. Rev. 463 (1961); Note, 46 Iowa L. Rev. 455 (1961); Note, 29 U. Cinc. L. Rev. 255 (1960); Annot., 60 A.L.R.2d 77 (1958); Annot., 82 A.L.R. 440 (1933); Annot., 65 A.L.R. 1102 (1930).

681. *Samuels v. United States*, 232 Fed. 536 (8th Cir. 1916).

weight of authority is that medical books and treatises are not admissible to prove the statements therein contained.<sup>682</sup> While a subsequent case<sup>683</sup> conceded this to be the law, the court was impressed by Wigmore's<sup>684</sup> contrary argument, and would not apply the rule to administrative agencies. Rule 63(31) of the Uniform Rules of Evidence provides for the admission of:

A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of the matters stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority on the subject.<sup>685</sup>

In a murder prosecution in which the defendant sought to prove insanity at the time of the offense, the Supreme Court stated:

After a witness has once qualified himself as an expert and given his own professional opinion in reference to that which he has seen or heard, or upon hypothetical questions, then it is ordinarily opening the door to too wide an inquiry to interrogate him as to what other scientific men have said upon such matters, or in respect to the general teachings of science thereon, or to permit books of science to be offered in evidence.<sup>686</sup>

In one case, the court stated:

It is claimed that the court erred in refusing to permit the defendant, on the cross-examination of Dr. Dorsey, to practically introduce Gray's work on Anatomy, by asking him question after question from that book. As this was new matter, on which Dr. Dorsey had not been examined on his direct examination, it was properly excluded. It is true that the witness might have been examined as to the value of Dr. Gray's work, with which, he testified, he was familiar; but, if the defendant wanted to introduce that work as evidence, he should have offered it as his own testimony, and for that purpose he might have made Dr. Dorsey his own witness at the proper time.<sup>687</sup>

In 1953 the late Judge Soper stated in a civil case:

Wigmore has shown . . . that the exception to the hearsay rule respecting the admissibility in evidence of learned treatises has been recognized to a limited extent in this country when it is shown that the writer of the work is properly qualified; but that for the most part the exception has been repudiated. The decision in *Davis v. United States* . . . is a notable example of the application of the strict rule in the examination of a medical witness, who had given his opinion as to the sanity of a defendant in a criminal case based upon his personal observation, but was not allowed to show

682. *United States v. One Device*, 160 F.2d 194, 198-99 (10th Cir. 1947). See also *United States v. Paddock*, 68 F. Supp. 407 (W.D. Mo. 1946).

683. *Dolcin Corp. v. Federal Trade Comm'n*, 219 F.2d 742 (D.C. Cir. 1954), cert. denied, 348 U.S. 981 (1955).

684. 6 Wigmore § 1690.

685. For cases on judicial notice as to scientific matters, see Orfield, *Judicial Notice in Federal Criminal Procedure*, 31 *Fordham L. Rev.* 503, 514-15 (1963).

686. *Davis v. United States*, 165 U.S. 373, 377 (1897). The court cited only a single case, an English decision: *Collier v. Simpson*, 5 *Car. & P.* 73, 172 *Eng. Rep.* 883 (N.P. 1831).

687. *Samuels v. United States*, 232 Fed. 536, 543 (8th Cir. 1916).

the teachings of medical science in similar cases. The use of a scientific treatise in the cross-examination of an expert witness on the stand for discrediting purposes has also been generally repudiated in the past.<sup>688</sup>

When may books be used in cross-examination of the expert witness? In an early case, the Supreme Court seems to have held that the expert must have made a specific reference to the books as corroborating his opinion or as a book upon which he has relied as a basis for an opinion which he has expressed.<sup>689</sup> But in 1949, the Supreme Court laid down a different rule in a case involving an administrative agency.<sup>690</sup> That decision has been applied even in cases not involving administrative agencies.<sup>691</sup>

"[T]he state of the market in securities or commodities may be proven by reports or quotations in newspapers and trade journals."<sup>692</sup> Slot machine prices may be thus shown. A mere statement of a witness that an offered exhibit was a securities guide of stocks used for trading on the exchange was insufficient foundation for its admission as evidence of the value of the stock. Moreover, the defendants were in position to control the entire issue of stock of the company; hence there could be no market value.<sup>693</sup> On a prosecution for unlawful sales of securities, quotation sheets from the Seattle Mining Exchange were admitted as evidence of prices.<sup>694</sup>

