THE ADMISSION OF DOCUMENTARY EVIDENCE BEFORE THE UNITED STATES BOARD OF TAX APPEALS

by

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BIBLIOGRAPHY

Since the reference to outside material in this thesis is almost exclusively the reports of cases from various courts, the writer has seen fit to dispense with a bibliography and give full footnotes instead.

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INTRODUCTION

Prior to the establishment of the United States Board of Tax Appeals, a taxpayer was in a precarious situation so far as securing redress from unjust and excessive taxes. The Supreme Court of the United States has held that an injunction, the only remedy of an immediate character available, in the regular courts, will issue only when the collection of the taxes would be illegal,[1] or when the statute upon which the tax is based is unconstitutional.[2] In other words, an injunction will not be granted because of irregular proceedings in the collection of the tax,[3] or because of irregularities in assessment,[4] or on the

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1. City National Bank v. Paducah, Federal Case # 2743.
2. Osborn v. Bank of the United States, 22 U.S. 738, 6 L Ed 204.
3. Parmley v. St. Louis I.M.& S. Railway Company, Federal Case # 10,767.
4. Union Pacific Railway Company v. Lincoln Company, Federal Case # 14,379.

ground that the tax is excessive.[1]

It will be seen that the taxpayer in the great majority of instances had no remedy when an unjust or unfair tax was imposed but to pay the tax and then file an ordinary action at law for its recovery. Should he win after the long delays caused by court continuances and appeals, his victory would be an empty one as the cost in itself of such an action would be almost prohibitive.

Even should the taxpayer's case come within the narrow realm in which an injunction would lie, the Supreme Court of the United States has held that the action for an injunction cannot be maintained unless the taxpayer has tendered the portion legally assessed to the government.[2] Since this is the question usually in controversy, it is easily seen what great difficulties must be surmounted before an injunction will issue. This leaves the taxpayer practically without a remedy so far as immediate relief is concerned.

1. Washington Market Company v. District of Columbia, 4 Mackey(U.S.) 416.
2. Taylor v. Secor, 92 U.S. 575; 23 L. Ed. 663; Albuquerque Nat'l Bank v. Perea, 147 U.S. 887, 13 Sup Ct 194.

Because of the above difficulties in having tax matters adjudicated by the regular courts, a very urgent need has been felt for the establishment of a tribunal which could handle the tax controversies in a prompt yet efficient manner. The Board was established to meet this need and is therefore destined to become of increasing importance in the tax machinery of our federal government. It is therefore of major concern to a taxpayer's case that his counsel know its proceedure.

One who has a grievance which he wishes a court to adjust must produce proof of the facts upon which he bases his claim for relief. Just what proof will be considered necessary of course must be determined before the trial of the case begins in order that the plaintiff may be able to make a prima facie case in his favor. That is, if at the trial it develops that material facts have not been proved, the party which has the burden of proving such material facts loses. In cases before the United States Board of Tax Appeals, this is the taxpayer. In other words, taxpayers and their counsel are presumed to know the law of evidence and the appeal will be dismissed and

the Commissioner of Internal Revenue's determination approved if a prima facie case is not established by the taxpayer.[1]

Federal statutes and the general substantive law determine just what the United States Board of Tax Appeals may or may not pass upon. The United States Revenue Act of 1924 gave the Board the power to prescribe its own rules of evidence. Experience showed that this provision was confusing so the Revenue Act of 1926 changed the provisions in the Revenue Act of 1924 and now the hearings of the Board must be conducted in accordance with the rules of evidence applicable in the courts of equity of the District of Columbia.[2]

Such a broad and comprehansive subject as proceedural rules in equity courts in the District of Columbia cannot be covered in such a short treatise as this. Suffice is to say that, as a general proposition, the rules as to equity proceedure there do not differ materially from the adjective law regarding

1. In re Appeal of Pleasant Valley Ranch Co. 2 B.T.A. 335; In re Appeal of Harry Israel, 2 B.T.A. 1252; Lee Sturges, Administrator of Lucy H. Sturges.
2. Revenue Act of 1926, Section 907a.

equity in other jurisdictions having the common law of England as a basis. The District of Columbia Code, the reports of the Supreme Court of the United States and the equity courts of the District of Columbia should be studied before delving into the reports of the United States Board of Tax Appeals for, as stated above, the taxpayer and his counsel are presumed to know the adjective law pertaining to proceedure before the Board, so that tribunal does not discuss this matter to any great length in its decisions.

