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EVIDENCE-DOCUMENTARY PROOF OF MARKET VALUE OF PERSONAL PROPERTY-ADMISSIBILITY-RELATIONSHIP TO ORAL TESTIMONY BASED THEREON

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EVIDENCE—DOCUMENTARY PROOF OF MARKET VALUE OF PERSONAL PROPERTY—ADMISSIBILITY—RELATIONSHIP TO ORAL TESTIMONY BASED THEREON—Even the most casual observer of modern business practices will accede to the general proposition that the most accurate reflection of market value for many commodities can be found in documentary sources. This is particularly true of those commodities of an homogeneous character which are sold in well-organized markets characterized by price uniformity and free access to price information. Of them, it may well be said that no more satisfactory evidence of market value than the newspaper market reports can be found, barring the possibility of personal observation of “the board” at the market itself. However, the average businessman will also rely on documentary indications of market value, such as price lists and catalogs, when dealing with articles of manufacture which, because of style variations or other peculiar characteristics, are not readily interchangeable with other articles of like design and manufacture. In addition, the business world will attach great significance to the influence of the document on the market in determining the credibility of price lists and similar docu-

ments where it appears that prices may be influenced by monopolistic control. It is proposed to examine herein the competency of all such documents as evidence of market value and to inquire as to the circumstances which control their admissibility.

The courts first recognized the possibilities of documentary evidence in settling the issue of market value during the 1860's, when the first significant decisions with reference to the competency of such evidence were reported.¹ All of these early cases treated the documents as hearsay but assigned various grounds for admissibility notwithstanding the exclusionary hearsay rule. The document might be regarded as a regular business entry² or an admission of the opposite party.³ Again, it was reasoned that independent grounds for the admission of documentary evidence of market value existed in the general acceptance by the business world of these criteria of value.⁴ Regardless of the specific ground for admissibility adopted, these early cases aimed at avoiding undue complication in trial of the issue and unnecessary expense to the litigants. As Justice Swayne, speaking for the United States Supreme Court, stated:

"While courts, in the administration of the law of evidence, should be careful not to open the door to falsehood, they should be equally careful not to shut out truth. They should not encumber the law with rules which will involve labor and expense to the parties, and delay the progress of the remedy—itsself a serious evil—without giving any additional safeguard to the interests of justice."⁵

Subsequently, the competency of documentary evidence of the market value of personal property has been examined in all but a few of the appellate jurisdictions of the United States and, with but one exception,⁶ the courts have indicated their willingness to receive such

¹ In re Cliquot's Champagne, 3 Wall. (70 U.S.) 114 (1865); In re Fennerstein's Champagne, 3 Wall. (70 U.S.) 145 (1865); Sisson v. Cleveland & T. R. Co., 14 Mich. 489 (1866); Terry v. McNeil, 58 Barb. (N.Y.) 241 (1870). But see Ferris v. Sutcliff, 1 ALB. L. J. 238 (1870).

² In re Cliquot's Champagne and In re Fennerstein's Champagne, *ibid.*

³ In re Cliquot's Champagne, *ibid.*

⁴ Sisson v. Cleveland & T. R. Co., 14 Mich. 489 (1866).

⁵ In re Cliquot's Champagne, 3 Wall. (70 U.S.) 114 at 141 (1865). See also Alfonso v. United States, (C.C. 1st, 1943) 2 Story 421.

⁶ Whitney v. Thacher, 117 Mass. 523 (1875), admitted testimony based in part on documents not produced in evidence upon the theory that it was not necessary that testimony involving opinions as to market value be based upon primary evidence. But documentary evidence as such was rejected in National Bank of Commerce v. City of New Bedford, 175 Mass. 257, 56 N.E. 288 (1900), upon the ground that the persons furnishing the data in the documents could have been called to testify. The same

evidence, though subject in some instances to certain qualifications to be noted hereafter. Before investigating further the circumstances under which the documents are received, it is necessary to recognize the inter-relationship of the decisions passing upon the admissibility of the documents and those passing upon the admissibility of oral testimony based in whole or in part upon documents not produced in evidence, since decisions in either category have been cited, oftentimes indiscriminately, by courts and commentators in discussing the competency of the documents themselves.

A. Oral Testimony Based Upon Documentary Sources

Within but a brief time after the first decisions on the admissibility of documents themselves in proof of market value, the courts were called upon to consider the competency of oral testimony based upon such documents. In the first decisions on this point, two divergent but non-exclusive lines of thought appeared and the divergence remains to the present time. On the one hand, it was indicated that the competency of oral testimony based on documentary sources would depend upon the qualification of the witness to give opinion evidence,⁷ while, on the other hand, the admission of the oral testimony was made to depend upon the admissibility of the document itself, had it been offered.⁸ These two criteria were treated, quite properly, as overlapping so that oral testimony as to market value, based upon documentary sources, might be admissible on either⁹ or both¹⁰ grounds.

In the course of the last seventy-five years, a number of courts considering the question have indicated a willingness to determine the admissibility of oral testimony (founded solely or primarily on documentary sources) with reference to the admissibility of the documents themselves.¹¹ The decisions of a few jurisdictions fail to indicate which

line of reasoning was followed in *Doherty v. Harris*, 230 Mass. 341, 119 N.E. 863 (1918).

⁷ *Smith v. North Carolina R. Co.*, 68 N.C. 107 (1873); *Whitney v. Thacher*, 117 Mass. 523 (1875). See note 6, supra.

⁸ *Cleveland & T. R. Co. v. Perkins*, 17 Mich. 296 (1868).

⁹ *Fairley v. Smith*, 87 N.C. 367 (1882); *Fountain v. Wabash R. Co.*, 114 Mo. App. 676, 90 S.W. 393 (1905).

¹⁰ *Central R. & B. Co. v. Skellie*, 86 Ga. 686; 12 S.E. 1017 (1891).