In *United States v. Hiss* the results of a public opinion poll were submitted in affidavit form to show that the defendant could not receive a fair trial in the district of prosecution.<sup>695</sup>

### XIII. DECLARATIONS AND REPUTATION AS TO PEDIGREE

In 1943, the Second Circuit stated in a dictum with respect to the right of confrontation and the pedigree exception: "But statements by relatives as to pedigree . . . have long been recognized as admissible."<sup>696</sup>

688. *Lawrence v. Nutter*, 203 F.2d 540, 542 (4th Cir. 1953).

689. *Davis v. United States*, 165 U.S. 373 (1897) (semble).

690. *Reilly v. Pinkus*, 338 U.S. 269 (1949). See Orfield, *supra* note 680; Note, 41 J. Crim. L. & Criminology 192 (1950); Annot., 60 A.L.R.2d 77 (1958).

691. *Abrams v. Gordon*, 276 F.2d 500 (D.C. Cir. 1960) (per curiam); *Lawrence v. Nutter*, 203 F.2d 540 (4th Cir. 1953).

692. *Wolcher v. United States*, 200 F.2d 493, 498 (9th Cir. 1952), cert. denied, 350 U.S. 822 (1955). See *Western Assur. Co. v. J. H. Mohlman Co.*, 83 Fed. 811, 821 (2d Cir. 1897); 6 *Wigmore* § 1704; Note, *Commercial Lists*, 46 *Iowa L. Rev.* 455 (1961).

693. *Harris v. United States*, 48 F.2d 771 (9th Cir. 1931).

694. *Coplin v. United States*, 88 F.2d 652, 669 (9th Cir.), cert. denied, 301 U.S. 703 (1937). The court cited *Virginia v. West Virginia*, 238 U.S. 202 (1915).

695. 185 F.2d 822 (2d Cir. 1960), cert. denied, 340 U.S. 948 (1951). See Note, 66 *Harv. L. Rev.* 498, 510 n.75 (1953); 52 *Mich. L. Rev.* 914 (1954); 37 *Minn. L. Rev.* 385 (1953); 29 *N.Y.U.L. Rev.* 751 (1954).

696. *United States v. Leathers*, 135 F.2d 507, 511 (2d Cir. 1943). On declarations concerning

In a prosecution for statutory rape, the age of the victim may be shown by the testimony of the victim, of her mother and of the nurse attending at her birth. If there is error in admitting evidence of an entry in a Bible, made by the mother five weeks after birth, it is harmless error though the book was not a family Bible, and contained but a single entry.<sup>697</sup> Notwithstanding the hearsay rule, a person may testify as to the date of his birth.<sup>698</sup>

On a prosecution for bigamy, the general reputation in the community as evidence of the marriage relation is competent as tending to prove such relation, although it is not alone sufficient to establish it.<sup>699</sup>

#### XIV. RECITALS IN ANCIENT WRITINGS

A court has pointed out:

Documents coming from official custody and bearing on their face every evidence of age and authenticity, and which present an honest as well as ancient appearance, are admissible in evidence as ancient documents. With reference to such documents, it is only necessary to show that they are of the age of thirty years, and come from a natural and reasonable custody.<sup>700</sup>

But the court found that neither the certificates nor the photograph offered was ancient.

#### XV. REPUTATION

A court has stated: "Reputation is one thing; character is another. It has been said that character and reputation are as distinct as are destination and journey."<sup>701</sup> The Supreme Court has pointed out: "What com-

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pedigree, see 2 Jones §§ 280-88 (5th ed. 1958); McCormick § 297; 2 Morgan 300-10; 1 Wharton §§ 260-66; 5 Wigmore §§ 1480-1503, 1602-06; Hale, Proof of Facts of Family History, 2 Hastings L.J. 1 (1950); Comment, 5 Ark. L. Rev. 58 (1951); Note, 46 Iowa L. Rev. 414 (1961); Note, 46 Iowa L. Rev. 426, 435-40 (1961); Annot., 15 A.L.R.2d 1412 (1951).