Properly speaking, the word "evidence" considered in relation to law, includes all the legal means, exclusive of mere argument which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation.[1] Adopting this definition without further discussion, even though authorities differ on the matter, we are then confronted with the necessity of defining adjective law and evidence. Adjective law includes all the laws which have built up the judicial system, whether they

1. James Bradley Thayer, 3 Harvard Law Review 143.

have had their origin in the constitution, the legislature, or the courts.[1] It embraces, too the laws which have fixed the practice in the courts--the methods of carrying on the work by judge and jury, the laws prescoibing the manner in which litigants must seek relief and carry on their cases is also included; and finally certain rules have grown up as a part of this law, which relate, not to the machinery of the system, but, having regard to the imperfections of the machinery, are concerned with sorting out and selecting the materials which are supplied to it.

These rules for the admission of evidence are based upon the experience of several centuries as to what should be considered and what should not in deciding controversies. In the period of little over four years which the Board of Tax Appeals has been in existence, it is obvious that no revolutionary changes in the law of evidence as interpreted by it would take place. A cursory reading of the cases de-

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1. Thayer's Preliminary Treatise on Evidence, Chapter 6.

cided by the Board in this short period reveals two things, viz: (1) A surprising amount of ignorance in regard to the laws of evidence in proceedings before the Board which has been very costly to the taxpayers, and (2) a trend which the rules affecting the admission of documentary evidence before the Board has taken.

The purpose of this thesis therefore, will be to report the result of an investigation of the cases decided by the Board affecting the admission of documentary evidence and incidentally to bring out just how the Board in its decisions adheres to the long established and well founded rules of courts in general regarding the admission of evidence of a documentary nature.

CHAPTER 1

PRESUMPTION

A presumption is a probable inference which common sense, enlightened by human knowledge and experience, draws from the connection, relation and coincidence of facts and circumstances with each other.[1] Presumptions are of law or of fact. Presumptions of law are usually founded upon reasons of public policy and social convenience and safety, which are warranted by the legal experience of courts in administering justice, while presumptions of fact result from the proof of a fact or a number of facts and circumstances, which human experience has shown are usually associated with the matter under investigation.[2]

If used as a rule of law then the word may mean a great many different things. It is the purpose of this chapter to discuss the use of the term in its

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1. When the word "presumption" is used, it will be clearer to think (a) Is the word used for inference? (b) If not used synonymously with inference, what rule of law does it refer to? One may thus get rid of carrying in the mind the subject of presumptions as a separate branch of law. (see Bouviers Law Dictionary.)
2. United States v. Searcey (D.C.) 26 Fed. 435.

latter meaning in a restricted sense. That is, only so far as the law affects the particular kinds of cases that come before the United States Board of Tax Appeals.

The Board, like other tribunals, holds that in some cases presumptions are stronger than in others, and that the weight to be given to various presumptions must be determined from common experience.[1] Where the statute creates a presumption that of course is conclusive.[2] In the average court all other presumptions have the effect of creating a prima facie case only and the least amount of proof by the opposite party will shift the burden of going forward with the evidence to the complainant.[3]

In cases before the Board, the strength to be given the various presumptions seems to vary.

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1. Barnes Coal & Mining Company Appeal, 3 B.T.A. 891.
2. Appeal of Elizabeth W. Stranahan, 4 B.T.A. 287. (Presumption created by Section 31 (b) Revenue Act of 1926 which declares that distributions by corporations shall be deemed to have been made from most recently accumulated undivided profits or surplus is conclusive.)
3. Chafee v. United States, 85 U.S. 516, 21 L. Ed 908.