¹¹ *Alabama*: *Kentucky Refining Co. v. Conner*, 145 Ala. 664, 39 S. 728 (1905). *Arkansas*: *St. Louis & S. F. R. Co. v. Pearce*, 82 Ark. 353, 101 S.W. 760, (1907); *St. Louis, I. M. & S. R. Co. v. Laser*, 120 Ark. 119, 179 S.W. 189 (1915); *Missouri*: *P. R. Co. v. Henderson*, 157 Ark. 43, 247 S.W. 1070 (1923). *Illinois*: *Pass v. Briggs & Turivas*, 231 Ill. App. 214 (1923). *Iowa*: *Wilbur v. Buckingham*, 153 Iowa 194, 132 N.W. 960 (1911). *Michigan*: *Cleveland & T. R. Co. v. Perkins*, 17 Mich. 296 (1868). *North Carolina*: *Fairley v. Smith*, 87 N. C. 367 (1882); *Suttle v. Falls*, 98 N.C. 393, 4 S.E. 541 (1887); *Commander v. Smith*, 182 N.C. 159, 134 S.E. 412 (1926). *North Dakota*: *Schnitz Bros. v. Bolles & Rogers Co.*, 48 N.D. 673, 186 N.W.

criteria they have used,¹² while still other jurisdictions have stated clearly that oral testimony is incompetent when it is based solely on documentary sources on the startlingly incompatible grounds that the documents themselves would not be admissible because they are not the best evidence¹³ or that the documents themselves are the best evidence.¹⁴

It is submitted that the proper treatment of oral testimony based solely on documentary sources is that last indicated, namely, that the oral testimony is incompetent because the documents themselves are the best evidence of their contents.¹⁵ Such a ruling leaves ample ground for use of documentary sources by experts but eliminates the mere parroting of a document by an otherwise unqualified witness and focuses attention on the credibility of the document itself.¹⁶ It may be that many of the courts cited herein as stating a contrary rule did not intend to go this far but were merely presenting a collateral ground for admission or exclusion of oral testimony at the same time that they were considering the qualifications of a witness to offer opinion evidence. In any event, the vast majority of decisions in the last twenty-five years on the proof of market value by means of documentary sources have involved the use of the documents themselves as evidence and not as

96 (1921). *Oklahoma*: *Midland V. R. Co. v. Adkins*, 36 Okla. 15, 127 P. 867 (1912). *Rhode Island*: *National Cash Register Co. v. Underwood*, 56 R.I. 379, 185 A. 909 (1936). *Texas*: *International & G. N. R. Co. v. Dimmitt County. Pasture Co.*, 5 Tex. Civ. App. 186, 23 S.W. 754 (1893); *Gulf, C. & S. F. R. Co. v. Patterson*, 5 Tex. Civ. App. 523, 24 S.W. 349 (1893); *Texas & P. R. Co. v. Donovan*, 86 Tex. 378, 25 S.W. 10 (1894); *Houston & T. C. R. Co. v. Williams*, (Tex. Civ. App. 1895) 31 S.W. 556, suggests that the witness must be qualified but holds that knowledge based on market reports is sufficient qualification. Similarly, *St. Louis S. W. R. Co. of Texas v. Barnes*, (Tex. Civ. App. 1903) 72 S.W. 1941. *Virginia*: *Norfolk & W. R. Co. v. Reeves*, 97 Va. 284, 33 S.E. 606 (1899). See also annotation, "Newspapers and trade journals as evidence of market price or quotations," 43 A.L.R. 1193 at 1200 (1926).

¹² *Georgia*: *Central R. & B. Co. v. Skellie*, 86 Ga. 686, 12 S.E. 1017 (1891); *Erk v. Simpson*, 137 Ga. 608, 73 S.E. 1065 (1912); *Pilcher & Dillon v. Smith*, 31 Ga. App. 606, 121 S.E. 701 (1924). *Maryland*: *Morris v. Columbia Iron Wks. & Dry Dock Co.*, 76 Md. 354, 25 A. 417 (1892). *Montana*: *Morgan v. Hines*, 65 Mont. 306, 211 P. 778 (1922). *New York*: *Bunte v. Schumann*, 46 Misc. 593, 92 N.Y. S. 806 (1905). The court's language is suggestive of the idea that the testimony would have been inadmissible even if the document itself had been shown to be admissible. See note 14, *infra*.

¹³ *Massachusetts*, see note 6, *supra*.

¹⁴ *Missouri*: *Klingenberg & Son v. Davis*, 219 Mo. App. 1, 268 S.W. 99 (1925). *Federal*: *The Union Pacific R. Co. v. Perrine*, (C.C.A. 8th, 1920) 267 F. 657.

¹⁵ 3 WIGMORE, TREATISE ON EVIDENCE, 3d ed., § 719 (1940). See also note on *Commander v. Smith*, 192 N.C. 159, 134 S.E. 412 (1926), appearing in 25 MICH. L. REV. 464 (1927).

¹⁶ Cf. *St. Louis, I. M. & S. R. Co. v. Laser*, 120 Ark. 119, 179 S.W. 189 (1915).

sources for oral testimony, which leads to the conclusion that, in practice at least, the profession has adopted the better alternative.

For present purposes, the confusion noted in the earlier cases is significant in that, as already stated, these decisions have been cited indiscriminately without reference to the distinction between documentary and oral evidence. With that general practice, it becomes important to note that consideration of the competency of documentary evidence of market value in connection with the admissibility of oral testimony presents the question of the admission of the documents under circumstances which involve (1) an extremely weak factual situation to back up any bold stand on the admissibility of documentary evidence since the oral testimony is already once removed from the documents being attacked as hearsay and (2) an overlapping of two types of proof, opinion evidence and documentary evidence, with the result that the decision may go off on either ground and yet contain sweeping *dicta* with reference to the other.

B. *Prior Showing of Trustworthiness*

The ink was scarcely dry on the *Sisson* and the *Champagne* decisions¹⁷ when consideration was given to the nature of the prior showing of trustworthiness, if any, which was necessary to the introduction of a document in proof of market value. The case of *Whelan v. Lynch*¹⁸ set forth the view of the New York Court of Appeals as to the requisite foundation in these words:

"It is not plain how a newspaper, containing the price current of merchandise, of itself, and aside from any explanation as to the authority from which it was obtained, can be made legitimate evidence of the facts stated. The accuracy and correctness of such publications depend entirely upon the sources from which the information is derived. Mere quotations from other newspapers, or information obtained from those who have not the means of procuring it, would be entitled to but little if any weight. The credit to be given to such testimony must be governed by extrinsic evidence, and cannot be determined by the newspaper itself, without some proof of knowledge of the mode in which the list was made out. As there was no such testimony, the evidence was entirely incompetent, and should not have been received."¹⁹

A showing of source and method of compilation would occasion no

¹⁷ *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489 (1866); *In re Cliquot's Champagne*, 3 Wall. (70 U.S.) 114 (1865); *In re Fennerstein's Champagne*, 3 Wall. (70 U.S.) 145 (1865). See note 1, *supra*.

¹⁸ 60 N.Y. 469 (1875). See also, *Gibson v. Ebert*, 52 Mo. 260 (1873); *Vogt v. Cope*, 66 Cal. 31, 4 P. 915 (1884); *Norfolk & W. R. Co. v. Reeves*, 97 Va. 284, 33 S.E. 606 (1899).