697. *Reagan v. United States*, 202 Fed. 488 (9th Cir. 1913). See also *United States v. Mid-Continent Petroleum Corp.*, 67 F.2d 37, 45 (10th Cir. 1933) (civil case). See 5 Wigmore § 1496.

698. *McGregor v. United States*, 206 F.2d 583 (4th Cir. 1953); *Antelope v. United States*, 185 F.2d 174 (10th Cir. 1950). See *Slaughter v. District of Columbia*, 134 A.2d 338 (D.C. Munic. Ct. App. 1957); 5 Wigmore § 1493; Annot., 39 A.L.R. 376 (1925).

699. *United States v. Higgerson*, 46 Fed. 750 (C.C.D. Idaho 1891). See 5 Wigmore § 1602.

700. *Hartzell v. United States*, 72 F.2d 569, 580 (8th Cir. 1934) (dictum). On recitals in ancient writings see 3 Jones §§ 569-71; McCormick § 298; 2 Morgan 316-17; 5 Wigmore §§ 1573-74; Wickes, Ancient Documents and Hearsay, 8 Texas L. Rev. 451 (1930); Note, Recitals in Ancient Documents, 46 Iowa L. Rev. 448 (1961); Note, 83 U. Pa. L. Rev. 247 (1934); Note, 33 Yale L.J. 412 (1924); 26 Harv. L. Rev. 544 (1913); Annot., 46 A.L.R.2d 1318 (1956); Annot., 6 A.L.R. 1437 (1920).

701. *Kreiner v. United States*, 11 F.2d 722, 725 (2d Cir.), cert. denied, 271 U.S. 688 (1926). The court cited 1 Wigmore §§ 52-88. See also 5 id. § 1608. On reputation, see

monly is called 'character evidence' is only such when 'character' is employed as a synonym for 'reputation.'<sup>702</sup>

The Supreme Court pointed out by Mr. Justice Jackson that not only is the defendant "permitted to call witnesses to testify from hearsay, but indeed such a witness is not allowed to base his testimony on anything but hearsay."<sup>703</sup> Mr. Justice Rutledge stated in a dissenting opinion: "The rule which allows the defendant to prove his good standing by general reputation is, of course, a kind of exception to the hearsay rule of exclusion, though one may inquire how else could reputation be proved than by hearsay if it is to be proved at all."<sup>704</sup>

A court has pointed out: "Mere rumors are not reputation but reputation involves a notion of the general estimate of a person by the community as a whole. Reputation is not what a few persons may say or may think about the accused, it is what the community generally believes."<sup>705</sup> In general, the witness should not quote what others have had to say.<sup>706</sup>

A witness to the good reputation of a government witness may testify by saying that he had never heard anything said against the person.<sup>707</sup> As to the reputation of the defendant and such a statement the Supreme Court has stated: "But this answer is accepted only from a witness whose knowledge of defendant's habitat and surroundings is intimate enough so that his failure to hear of any relevant ill repute is an assurance that no ugly rumors were about."<sup>708</sup>

In one case, the defendant's character witness testified that he had never talked to anyone in the community concerning the defendant's reputation. The witness was permitted to say that he had never heard the defendant's character for truth and veracity questioned in the community. It was held that testimony as to whether the defendant's reputation for truth and veracity and obedience to the law was good or bad was properly excluded since he had never heard it discussed and since the witness' own personal knowledge of the defendant is not enough.<sup>709</sup> Where on cross-examination a character witness for the defendant testified that he had never talked to anyone about the defendant or even discussed him, his direct examination was stricken.<sup>710</sup>

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McCormick § 299; 3 Morgan 309-15; 1 Wharton §§ 273-78; 5 Wigmore §§ 1580-1626; Ladd, *Techniques and Theory of Character Testimony*, 24 *Iowa L. Rev.* 498 (1939); Note, *Reputation*, 46 *Iowa L. Rev.* 426 (1961).

702. *Michelson v. United States*, 335 U.S. 469, 477 (1948), citing 5 Wigmore § 1609.

703. *Ibid.*

704. *Id.* at 490.

705. *Moore v. United States*, 123 F.2d 207, 210 (5th Cir. 1941).