The presumption as to the correctness of the findings of the Commissioner of Internal Revenue is strong.[1] In other words his findings are correct until definitely proven otherwise by evidence of unquestioned probative value. This presumption is especially true as to his determinations as to value of property and assets in general.[2] In fact, book entries made at the time of the acquisition of the assets are insufficient to overcome the presumption of correctness attaching to the valuation of assets made by the Commissioner.[3] The Board, however, does not allow this presumption to be carried to an absurdity and thus be unfair.[4]

The presumption also exists that the Commissioner of Internal Revenue performs his duty in the manner provided by the statute and does not exceed his

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1. In re Appeal of R. L. Cook, 5 B. T. A. 197, Hamilton Mfg. Company's Appeal, 3 B. T. A. 1045.
2. In re Appeal of Max Schott, 5 B. T. A. 79.
3. In re Appeal of Kennedy Construction Company, 4 B. T. A. 276.
4. In re Appeal of S. L. Fowler, 6 B. T. A. 250 (There is no presumption as to the correctness of finding of the Commissioner in a letter of earlier date than the letter giving notice of final determination.)

lawful authority.[1] The Board here simply acts, in the consideration of facts coming before them, upon the theory which governs the actions of all men, viz: that the Commissioner and public officers in general conduct their business in the ordinary way, and perform their duties regularly. Similar to the above is the so-called "presumption" that the regular course in business matter or the conduct of affairs is followed. The familiar doctrine that proof of the mailing of a letter is sufficient prima facie evidence of its receipt is an illustration of the reliance placed by the courts on the regularity of the conduct of public officials.[2]

Where the findings of the Commissioner of Internal Revenue are not involved, less force is given to presumptions by the Board.[3] It seems to hold

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1. "In determining whether deficiency notice signed by a deputy commissioner is a statutory notice, it will be presumed that the deputy was acting regularly and under proper authorization of the Commissioner." Fanny Newman's Appeal, 6 B. T. A. 373.
2. Henderson v. Coke Company, 140 U. S. 25, 11 Sup Ct 691.
3. In re Appeal of Masagiro Turuya, 4 B. T. A. 357; In re Appeal of Acton Farms Milk Company, 4 B. T. A. 899.

rather close to the holdings of courts in general regarding the legal status of the marital relation.[1] This is also true in those case pertaining to the regularity and legal status of corporations and business concerns in general.[2]

The possession of personal property when there is no evidence explaining its nature is prima facie proof of ownership. The United States Supreme Court has held that the possession of a negotiable instrument raises the presumption of ownership in the possessor.[3] The United States Board of Tax Appeals has held in accordance with that decision.[4] Of course this presumption is very limited in its scope for the possession of an open account in favor of another is not presumptive evidence of its ownership by the hold.

When it is shown that certain property be-

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1. In re Appeal of J. B. Lilly, 4 B. T. A. 1149.
2. In re Appeal of Collins-McCarthy Candy Co., 4 B. T. A. 1280.
3. Collins v. Gilbert, 94 U. S. 753.
4. In re Appeal of Harry N. Gifford, 3 B. T. A. 334.
5. Gregg v. Mallett, 111 N. C. 74, 15 S. E. 936.

longs to a particular person, the law presumes that the ownership remains unchanged until the contrary appears.[1] In proceedings before the Board this rule is supplemented by the one holding that the value of property established by the price paid for it at time of purchase may be presumed to obtain at a later date until rebutted by evidence.[2]

The Board also presumes that a previously existing state of things continues to exist.[3] This is only another way of saying that the Board takes for granted such matters of common experience as are incidental to the consideration of a case in the same way as any intelligent person does.[4] It does not mean that, if the continued existence of a state of facts is in issue, there is any presumption which will relieve the one party or the other from the ordinary amount of proof required to establish such facts. For example, attempts to make use of the presumption

1. United States v. Mathoit, Fed case # 15,740.
2. In re: Appeal of W. C. Arthur, 3 B.T.A. 374.
3. City National Bank's Appeal, 2 B.T.A. 623.
4. In re: Appeal of W. C. Arthur, supra.

of regularity as a substitute for proof have frequently been made. They have failed for the reason that, when the courts have been brought to a close examination of its nature, they have recognized its real character, and have refused to go to the length which the unconsidered language of some of the decisions would warrant.