¹⁹ 60 N.Y. 469 at 474 (1875).

great difficulty when the document originated at or near the place of trial, which was undoubtedly most frequently the case at the time *Whelan v. Lynch* was decided. However, such a requirement would present almost insuperable obstacles when the nature of the case was such that market value at a distant point was in issue and it became necessary to use documents originating at that point or when the market covered a large area with the result that one or two market publications might serve an entire region or even the whole country.²⁰ The obvious difficulties of proof under such circumstances brought forth the proposition that documentary evidence of market value was competent when shown to be generally relied upon by the trade dealing in the particular article or commodity in question.²¹ This approach is best formulated in *Mt. Vernon Brewing Co. v. Teschner*²² in which the Maryland court subscribed to the following statement:

"It is undoubtedly the safe and proper rule to require some evidence to show either how the newspaper obtains its information, or that those dealing in the article in question rely on such newspaper for information as to its market value. It would not, however, reflect credit upon the law to hold that Courts should not admit, as *prima facie* evidence of market values of articles, newspapers which are accepted by those dealing in them as sufficiently accurate and correct to base their dealings on. . . . We are of opinion, therefore, that if it be shown that a newspaper offered in evidence is accepted by the trade as trustworthy and reliable in stating the market price of the article in question, it should be admitted without requiring evidence of how the information published is obtained, but unless there is some testimony that it is so accepted by the trade, Courts should require evidence as to how the information was obtained by the publishers."²³

Although the requirement of a showing of source and method of compilation has been called into question in the state of its origin,²⁴ a

²⁰ See, for example, *In re Cliquot's Champagne*, 3 Wall. (70 U.S.) 114 (1865); *Chicago, B. & Q. R. Co. v. Todd*, 74 Neb. 712, 105 N.W. 83 (1905); *Mt. Vernon Brewing Co. v. Teschner*, 108 Md. 158, 69 A. 702 (1908); *Kibler v. Caplis*, 140 Mich. 28, 103 N.W. 531 (1905); *Wilbur v. Buckingham*, 153 Iowa 194, 132 N.W. 960 (1911); *Marden, Orth & Hastings Co. v. Trans-Pacific Corp.*, 109 Wash. 296, 186 P. 884 (1920).

²¹ *Farley v. Smith*, 87 N.C. 367 (1882); *Mt. Vernon Brewing Co. v. Teschner*, 108 Md. 158, 69 A. 702 (1908). Later cases containing excellent discussions on this point include *California Sugar & White Pine Co. v. Jackson & Co.*, 33 N.M. 117, 263 P. 504 (1928), and *Bushnell v. Curtis*, 236 Ill. App. 89 (1925).

²² 108 Md. 158, 69 A. 702 (1908).

²³ *Id.* at 168.

²⁴ *Whelan v. Lynch*, 60 N.Y. 469 (1875) (see notes 18 and 19, *supra*) distinguished the case of *Terry v. McNeil*, 58 Barb. (N.Y.) 241 (1870). Subsequent

few courts have yet to depart from a strict application of the doctrine.²⁵ However, a clear majority of those later cases discussing the question have adopted a showing of reliance as an alternative test.²⁶ But this is not to say that all or even a majority of the courts have expressed themselves to the effect that a prior showing of trustworthiness is always necessary. Relatively few of the decisions heretofore cited have ruled out documentary evidence on the sole ground that it was not shown to

New York decisions have modified *Whelan v. Lynch* considerably. In *Burns Mfg. Co. v. Clinchfield Products Corp.*, 189 App. Div. 569, 178 N.Y. S. 483 (1919), the court adopted a test of general reliance without commenting on *Whelan v. Lynch*. In *Watts v. Phillips-Jones Corporation*, 211 App. Div. 523, 207 N.Y. S. 493 (1925), the court applied a test of general reliance and limited *Whelan v. Lynch* as not stating the only basis for qualifying a document in proof of market value. In the later case of *Von Reitzenstein v. Tomlinson*, 249 N.Y. 60, 162 N.E. 584 (1928), the court of appeals expressed a preference for the test of general reliance.

²⁵ *California*: *Vogt v. Cope*, 66 Cal. 31, 4 P. 915 (1884); in a later case, *Meer v. Cerati*, 53 Cal. App. 497, 200 P. 501 (1921), the point was not raised in a decision holding documentary evidence of market value to be relevant. *Colorado*: *Willard v. Mellor*, 19 Colo. 534, 36 P. 148 (1894). *Missouri*: *Gibson v. Ebert*, 52 Mo. 260 (1873); *Seligman v. Rogers*, 113 Mo. 642, 21 S.W. 94 (1893); *Fountain v. Wabash R. Co.*, 114 Mo. App. 676, 90 S.W. 393 (1905). But see *Klingenberg & Son v. Davis*, 219 Mo. App. 1, 268 S.W. 99 (1925). *New Jersey*: *E. Clemens Horst Co. v. Peter Breidt City Brewery*, 94 N.J.L. 230, 109 A. 727 (1920); *Crowley v. E. Homan Co.*, (N. J. Sup. Ct. 1925) 130 A. 372. *North Dakota*: *Schnitz Bros. v. Bolles & Rogers Co.*, 48 N.D. 673, 186 N.W. 96 (1921). *Utah*: *Baglin v. Earl Eagle Mining Co.*, 54 Utah 572, 184 P. 190 (1919). *Virginia*: *Norfolk & W. R. Co. v. Reeves*, 97 Va. 284, 33 S.E. 606 (1899).