706. The court cited 5 Wigmore § 1610(2), at 480. *Id.* at 210.

707. *Foerster v. United States*, 116 Fed. 860 (8th Cir. 1902).

708. *Michelson v. United States*, 335 U.S. 469, 478 (1948), citing 5 Wigmore § 1614.

709. *Deschenes v. United States*, 224 F.2d 688 (10th Cir. 1955).

710. *United States v. Sorkin*, 275 F.2d 330 (2d Cir. 1960) (*per curiam*).



Where a character witness called by the defendant states that he can speak only for himself and not for the community, the trial court may treat this as unwillingness to testify as to the defendant's reputation, and excuse the witness.<sup>711</sup>

Evidence of good character must be based on the reputation of the defendant in the community where he lives.<sup>712</sup> One court has stated that "the only admissible evidence of good character is what people generally, who know the accused, think about him . . ." <sup>713</sup> Testimony was properly excluded where the witness did not know where the defendant lived or any of the people of the community.<sup>714</sup>

On a prosecution for extortion of a custom-house officer, evidence offered by the Government of the defendant's bad reputation "in the Custom House" was held improperly admitted because it prevailed only "among the limited number of people employed in a particular public building."<sup>715</sup> Wigmore, in criticism, has pointed out that "the place where a reputation would be best founded is the place of daily employment."<sup>716</sup> In 1947, testimony of a business acquaintance was excluded.<sup>717</sup>

Reputation before the time in issue may be shown.<sup>718</sup> Remoteness in such time should affect only the weight to be given such evidence. The Supreme Court held it proper to ask the defendant's character witness, to test his knowledge, if he had heard that the defendant had been arrested twenty years previously.<sup>719</sup> Testimony as to the defendant's good reputation after the act charged is not admissible.<sup>720</sup> Where the evidence offered as to the bad reputation of a witness testifying against his codefendant is as to a time after the finding of the indictment, such testimony may be stricken on motion of the Government.<sup>721</sup>

Under an exception based on necessity, evidence of the reputation of a bawdy house may be introduced.<sup>722</sup> On a prosecution under the Mann Act,

711. *Dailey v. United States*, 261 F.2d 870 (5th Cir.), cert. denied, 359 U.S. 969 (1958).

712. *Williams v. United States*, 168 U.S. 382, 397 (1897). See *Iva Ikuko Toguri D'Aquino v. United States*, 192 F.2d 338, 372 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1952).

713. *Stewart v. United States*, 104 F.2d 234, 235 (D.C. Cir. 1939) (per curiam).

714. *United States v. Pincourt*, 159 F.2d 917 (3d Cir. 1947).

715. *Williams v. United States*, 168 U.S. 382, 397 (1897).

716. 5 Wigmore, § 1616, at 489 n.2.

717. *United States v. Pincourt*, 159 F.2d 917 (3d Cir. 1947).

718. 5 Wigmore, § 1617.

719. *Michelson v. United States*, 335 U.S. 469, 472 (1948).

720. *Spurr v. United States*, 87 Fed. 701, 713 (6th Cir. 1898).

721. *Shibley v. United States*, 237 F.2d 327 (9th Cir.), cert. denied, 352 U.S. 873 (1956). The court (at 333) cited 5 Wigmore § 1618.

722. *Ancine v. United States*, 260 Fed. 827 (9th Cir. 1919), citing (at 828) 3 Wigmore, Evidence § 1620 (1st ed. 1907). *Hunter v. United States*, 272 Fed. 235 (4th Cir. 1921); *Botts v. United States*, 155 Fed. 50 (9th Cir. 1907); *United States v. Johnson*, 7 Fed. 453, 455 (C.C.S.C.N.Y. 1881); *United States v. Grey*, 26 Fed. Cas. 17 (No. 15251) (C.C.D.C.

the general character of the premises to which the girls were taken, as being a house of prostitution, could be admitted to show the character of such premises and the intent of the defendant.<sup>723</sup>

To be distinguished is the reputation of persons other than the defendant. On counts for keeping a disorderly house and for keeping a bawdy house the Government may give evidence of the general reputation of the persons who visited the house.<sup>724</sup>

On a liquor nuisance prosecution "general reputation of an individual or a place" is admissible. "This is an exception to the hearsay rule, but the exception does not extend so far as to permit of the proof of specific acts. . . ."<sup>725</sup>

The defendant's reputation for not possessing the trait or traits of the offense charged is admissible in his behalf.<sup>726</sup> The defendant wished to offer testimony to prove his general reputation for honesty in the community. The error in excluding was not cured by letting in proof of his reputation for truth and veracity.