CHAPTER 111

RECEIVING THE DOCUMENT AS EVIDENCE

The introduction in evidence of a writing is not accomplished when the document is produced in court. There are preliminary matters to be taken care of before the writing can be received.[1] One of these matters is that the authentication of the writing, by establishing the signature on the document as the proper one. Another is that of establishing the genuineness of the writing when the document contains no signature.[2] With respect to proof of the former kind, documents have been divided into two classes: those which are attested and those which are not.

The common law rule was that resort must first be had to proof of handwriting of the attesting witness or at least one of them, and in the event of its being impossible to produce such evidence, then to prove execution by the maker. However, today the

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1. In re Appeal of M. Tischman, 2 B. T. A. 717.
2. In re Appeal of J. A. Rowland, 5 B. T. A. 770; In re Appeal of Montgomery Bros & Company, 5 B. T. A. 258; In re Appeal of Beadleston & Woerz, inc., 5 B. T. A. 165; 108 U. S. 32 at page 44, 2 Sup Ct. 313.

courts recognize indiscriminately both the proof by the maker as well as by the attesting witnesses as sufficient.

The testimony of an attesting witness is largely a matter of form. Such witness need not know anything about the instrument itself. It is sufficient if he identifies his signature. When it is considered that the fact that it was executed by the maker, it will be seen that the act of attestation is in itself evidence that the document was in existence and executed. That the witness purporting to sign actually did sign is therefore all the evidence that is necessary to authenticate the document. Knowledge of the contents of the document on the part of the witness is immaterial.[1]

If a writing has no subscribing witness, and is not of the age of thirty years or more, the signature of the maker must be proved as a preliminary to its introduction in evidence, or, in case of its

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[1] Wigmore on Evidence (2nd) Section 733.

being a document without signature, the writing must be identified as that of the person with whom it is sought to connect the paper. It is not necessary to prove the date of the signing of the instrument, nor other circumstances of its execution. Proof of handwriting is sufficient to admit it in evidence tending to show that it was antedated, or otherwise affected with fraud or given for a particular purpose. The person offering it, to make it effective, of course would be obliged to introduce further evidence.[1]

In connection with the proof of the execution of documents we have seen that it becomes necessary to prove the handwriting of the maker, or of the attesting witnesses, or both. In the proof of matter of this character certain rules have grown up. It may be said, in the first place, that proof of handwriting may be waived by the admission of the opposing party of its authenticity. This is not, strictly speaking, a form of proof

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1. In re: Appeal of M. Tischman, 2 B.T.A. 717. (Checks purporting to show payments by taxpayer, introduced without identification or explanation of purpose for which they were drawn, are inadmissible.)

of handwriting, but is one method of making a document admissible where otherwise proof would be required. Proof of handwriting may consist of the testimony of the writer himself or any one who saw the writing made. It may consist of opinion evidence, in respect to the writing, and of a comparison of the writing with other specimens that are unquestionably genuine. Of the ordinary circumstantial evidence which may bear on the question, nothing need be said, as it in no respects differs in its nature and manner of introduction from the evidence of other facts. When we come, however, to opinion evidence, we have several rules which are useful to bear in mind. These relate to the qualification of the person who may give an opinion as to the handwriting in question and will be discussed in a later chapter of this paper.