²⁶ *Arizona*: *Atlantic Natl. Bank v. Moore*, 29 Ariz. 346, 241 P. 601 (1925); *Atlantic Natl. Bank v. Korrick*, 29 Ariz. 468, 242 P. 1009 (1926). *Arkansas*: *St. Louis & S. F. R. Co. v. Pearce*, 82 Ark. 353, 101 S.W. 760 (1907); *St. Louis, I. M. & S. R. Co. v. Laser*, 120 Ark. 119, 179 S.W. 189 (1915); *Missouri P. R. Co. v. Hendeison*, 157 Ark. 43, 247 S.W. 1070 (1923). *Connecticut*: *Henry v. Kopf*, 104 Conn. 73, 131 A. 412 (1925). *Idaho*: *State v. Jensen*, 47 Idaho 785, 280 P. 1039 (1929). *Illinois*: *Acme-Evans Co. v. Hunter*, 194 Ill. App. 542 (1915); *Pass v. Briggs & Turivas*, 231 Ill. App. 214 (1923); *Bushnell v. Curtis*, 236 Ill. App. 89 (1925). *Iowa*: *Wilbur v. Buckingham*, 153 Iowa 194, 132 N.W. 960 (1911). *Kentucky*: *Perry v. Reuss*, 204 Ky. 359, 264 S.W. 750 (1924). *Louisiana*: *Hafner Mfg. Co. v. Lieber Lumber Co.*, 127 La. 348, 53 S. 646 (1910). *Maryland*: *Mt. Vernon Brewing Co. v. Teschner*, 108 Md. 158, 69 A. 702 (1908); *Jones v. Ortel*, 114 Md. 205, 78 A. 1030 (1910). *Minnesota*: *Whitcomb v. Auto Insurance Co. of Hartford*, 167 Minn. 362, 209 N.W. 27 (1926). *New Mexico*: *California S. & W. Pine Co. v. Jackson & Co.*, 33 N. M. 117, 263 P. 504 (1928). *New York*: *Burns Mfg. Co. v. Clinchfield Products Corp.*, 189 App. Div. 569, 178 N.Y. S. 483 (1919); *Watts v. Phillips-Jones Corp.*, 211 App. Div. 523, 207 N.Y.S. 493 (1925); *Von Reitzenstein v. Tomlinson*, 249 N.Y. 60, 162 N.E. 584 (1928). *North Carolina*: *Mosely v. Johnson*, 144 N.C. 257, 56 S.E. 922 (1907). *Texas*: *Houston Packing Co. v. Griffith*, (Tex. Civ. App. 1914) 164 S.W. 431. *Washington*: *Marden, Orth & Hastings Co. v. Trans-Pacific Corp.*, 109 Wash. 296, 186 P. 884 (1920); *Meyer Bros. Drug Co. v. Callison*, 120 Wash. 378, 207 P. 683 (1922); *Cron & Dehn v. Chelan Packing Co.*, 158 Wash. 167, 290 P. 999 (1930). And see note on the Arizona cases cited above, 39 HARV. L. REV. 885 (1926).

be trustworthy,²⁷ while many jurisdictions have not gone farther than to hold that documentary proof of market value which has been shown to be trustworthy is clearly admissible.²⁸ Some of the cases using the strongest language as to the necessity of a preliminary showing of trustworthiness have involved affirmative showings of unreliability by the opposing party.²⁹ In these instances, it would seem that conflicting testimony as to reliability should be considered in connection with the credibility and not the admissibility of the evidence.³⁰ Finally, no summary of the decisions on the question of a prerequisite showing would be complete without mention of the several jurisdictions in which documentary evidence as to market value of personal property has consistently been admitted without a decision as to the necessity of a prior showing of trustworthiness and, in many cases, accompanied by language which raises a question whether any such showing has been made or required.³¹

²⁷ To the best of the author's knowledge after a careful perusal of the cases, those decisions still unquestioned, which have so held are *E. Clemens Horst Co. v. Peter Breidt Brewing Co.*, 94 N.J. L. 230, 109 A. 727 (1920); *Crowley v. E. Homan Co.*, (N.J. Sup. 1925) 130 A. 372; *Schnitz Bros. v. Bolles & Rogers Co.*, 48 N.D. 673, 186 N.W. 96 (1921); *Norfolk & W. R. Co. v. Reeves*, 97 Va. 284, 33 S.E. 606 (1899); *Perry v. Reuss*, 204 Ky. 359, 264 S.W. 750 (1924); *Jones v. Ortel*, 114 Md. 205, 78 A. 1030 (1910).

For an interesting discussion suggesting that the requirement of a prior showing of trustworthiness is a "minority" rule, see *Columbian Peanut Co. v. Pope*, 69 Ga. App. 26, 24 S.E. (2d) 710 (1943).

²⁸ Arkansas, Connecticut, Idaho, Illinois, Louisiana, Minnesota, New Mexico, Texas and Washington; see cases cited in note 26, supra.

²⁹ *Atlantic Natl. Bank v. Moore*, 29 Ariz. 346, 241 P. 601 (1925); *Atlantic Natl. Bank v. Korrick*, 29 Ariz. 468, 242 P. 1009 (1926); *Baglin v. Earl-Eagle Mining Co.*, 54 Utah 572, 184 P. 190 (1919); *F. W. Brockman Co. v. Aaron*, 145 Mo. App. 307, 130 S.W. 116 (1910).

³⁰ *St. Louis, I. M. & S. R. Co. v. Laser*, 120 Ark. 119, 179 S. W. 189 (1915); *Nelson v. Union P. R. Co.*, 116 Kan. 35, 225 P. 1065 (1924); *Houston Packing Co. v. Griffith*, (Tex. Civ. App. 1914) 164 S.W. 431; *Hard & Rand v. Biston Coffee Co.*, (C.C.A. 8th, 1930) 41 F. (2d) 625; *Caten v. Salt City Movers & Storage Co.*, (C.C.A. 2d, 1945) 149 F. (2d) 428.

³¹ *Kansas*: *Ray v. Missouri, K. & T. R. Co.*, 90 Kan. 244, 133 P. 847 (1913); *Nelson v. Union P. R. Co.*, 116 Kan. 35, 225 P. 1065 (1924); *Webber v. Umback*, 125 Kan. 117, 263 P. 786 (1928). *Michigan*: *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489 (1866); *Cleveland & T. R. Co. v. Perkins*, 17 Mich. 296 (1868); *Peter v. Thickett*, 51 Mich. 589, 17 N.W. 68 (1883); *Aulls v. Young*, 98 Mich. 231, 57 N.W. 119 (1893); *Kibler c. Caplis*, 140 Mich. 28, 103 N.W. 531 (1905); *Tri-State Milling Co. v. Breisch*, 145 Mich. 232, 108 N.W. 657 (1906); *Jordan v. Miller*, 232 Mich. 8, 204 N.W. 708 (1925). *Mississippi*: *Yazoo & M. V. R. Co. v. M. Levy & Sons*, 141 Miss. 196, 106 S. 525 (1925). *Nebraska*: *Chicago, B. & Q. R. Co. v. Todd*, 74 Neb. 712, 105 N.W. 83 (1905); *Fahey v. Updike Elevator Co.*, 102 Neb. 249, 166 N.W. 622 (1918); *Trennt v. Chicago, B. & Q. R. Co.*, 107 Neb. 406, 186 N.W. 322 (1922). The case of *Pierce v. Miller*, 107 Neb. 851, 187 N.W. 105 (1922), ruled out a weekly newspaper which was affirmatively shown to have published

No question is here raised that a prior showing of trustworthiness or some substitute therefor is not the "safe and proper rule." However, as will be seen presently, it is doubtful that the means of qualifying a document have been or should be limited to a showing of source or of general reliance. Further, it is suggested that rare indeed is the case where failure to require such a showing should constitute reversible error. It clearly appears in many cases that the showing offered consisted only of testimony by the party tendering the document³² and it may well be doubted that such a showing constitutes any greater guarantee of trustworthiness than the document itself.³³ Consider that the opposing party has equal access to price information and equal opportunity to introduce evidence on the point; should we so far adopt the adversary theory of litigation that he can win the point without any move except to object? Certainly, little can be said in support of those scattered cases which put the time and money involved in the trial of an entire lawsuit at naught or limit recovery on an admittedly valid cause of action to nominal damages merely for failure of such a showing.³⁴