#### XVI. PRELIMINARY EXAMINATION

It is not clear from the cases whether hearsay evidence is admissible at the preliminary examination.<sup>727</sup> It is not unlikely that hearsay evidence is sometimes admitted.<sup>728</sup>

#### XVII. NONADVERSARY PROCEEDINGS

In hearings on the issuance of search and arrest warrants, convincing hearsay is often recognized as a basis for action.<sup>729</sup> In 1963, Judge Weinfeld stated: "The fact that the Commissioner acted upon hearsay does not negate probable cause for the issuance of the warrant any more so than where an indictment returned by a grand jury is based upon hearsay information."<sup>730</sup>

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1826); *United States v. Jamerson*, 60 F. Supp. 281 (N.D. Iowa 1944). But see *United States v. Warner*, 28 Fed. Cas. 404 (No. 16642) (C.C.D.C. 1833); *United States v. Nailor*, 27 Fed. Cas. 69 (No. 15853) (C.C.D.C. 1833); *United States v. Jourdine*, 26 Fed. Cas. 666 (No. 15499) (C.C.D.C. 1833).

723. *United States v. Jamerson*, supra note 722.

724. *United States v. Stevens*, 27 Fed. Cas. 1312 (No. 16391) (C.C.D.C. 1833). See *United States v. Jamerson*, 60 F. Supp. 281, 286 (N.D. Iowa 1945) (dictum).

725. *Lambert v. United States*, 26 F.2d 773, 774 (9th Cir. 1928).

726. *Carnley v. United States*, 274 F.2d 68 (5th Cir. 1960).

727. Orfield, *Proceedings Before the Commissioner in Federal Criminal Procedure*, 19 U. Pitt. L. Rev. 489, 529-34, 536-37, 563-65 (1958).

728. Orfield, *Criminal Procedure From Arrest to Appeal* 88 (1947). But see Note, 1963 Wash. U.L.Q. 102, 115-19.

729. *Jones v. United States*, 362 U.S. 262, 270-71 (1960); cf. *Draper v. United States*, 358 U.S. 307, 313 (1959). See Note, 32 Ind. L.J. 332 (1957).

730. *United States v. Casanova*, 213 F. Supp. 654, 656 (S.D.N.Y. 1963).

In 1956, the Supreme Court held that a grand jury indictment may be based on hearsay without other evidence. This did not violate the right under the fifth amendment to indictment by a grand jury for capital or otherwise infamous offense.<sup>731</sup> In the exercise of its supervisory power the Court would not lay down a different rule. Mr. Justice Burton, concurring,<sup>732</sup> agreed with the statement of Judge Learned Hand in the court below that "if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated."<sup>733</sup> The latter view seems the more sensible. Wigmore takes the position that grand juries should not be bound by the rules of evidence because proceedings before them are interlocutory and are based on probable cause.<sup>734</sup>

### XVIII. SENTENCING

The sentencing reports of probation officers which must be left confidential in the nature of the case are likely to involve hearsay, yet have been upheld.<sup>735</sup> The solution is procedural devices enabling the defendant to meet the hearsay and so reduce its apparent force.<sup>736</sup> In 1962, the Advisory Committee on Criminal Procedure of the Judicial Conference proposed to amend Rule 32(c)(2) so that the defendant upon request could obtain a summary of the presentence report before imposition of sentence. This appears to be a step in the right direction.

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731. *Costello v. United States*, 350 U.S. 359 (1956). The case was followed in *Ford v. United States*, 233 F.2d 56, 60 (5th Cir.), cert. denied, 352 U.S. 833 (1956). See *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959) (dictum); Orfield, op. cit. supra note 728, at 163-64; Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 405-407, 450-51 (1959); Weinstein, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331, 349 (1961); Note, 32 Ind. L.J. 332 (1957); Comment, 58 Mich. L. Rev. 1218, 1226 (1960); Note, 1963 Wash. U.L.Q. 102 (1963); Note, 72 Yale L.J. 590 (1963).