No great degree of familiarity with the

handwriting is required to render a witness competent to give an opinion. If he has seen the person write a single time, it has generally been held sufficient.[1] The law is not technical when it comes to proof of handwriting, and allows any reasonably reliable testimony. In fact, the genuineness of a document is so largely determined by its connection with the circumstances and persons involved in the case that it may be determined to a practical certainty without resort to any formal proof. The requirements, therefore, as to evidence expressly directed to the handwriting itself, are not strict.[2] It is in accordance with this principle that the courts have held that an ability to read and write is not absolutely necessary to make a person competent as a witness to handwriting. However, a certain degree of intelligence on the part of the witness must be shown, to give the evidence any weight. If the witness states he has seen the person

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1. Keith v. Lothrop, 10 Cush (Mass) 453.
2. Rinker v. United States (1907) 151 Fed 755. (Witness of limited acquaintance admitted).

write, but is unable to say that from such observation he knows the handwriting sufficiently to recognize it, he is competent to testify.[1] With respect to the time when the witness has seen the person write, it is not necessary that it shall have been before the time of the handwriting, in dispute. Aperson's handwriting is treated as a uniform thing, and observation at one time sufficiently qualifies a witness to recognize a specimen made at another, whether before or after. Such observation, however, must have been prior to the controversy. In the case of a signature made by a witness who cannot write, and who therefore merely affixes his mark in the shape of a cross to his name, written by some other person, it would seem that there was little value in testimony based on familiarity with previous signature of the same kind. Yet it is held that such testimony is admissible. The familiar-

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Holmes v. Goldsmith, 147 U. S. 150, 13 Sup Ct. 288.

which a witness has acquired with the handwriting of another through business dealings with him, which have involved the frequent examination of, reading of and reliance upon his writing, is held to sufficiently qualify the witness to testify. If the witness has merely seen letters or other writing meant for third persons, and has not himself conducted the correspondence, or acted upon it in a business way, he will not be competent. It is largely the element of reliance in business matters upon the genuineness of the specimens that is the ground of competency. Where examination of genuine specimens, either written in the presence of the witness or admitted to be genuine at the time of his observation is made for the purpose of the witness after testifying, it does not sufficiently qualify him.

The process of authenticating documents which have no signature and do not purport on their faces to be of a certain person's authorship, is another matter from that which we have been discuss-

ing. The point is a very important one, however, since a large part of the evidence coming before the Board is of this nature. In discussing the different modes of showing their authenticity we will divide them into two groups: (1) Those modes of proof which are never questioned as being sufficient to sustain a judgment, (2) Those which give rise to rulings of sufficiency.

We can eliminate at the outset those modes of proof coming under (10 above by simply listing them. They may be given as (a) when the act of writing is done in the presence of the tribunal (b) testimonial evidence[1] (testimony of a witness who saw the very act of writing) (c) circumstantial evidence (style of handwriting and sundry circumstances preceding or following the act of writing. Under (2) may be listed those forms of circumstantial evidence having to do with the age of the document, its contents, custody and whether or not there are any official marks about it.

1. In re Appeal of Spiegal's Housefurnishing Company, 2 B. T. A. 158.

The general rule is that, under certain conditions, the genuineness of a document need not be proved to be admitted as evidence where it is of sufficient age to be regarded as "ancient." Ever since the second half of the 1700's a document may be admitted in evidence as an "ancient" document when a period of thirty years has elapsed since the making of it.[1]

The mere contents of a written communication purporting to be a particular person's are of themselves not sufficient evidence of genuineness. Only in those special instances where the contents reveal a knowledge or other trait peculiarly referable to a single person, could the contents alone suffice. That is, in those cases where an illiterate signs by a mark or the document is typewritten or is printed, resort is had to evidence from its contents. For example, the authorship of a typewritten document may be shown by tracing the writing to some specific machine. It is generally far more difficult to prove the genuine-

1. Wigmore on Evidence, 2nd Edition, Section 2138.

ness of a printed document since presses do not have the individuality that type writing machines do. Authenticity is usually shown in the case of printed matter by extrinsic testimony such as having some one responsible for the writing testify.[1]

The great inconvenience of having to prove the genuineness of printed matter purporting to be published by the government has led to the rule that such publications, at least when in the form of standard official documents constantly issued and referred to are to be assumed as genuine.[2]