C. Hearsay or Non-Hearsay

The objection uniformly raised against documentary proof of market value is that it is hearsay and, therefore, inadmissible. As heretofore indicated, the earliest decisions on the competency of such evidence conceded the hearsay point but admitted the documents (or testimony based thereon) notwithstanding the objection. The courts themselves did not attempt any general formulation of the principle

quotation furnished by only one dealer. *South Carolina*: Kirkpatrick v. Hardeman, 123 S.C. 21, 115 S.E. 905 (1823). *Federal*: Virginia v. West Virginia, 238 U.S. 202, 35 S. Ct. 795 (1915); Caten v. Salt City Movers and Storage Co., (C.C.A. 2d, 1945) 149 F. (2d) 428. This last cited case is a clear holding that a dealer's letter stating market prices is admissible and must be taken as an extension of some of the earlier federal cases which, while holding documentary evidence as to market value admissible, indicated that a showing of trustworthiness had been made. Rice v. Eisner, (C.C.A. 2d, 1926) 16 F. (2d) 358; The Blandon, (D.C. N.Y. 1929) 39 F. (2d) 933; Coplin v. United States, (C.C.A. 9th, 1937) 88 F. (2d) 652.

³² See, for example, St. Louis, I.M. & S. R. Co. v. Laser, 120 Ark. 119, 179 S.W. 189 (1915); Houston Packing Co. v. Griffith, (Tex. Civ. App. 1914) 164 S.W. 431. See also 39 HARV. L. REV. 885 (1926).

³³ See the analysis of Burns Mfg. Co. v. Clinchfield Products Corp., 189 App. Div. 569, 178 N.Y. S. 483 (1919), contained in Watts v. Phillips-Jones Corp., 211 App. Div. 523, 207 N.Y. S. 493 at 499 (1925).

³⁴ Vogt v. Cope, 66 Cal. 31, 4 P. 915 (1884); Kentucky Refining Co. v. Conner, 145 Ala. 664, 39 S. 728 (1905); Henderson v. Wabash R. Co., 126 Mo. App. 610, 105 S.W. 13 (1907); Schnitz v. Bolles & Rogers Co., 48 N.D. 673, 186 N.W. 96 (1921); Jones v. Ortel, 114 Md. 205, 78 A. 1030 (1910); Union P. R. Co. v. Perrine, (C.C.A. 8th, 1920) 267 F. 657.

upon which the competency of the documents was founded but the commentators on the law of evidence soon took up that burden. Greenleaf, while not treating the matter specifically, developed an exception to the hearsay rule relating to matters of public and general interest which was cited approvingly by a number of early decisions.³⁵ Wharton stated that the principle sustaining the admission of regular business entries as an exception to the hearsay rule had specific application to the competency of documentary proofs of market value.³⁶ On the other hand, Chamberlayne took the view that the admission of documentary proofs of market value should not be considered an exception to the hearsay rule in that they were acceptable as circumstantial evidence of a fact in issue and came within the broader principle described as the "relevancy of regularity."³⁷

Reading these early treatments, one cannot but be impressed that the basic difference is primarily one in formulating the rule with substantial agreement as to the underlying principles on which the rule should be based. The issue, simply stated, is whether the hearsay rule should be treated as the principle itself or the exception. As stated by Thayer,

"A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible. To any such main rule there would, of course, be exceptions; but as in the case of other exceptions so in the hearsay prohibition, this classification would lead to a restricted application of them, while the main rule would have a freer course."³⁸

However appealing Thayer's refreshing approach may have been, the fact remains that Wigmore, pre-eminent among modern authorities in the field of evidence, while concurring that a rigorous application of the hearsay rule and strict limitation of its exceptions gives no greater guarantee of the truth and certainly is an obstruction to the smooth progress of trial,³⁹ formulates the hearsay rule as the main principle

³⁵ 1 GREENLEAF, TREATISE ON EVIDENCE, 14th ed., §§ 127, 128 (1883). A similar but more specific treatment is found in 1 ELLIOTT, TREATISE ON THE LAW OF EVIDENCE, § 419 (1904), and 2 id., § 1302 (1904).

³⁶ 1 WHARTON, COMMENTARY ON EVIDENCE, 2d ed., § 674 (1879).

³⁷ 3 CHAMBERLAYNE, TREATISE ON EVIDENCE, § 2099c (1912). An earlier treatment by the same author is contained in BEST PRINCIPLES OF EVIDENCE, Am. ed. from the 7th Eng. ed., by C. F. Chamberlayne, 466 (1883).

³⁸ THAYER, PRELIMINARY TREATISE ON EVIDENCE 522 (1898). A modern development of the basic principles set forth by Thayer is found in MCKELVEY, HANDBOOK OF THE LAW OF EVIDENCE, 5th ed., §§ 207, 209 (1944).

³⁹ 5 WIGMORE, TREATISE ON EVIDENCE IN TRIALS AT COMMON LAW, 3d ed., § 1427 (1940).

and develops some fourteen exceptions to it.⁴⁰ The American Law Institute's Committee on Evidence, while disagreeing with Wigmore's assertion that a detailed statement of the existing law of evidence was necessary in formulating a code of evidence,⁴¹ concurred in the treatment of the hearsay rule as a main principle and formulated well established categories of evidence as exceptions to it.⁴² The statement of the rule as to the admissibility of documentary evidence in proof of market value by Wigmore and by the American Law Institute differs primarily in the detail with which the rule is set forth.⁴³

It must be recognized that the courts are wont to think in the pattern followed by Wigmore and the American Law Institute. Modern decisions on the competency of documentary evidence in proof of market value are almost as one in citing with approval the classification of such documentary evidence with other commercial documents as an exception to the hearsay rule.⁴⁴ While the future may hold a rephrasing of the hearsay rule so as to eliminate the necessity for this and other exceptions, it seems apparent that no such far-reaching change is imminent.

⁴⁰ *Id.*, § 1426.

⁴¹ AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE xii-xvi (1942); AMERICAN LAW INSTITUTE, CODE OF EVIDENCE, Tentative Draft No. 1, p. 111-115 (1940); Wigmore, "The American Law Institute Code of Evidence: A Dissent," 28 A.B.A.J. 23 (1942).

⁴² AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE 36-50 and rule 502, p. 231 (1942).