732. 350 U.S. at 365.

733. *United States v. Costello*, 221 F.2d 668, 677 (2d Cir. 1955), citing Wigmore § 2364(a). Judge Frank concurred out of "esteem<sup>o</sup> for Judge Hand's wisdom," but hoped that the Supreme Court would review the issue. 221 F.2d at 679-80.

734. 1 Wigmore § 4, at 21.

735. See *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959); *Williams v. New York*, 337 U.S. 241, 249-50 (1949). Accord, *Application of Hodge*, 262 F.2d 778 (9th Cir. 1958); *Pence v. United States*, 219 F.2d 70, 72 (10th Cir. 1955); *Klingstein v. United States*, 217 F.2d 711 (4th Cir. 1954) (per curiam); *Price v. United States*, 200 F.2d 652 (5th Cir. 1953); *Friedman v. United States*, 200 F.2d 690, 697 (8th Cir. 1952), cert. denied, 345 U.S. 926 (1953); *Virgin Islands v. Price*, 181 F.2d 394, 396 (3d Cir. 1950); *Taylor v. United States*, 179 F.2d 640 (9th Cir.), cert. denied, 339 U.S. 988 (1950); *Sachs v. Canal Zone*, 176 F.2d 292, 299 (5th Cir.), cert. denied, 338 U.S. 858 (1949); *United States v. Nelms*, 201 F. Supp. 890, 892 (W.D. Va.), aff'd, 291 F.2d 390 (4th Cir. 1961); *United States v. Durham*, 181 F. Supp. 503 (D.D.C.), cert. denied, 364 U.S. 854 (1960); *United States v. Clark*, 11 F.R.D. 269 (W.D. Mo. 1951) (per curiam).

736. Orfield, op. cit. supra note 728, at 545-46; Orfield, *Amending the Federal Rules of Criminal Procedure*, 24 Notre Dame Law. 315, 340 (1949); Weinstein, supra note 731.

## XIX. HABEAS CORPUS

A recent commentator has pointed out: "The hearsay rule is universally enforced in habeas corpus, with the exception of the deportation area."<sup>737</sup>

## XX. EXTRADITION

The hearsay rule does not seem to be applied in extradition cases. The evidence is brought from outside the jurisdiction. Hence, the procurement of evidence is likely to be hampered by the lack of power or practicability, as well as by the differences of law in another system.<sup>738</sup> Depositions properly authenticated under the statute on international extradition have been admitted.<sup>739</sup> Certificates and affidavits are admissible.<sup>740</sup> Depositions containing hearsay have been admitted; their hearsay nature merely affects their weight.<sup>741</sup>

Affidavits are often used in cases of interstate rendition.<sup>742</sup>

737. Comment, 58 Mich. L. Rev. 1218, 1225 (1960); see Note, 111 U. Pa. L. Rev. 788, 795-97 (1963).

738. 1 Wigmore, § 4, at 24.

739. Collins v. Loisel, 259 U.S. 309, 313 (1922); Collier v. Vaccaro, 51 F.2d 17 (4th Cir. 1931).

740. Desmond v. Eggers, 18 F.2d 503 (9th Cir. 1927).

741. United States ex rel. Klein v. Milligan, 50 F.2d 687 (2d Cir.), cert. denied, 284 U.S. 665 (1931). The court (at 688) cited 1 Wigmore, Evidence § 4 (2d ed. 1923). See also President of the United States ex rel. Caputo v. Kelly, 19 F. Supp. 730, 737 (S.D.N.Y.), aff'd, 92 F.2d 603 (2d Cir. 1937), cert. denied, 303 U.S. 635 (1938) (dying declaration of victim of homicide in France.).

742. Munsey v. Clough, 196 U.S. 364, 370, 374 (1905); Raferty ex rel. Huie Fong v. Bligh, 55 F.2d 189 (1st Cir. 1932); United States ex rel. Austin v. Williams, 6 F.2d 13 (E.D. La. 1925), aff'd, 12 F.2d 66 (5th Cir. 1926).