Due to the regularity and accuracy of the mails, courts generally also hold that in questions regarding reply letters, that the arrival by mail of a reply purporting to be from the addressee of a

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1. In re: Appeal of Irma Lindheim, 2 B.T.A. 913; In re: Appeal of Lee Sturges, 2 B.T.A. 69.
2. (Printed copies of legislative journals published by law, are evidence of the contents) Post v. Supervisors, 105 U.S. 667; (Records of the U.S. Treasury Department, printed by authority of law and produced from the custody of the Department, admitted without certification of copy.) Chesapeake & Delaware Canal Company v. United States, 220 U.S. 123, 39 Sup Ct. 407. Scofield v. Parlin & O Company, 10 C.C.A. 83, 61 Fed 804; Nat'l Acc. Soc. v. Spiro, 24 C.C.A. 334, 78 Fed 775.

prior letter duly addressed and mailed are sufficient evidence of the reply's genuineness to sustain a decision.[1] This rule is not applied to reply telegrams as consistently as to reply letters. In fact there is such a conflict of authority that it is an open question as to how the Board would rule on the matter.

Proof that the official document is in the custody of the appropriate public official is generally held to be sufficient evidence of its genuineness to sustain a decision. It should be kept in mind however that a document purporting to be an official record that lacks the signature or other verifying attestation, will usually be treated with strictness, so that the appropriate custody alone will not suffice to authenticate it.[2] On the other hand the genuineness of certain purporting official seal-impressions need not be evidenced otherwise than by production for inspection of the document bearing them.

1. Scofield v. Parlin & O Company, 10 C.C.A. 83, 61 Fed 804; Nat'l Acc. Soc v. Spiro, 24 C.C.A. 334, 78 Fed 775
2. United States v. Ortiz, 176 U. S. 422, 20 Sup Ct 466.

CHAPTER III

THE BEST EVIDENCE RULE

The best evidence rule amounts to little more than the requirement that the contents of a writing must be proved by the introduction of the writing itself, unless its absence be satisfactorily accounted for. In other words, the usual and ordinary meaning of the phrase is that the terms of the document must be proved by the production of the document itself in preference to evidence about the document.[1] It must be noted that the production required is the production of the document whose contents are to be proved in the state of the issues. It is immaterial whether or not the document was written before or after another, was copied from another or was itself used to copy from. The question is: Is this the very document whose contents are desired to be proved.[2]

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1. In re Appeal of J. G. Ball Co., 5 B. T. A. 882.
2. In re Appeal of Frederick H. Butts Estate, 1 B.T.A. 415 (certified photostat copies of refund check are admissible as evidence, etc.)

To a general statement that the rule extends to all writings there must be slight qualification. Where the writing to be proved consists of a notice, there it is held that the rule does not apply and that the contents may be proved by other evidence, without showing any effort to get the original. It sometimes happens that there are several duplicates of the same document as in the case of placards, newspapers, etc. Where the writing is executed by the parties in duplicate or multiplicate, each of these parts is "the" writing, because by the act of the parties each is as much the legal act as another. It makes no difference that one party has signed only the document taken by the other.

A duplicate or counterpart, being considered as an original, may be used without accounting for the nonproduction of any other.[1] Conversely, all duplicates or counterparts must be accounted for before using copies.

Some jurisdictions hold that where a notice was made by writing it out twice at the same sitting,

1. Carroll v. Peake, 1 Pet. (U.S.) 18 at page 33.

the writings were in fact duplicates, though not written nor executed contemporaneously and that thus the one retained could be used without accounting for the non-production of the one delivered.[1] This seems to be the federal rule.[2] A reproduction by blotter-press or letter-press of the photostatic method cannot be considered as a duplicate. Policy here supports principle, for such reproductions are by no means uniformly identified or accurate. The same must be said of any process or machine production which consists in obtaining repeated ink traces from a single writing so prepared as to furnish such traces by pressure or by chemical operation.[3]

For the printing press having fixed type, the contents of any one such impression may be proved by the use of any other one without accounting for the former.[4]