⁴³ *Id.*, rule 528, p. 293; WIGMORE, CODE OF EVIDENCE, 3d ed., rule 166, p. 316 (1942). See also 6 WIGMORE, TREATISE ON EVIDENCE, 3d ed., §§ 1702, 1704 (1940) and 2 JONES, THE LAW OF EVIDENCE, § 582 (1938).

⁴⁴ Atlantic Natl. Bank v. Moore, 29 Ariz. 346, 241 P. 601 (1925); St. Louis & S. F. R. Co. v. Pearce, 82 Ark. 353, 101 S. W. 760 (1907); Henry v. Kopf, 104 Conn. 73, 131 A. 412 (1925); Columbian Peanut Co. v. Pope, 69 Ga. App. 26, 24 S.E. (2d) 710 (1943); Wilbur v. Buckingham, 153 Iowa 194, 132 N.W. 960 (1911); Mt. Vernon Brewing Co. v. Teschner, 108 Md. 158, 69 A. 702 (1908); California S. & W. Pine Co. v. Jackson & Co., 33 N.M. 117, 263 P. 504 (1928); Mosely v. Johnson, 144 N.C. 257, 56 S.E. 922 (1907); Schnitz Bros. v. Bolles & Rogers Co., 48 N.D. 673, 186 N.W. 96 (1921); National Cash Register v. Underwood, 56 R.L. 379, 185 A. 909 (1936); Marden, Orth & Hastings Co. v. Trans-Pacific Corp., 109 Wash. 296, 186 P. 884 (1920).

A few jurisdictions have cited with approval Chamberlayne's treatment of documentary evidence in proof of market value as being admissible independently of the hearsay rule; Bushnell v. Curtis, 236 Ill. App. 89 (1925); Houston Packing Co. v. Griffith, (Tex. Civ. App. 1914) 164 S.W. 431; Security Motors Co. v. Chestnut, (Tex. Civ. App. 1922) 244 S.W. 385. The decisions in Kansas, Michigan, Nebraska, and the federal courts would also seem to be more consistent with this approach than with the treatment as an exception to the hearsay rule; see cases cited for these jurisdictions, *supra*, note 31.

D. *Scope of the Exception*

The natural tendency, noted by Thayer, is to restrict a rule which is formulated as an exception to another principle. Thus, it is stated that newspapers and trade journals containing market reports or quotations are admissible in proof of market value as an exception to the hearsay rule.⁴⁵ While the vast majority of the cases have dealt with just such documents, the statement does not take account of those decisions holding competent documents (or testimony based thereon) such as privately published market reports and guides,⁴⁶ trade association price lists,⁴⁷ manufacturer's or dealer's price lists and catalogs,⁴⁸ and even invoices and letters setting forth price information.⁴⁹ Most of these decisions are founded on practical considerations which tend to liberalize the exception without destroying the effectiveness of the main principle. A brief analysis of two such factors, namely, (1) the nature of the commodity and (2) the nature of the issue, may serve to emphasize this realistic treatment of what is, after all, an eminently practical problem.

(1) *The nature of the commodity.* By far the largest number of the cases considered as being within the exception have involved commodities of an homogeneous character which are relatively uniform in grading and quality and are characterized by a high degree of price uniformity. Many of these commodities are regularly bought and sold on a well organized market or exchange. Of them, it has been said:

"In determining the market price of commodities of fluctuating value dealt in upon a recognized exchange, the courts receive as evidence proof of actual sales made on such exchange, for these prices are the best possible evidence of market value."⁵⁰

⁴⁵ *Atlantic National Bank v. Moore*, 29 Ariz. 346, 241 P. 601 (1925); *Columbian Peanut Co. v. Pope*, 69 Ga. App. 25, 24 S.E. (2d) 710 (1943); *National Cash Register Co. v. Underwood*, 56 R.I. 379, 185 A. 909 (1936); *Marden, Orth & Hastings Co. v. Trans-Pacific Corp.*, 109 Wash. 296, 186 P. 884 (1920).

⁴⁶ *Henry v. Kopf*, 104 Conn. 73, 131 A. 412 (1925); *Whitcomb v. Auto Insurance Co. of Hartford*, 167 Minn. 362, 209 N.W. 27 (1926).

⁴⁷ *Hafner Mfg. Co. v. Lieber Lumber & Shingle Co.*, 127 La. 348, 53 S. 646 (1910); *Morris v. Columbia Iron Wks. & Dry Dock Co.*, 76 Md. 354, 25 A. 417 (1892).

⁴⁸ *Latham v. Shipley*, 86 Iowa 543, 53 N.W. 342 (1892); *Wilbur v. Buckingham*, 153 Iowa 194, 132 N.W. 960 (1911); *California S. & W. Pine Co. v. Jackson & Co.*, 33 N. M. 117, 263 P. 504 (1928); *Security Motor Co. v. Chestnut*, (Tex. Civ. App. 1922) 244 S.W. 385; *In re Cliquot's Champagne*, 3 Wall. (70 U.S.) 114 (1865); *In re Fennerstein's Champagne*, 3 Wall. (70 U.S.) 145 (1865).

⁴⁹ *Alfonso v. United States*, (C.C. 1st, 1843) 2 Story 421; *Baltimore American Insurance Co. v. Pecos Mercantile Co.*, (C.C.A. 10th, 1941) 122 F. (2d) 143; *Caten v. Salt City Movers & Storage Co.*, (C.C.A. 2d, 1945) 149 F. (2d) 428.

⁵⁰ *Peschke v. Wright*, 93 Misc. 154, 156 N.Y. S. 773 at 777 (1916). See, also, *Howell v. Hines*, 298 Mo. 282, 249 S.W. 924 (1923).

Since the aggregate of transactions upon such exchanges is presented in the form of market reports, it follows that such reports, once qualified, will be readily accepted by the courts,⁵¹ providing always that they are relevant to the market price of the commodity at the time and place in question.⁵² Indeed it has been suggested that the courts will take judicial notice of the reliability of such documents,⁵³ a suggestion which has much merit in those communities or regions which are predominantly devoted to the production and marketing of the commodity in question. Even when no organized exchange exists for commodities in this general classification, the courts will recognize the price uniformity accompanying sales of these commodities and admit trade journal and newspaper market reports in proof of their market value almost as readily.⁵⁴

⁵¹ *Yazoo & M. V. R. Co. v. M. Levy & Sons*, 141 Miss. 196, 106 S. 625 (1925). See, also, *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489 (1866); *Klingenberg & Sons v. Davis*, 219 Mo. App. 1, 268 S.W. 99 (1925); *International & G. N. R. Co. v. Dimmitt County Pasture Co.*, 5 Tex. Civ. App. 186, 23 S.W. 754 (1893).

Commodities bought and sold on an organized exchange were involved in the following cases, in which documentary evidence (or testimony based thereon) was held to be admissible. *Livestock*: *St. Louis & S. F. R. Co. v. Pearce*, 82 Ark. 353, 101 S.W. 760 (1907); *Ray v. Missouri, K. & T. R. Co.*, 90 Kan. 244, 133 P. 847 (1913); *Webber v. Umbach*, 125 Kan. 117, 263 P. 786 (1928); *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489 (1866); *Aulls v. Young*, 98 Mich. 231, 57 N.W. 119 (1893); *Jordan v. Miller*, 232 Mich. 8, 204 N.W. 708 (1925); *Chicago, B. & Q. R. Co. v. Todd*, 74 Neb. 712, 105 N.W. 83 (1905); *Trennt v. Chicago, B. & Q. R. Co.*, 107 Neb. 406, 186 N.W. 322 (1922). *Corporate securities*: *Henry v. Kopf*, 104 Conn. 73, 131 A. 412 (1925); *State v. Jensen*, 47 Idaho 785, 280 P. 1039 (1929); *Bushnell v. Curtis*, 236 Ill. App. 89 (1925); *Mosely v. Johnson*, 144 N.C. 257, 56 S.E. 922 (1907); *Kirkpatrick v. Hardeman*, 123 S.C. 21, 115 S.E. 905 (1923); *King v. Shawver*, (Tex. Civ. App. 1930) 30 S.W. (2d) 930; *Virginia v. West Virginia*, 238 U.S. 202, 35 S. Ct. 795 (1915); *Rice v. Eisner*, (C.C.A. 2d, 1926) 16 F. (2d) 358; *Coplin v. United States*, (C.C.A. 9th, 1937) 88 F. (2d) 652. *Cotton*: *Pilcher & Dillow v. Smith*, 31 Ga. App. 606, 121 S.E. 701 (1924); *Yazoo & M. V. R. Co. v. M. Levy & Sons*, 141 Miss. 199, 106 S. 525 (1925); *Smith v. North Carolina R. Co.*, 68 N.C. 107 (1873). *Grain*: *Acme-Evans Co. v. Hunter*, 194 Ill. App. 542 (1915); *Nelson v. Union P. R. Co.*, 116 Kan. 35, 225 P. 1065 (1924); *Kent v. Miltenberger*, 15 Mo. App. 480 (1884); *Klingenberg & Sons v. Davis*, 219 Mo. App. 1, 268 S.W. 99 (1924); *Fahey v. Updike Elevator Co.*, 102 Neb. 249, 166 N.W. 622 (1918); *Terry v. McNiel*, 58 Barb. (N.Y.) 241 (1870).

⁵² The factors pertaining to relevancy are not treated herein. Some of the cases are collected in the annotation, "Newspapers and trade journals as evidence of market prices or quotations," 43 A.L.R. 1192 (1926).

⁵³ *Yazoo & M. V. R. Co. v. M. Levy & Sons*, 141 Miss. 196, 106 S. 625 (1925).

⁵⁴ Representative commodities of an homogenous character but which do not appear to have been dealt in upon an organized exchange were involved in the following cases, in which documentary evidence of market value (or testimony based thereon) was held to be admissible. *Agricultural products*: *St. Louis, I. M. & S. R. Co. v. Laser*, 120 Ark. 119, 179 S.W. 189 (1915) (fruit); *Central R. & B. Co. v. Skellie*, 86 Ga. 686, 12 S.E. 1017 (1891) (fruit); *Mt. Vernon Brewing Co. v. Teschner*, 108 Md. 158,

However, when the issue involves the market value of commodities which are highly diversified in grade and quality, as is the case with processed and manufactured articles generally, the problem of documentary proof is far more difficult. Normally, prices will vary widely and proof of a particular sale or offer justifies no inference that the price established therein is controlling. Add to these difficulties the fact that the article may be used and the problem of proof is still more complicated. A few decisions would seem to indicate that relevancy is the sole test which should be applied to determine the admissibility of documentary evidence under these circumstances,⁵⁵ a view which commends itself because it speeds the course of litigation, leaving a contrary showing to the adverse party. But even if the court insists on a showing of reliance by persons trading in such commodities, a number of possibilities for such a showing present themselves. The document offered may have been prepared by a trade association or similar organization, which controls the market in large measure, with the result that the document reflects market value as effectively as if it reported sales on an organized exchange.⁵⁶ The commodity may have a proprietary character so strongly ingrained that the price set by the manufacturer or his representative is as much controlling as any could be.⁵⁷ Perhaps the

69 A. 702 (1908) (malt); *Tri-State Milling Co. v. Breisch*, 145 Mich. 232, 108 N.W. 657 (1906) (flour); *Ferebee v. Berry*, 168 N.C. 281, 84 S.E. 262 (1915), (potatoes); *Commander v. Smith*, 192 N.C. 159, 134 S.E. 412 (1926) (peas); *Marden, Orth & Hastings Co. v. Trans-Pacific Corp.*, 109 Wash. 296, 186 P. 884 (1920) (soya bean oil); *Cron & Dehn v. Shelan Packing Co.*, 158 Wash. 167, 290 P. 999 (1930) (dried apple rings); *Alfonso v. United States*, (C.C. 1st, 1943) 2 Story 421 (sugar). *Animal by-products*: *Kibler v. Caplis*, 140 Mich. 28, 103 N.W. 531 (1905) (hides); *Western Wool Commission Co. v. Hart*, (Tex. Sup. 1892) 20 S.W. 131 (wool). *Lumber and lumber products*: *Hafner Mfg. Co. v. Lieber Lumber & Shingle Co.*, 127 La. 348, 53 S. 646 (1910); *Peter v. Thickstun*, 51 Mich. 589, 17 N.W. 68 (1883) (shingles); *California S. & W. Pine Co. v. Jackson & Co.*, 33 N.M. 117, 263 P. 504 (1928) (lumber). *Miscellaneous*: *Pass v. Briggs & Turivas*, 231 Ill. App. 214 (1923) (scrap iron); *Watts v. Phillips-Jones Co.*, 211 App. Div. 523, 207 N.Y. S. 493 (1925) (textiles); *Suttle v. Falls*, 98 N.C. 393, 4 S.E. 541 (1887) (mica); *Meyer Bros. Drug Co. v. Callison*, 120 Wash. 378, 207 P. 683 (1922), (cascara bark); *The Blandon*, (D.C. N.Y. 1929) 39 F. (2d) 933 (nitrate);

⁵⁵ *California S. & W. Pine Co. v. Jackson & Co.*, 33 N.M. 117, 263 P. 504 (1928); *Alfonso v. United States*, (C.C. 1st, 1943) 2 Story 421; *Baltimore American Insurance Co. v. Pecos Mercantile Co.*, (C.C.A. 10th, 1941) 122 F. (2d) 143; *Caten v. Salt City Movers & Storage Co.*, (C.C.A. 2d, 1945) 149 F. (2d) 428. This last decision undoubtedly goes further than any other in holding a letter from a single dealer, setting forth the price of certain glassware, to be admissible.

⁵⁶ *Hafner Mfg. Co. v. Lieber Lumber & Shingle Co.*, 127 La. 348, 53 S. 646 (1910); *Morris v. Columbian Iron Wks. & Dry Dock Co.*, 76 Md. 354, 25 A. 417 (1892).

⁵⁷ *Wilbur v. Buckingham*, 153 Iowa 194, 132 N.W. 960 (1911); *Security Motor Company v. Chestnut*, (Tex. Civ. App. 1922) 244 S.W. 385; *In re Cliquot's Champagne*, 3 Wall. (70 U.S.) 114 (1865). But see *National Cash Register Co. v. Under-*

document may have such an influence on market value as to be competent upon a showing of that influence.⁵⁸ And when the document has been prepared by the adverse party or his representative, it can be argued effectively that it constitutes an admission by the adverse party.⁵⁹ These circumstances indicate that guarantees of trustworthiness may exist even though the documentary proof offered falls outside the categories normally considered to be competent upon the issue of market value and even though it might not be possible to make a showing of trustworthiness in the normally accepted manner.

(2) *The nature of the issue.* The great majority of the decisions as to the competency of documentary evidence in proof of market value have turned on issues of fact wherein a very slight variation in the value accepted as correct would affect the amount of recovery substantially. Ordinarily, the controversy has been as to the difference between market value and contract price or the difference between market value on different dates. Where that is the case, it can easily be understood that the courts would mount careful guard over the admission of all evidence. But the issue is not always thus finely drawn. Even when the difference between market value and contract price is in controversy, the facts of a particular case may indicate that the party offering documentary evidence is seeking only to establish that the market price was above or below a given level and that circumstance may be given weight in passing upon the competency of the document.⁶⁰ When, on the other hand, the recovery sought is for the total value of a small number of articles, there is again room for relaxing the tests of competency,⁶¹ especially when the issue is whether there is any market

wood, 56 R.I. 379, 185 A. 909 (1936), where the proprietary article was used; it may well be questioned whether the manufacturer's list of used values did not exercise such an influence on market value as to be competent evidence.

⁵⁸ *Whitcomb v. Auto Insurance Co. of Hartford*, 167 Minn. 362 N.W. 27 (1926). But see *Puckett v. Patton*, (Tex. Civ. App. 1929) 16 S.W. (2d) 856, and *Forehand v. International & G.N. R. Co.*, (Tex. Civ. App. 1933) 60 S.W. (2d) 830.

⁵⁹ *In re Cliquot's Champagne*, 3 Wall. (70 U.S.) 114 (1865); *Latham v. Shipley*, 86 Iowa 543, 53 N.W. 342 (1892). See also, *Willard v. Mellor*, 19 Colo. 534, 36 P. 148 (1894), *semble*.

⁶⁰ *California S. & W. Pine Co. v. Jackson & Co.*, 33 N.M. 117, 263 P. 504 (1928). See, also, *Ferebee v. Berry*, 168 N.C. 281, 84 S.E. 262 (1915).

⁶¹ *Latham v. Shipley*, 86 Iowa 543, 53 N.W. 342 (1892); and *Burns Mfg. Co. v. Clinchfield Products Corp.*, 189 App. Div. 569, 178 N.Y. S. 483 (1919), give specific weight to the difficulties of valuation under such circumstances. The latter case is especially significant when considered in the light of the comments made in *Watts v. Phillips-Jones Co.*, 211 App. Div. 523, 207 N.Y. S. 493 (1925), mentioned in note 32, *supra*. Other cases which accord a liberal treatment to documentary evidence under similar fact situations but do not treat this element specifically include *Wilbur v. Buckingham*, 153 Iowa 194, 132 N.W. 960 (1911); *Morris v. Columbian Iron Wks. & Dry Dock Co.*, 76 Md. 354, 25 A. 417 (1892); *Baltimore American Insurance Co.*

at all.⁶² These factors emphasize the desirability of a wide discretionary power in the court and serve as a further warning against any tendency to state that only certain types of documents are admissible.

E. Conclusion

From these observations it appears that courts and commentators alike should exercise the utmost caution in attempting any categorical formulation of a rule to govern this and other exceptions to the hearsay principle. The two most ambitious undertakings in the codification of the law of evidence err on the side of caution insofar as their treatment of this specific exception is concerned. Wigmore's statement of the exception applicable to documentary evidence in proof of market value is unduly restrictive in its exclusive classification of admissible documents.⁶³ The American Law Institute formulation goes far to vest a real discretion in the hands of the trial judge but limits his authority to a finding that "the compilation is published for use by persons engaged in that occupation and is generally used and relied upon therein."⁶⁴ However well the two statements may fit the bulk of the instances where the use of documentary evidence in proof of market value is peculiarly appropriate, they ignore the borderline cases where the conflict between competency and relevancy is most acute. It is better to phrase the exception in broad terms without specifying the precise manner in which the trial judge must make his finding of trustworthiness. Then, and only then, can we hope to progress towards Thayer's two leading principles: (1) that nothing is to be received which is not logically probative of something requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground or policy of law excludes it.⁶⁵

P. F. Westbrook, Jr., S.Ed.

of *N.Y. v. Pecos Mercantile Co.*, (C.C.A. 10th, 1943) 122 F. (2d) 143; *Caten v. Salt City Movers & Storage Co.*, (C.C.A. 2d, 1945) 149 F. (2d) 428.

⁶² *King v. Shawver*, (Tex. Civ. App. 1930) 30 S.W. (2d) 930. See, also, *Henry v. Kopf*, 104 Conn. 73, 131 A. 412 (1925), and *State v. Jensen*, 47 Idaho 785, 280 P. 1039 (1929), for liberal treatment under similar facts without specific mention of this factor.

⁶³ WIGMORE, *CODE OF EVIDENCE*, 3d ed., rule 166, p. 316 (1942). The classifications of "a list, register or serial report" is followed by the more restrictive definition, "a printed report of current sales, shipments or other transactions done in the open market."

⁶⁴ AMERICAN LAW INSTITUTE, *MODEL CODE OF EVIDENCE*, rule 528, p. 293 (1942).

⁶⁵ THAYER, *PRELIMINARY TREATISE ON EVIDENCE* 530 (1898).