In those type-writing office machines in

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1. State v. Halstead (1887) 73 Ia 376, Kelly v. Elevator Company, 7 N. D. 343.
2. In re Appeal of the Findlay Dairy Co, 2 B.T.A. 918.
4. Kelly v. Rogers, 134 U.S. 10.

which the paper is stationary and the writer's hand applies a movable type or pen, producing an impression through several carbon sheets at once, the case is more difficult; for though the first few impressions may be identical, yet the lower sheets are likely to be imperfect. The federal courts seem to allow such carbon copies, however.[1]

Another interesting question coming under this heading is whether the rule under discussion has found favor respecting the application of the rule to material objects not paper bearing inscriptions in words. The court decisions are so varied on this point that about all that can be said in this short treatise is that the courts have a wide discretion in requiring or not requiring the production of an inscribed chattel. This question as yet has not come before the Board.

The rule is that the terms of the document shall be produced before the tribunal and the opponent for personal inspection. In other words, in proving a

1. Cohn v. United States, (1919) 258 Fed 355 (C.C.A.2d).

writing, production must be made of the writing itself unless it is not feasible, whenever the purpose is to establish its terms.

Production implies either the handing of the writing to the tribunal for perusal, or if that is not demanded, at least the reading aloud of the writing by counsel or witness. The production is for the benefit of the tribunal, it should be kept in mind, and not for the opponent.[1] His right of inspection, whether at or before the hearing rests on other principles.

There is a distinction between proving a fact which has been put in writing and in proving the writing itself. Other proof of a fact is not excluded merely because a fact has been described in a writing. For example, the proceedings of a corporate meeting of stockholders or directors are facts. They are ordinarily reduced to writing in the minutes of the meeting. Yet they may still be proved by independent oral testimony.[2] But suppose the dispute be as to the minutes

1. Hilyard v. Harrison, 37 N.J.Law 170 (Plaintiff offered tax warrants and duplicates in evidence at a hearing. An order to deliver them to defendants possession for inspection, held improper but an order of exhibition in open court held demandable.)
2. In re: Appeal of Spiegel Housefurnishing Co. 2 B.T.A. 158.

themselves, then the writing becomes the best evidence of what the minutes are and must be produced.[1]

An agency may have been constituted, by a written authority; but the repeated acting upon it, being equally a granting of authority, may be proved without production. By the same reasoning the fact that a partnership or a corporation exists may be proved without producing the articles of partnership or corporate charter.

Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements, the net balance resulting from a year's vouchers of a treasurer, or a year's accounts in a bank ledger, it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the Board or read aloud to them. The convenience of hearings demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will

1. Patriotic Bank v. Coote (U. S. 1827) 3 Cr.C.C. 139.

state summarily the net result.[1]

The Board exercises a wide discretion in this particular. In Pittsburgh Grinding Wheel Company's Appeal,[2] a group of creditors formed a corporation and took over the assets of the bankrupt. The question was the value of the property taken over. The Board held that the testimony of witnesses familiar with assets of the taxpayer, based on opinion as to actual value, although secondary and not supported by accounting records, was sufficient to prove cash value of assets. On the other hand, the decision of the Board in Jacob Roffwary's Appeal[3] was that the statements in tax return as to notes, accounts receivable, accounts payable, inventories, etc, accompanied by evidence explanatory of the manner in which they were compiled, was not admissible where books of original entry were not produced. Also in the Appeal of the Pacific Baking Company[4], the Board

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1."When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot conveniently be made in court, the result may be proved by the person who made the examination." Burton v. Driggs (1873) 20 Wall 125, 136; Rollins v. Board (1898) 33 C. C. A. 181, 90 Fed 575; Galbreuth v. U.S. 257 Fed 648 at 658.
2. 2 B. T. A. 712.
3. 2 B. T. A. 332.
3. 2 B. T. A. 391.

held that the oral testimony of a corporate officer as to what books would disclose unaccompanied by production of original records, is insufficient to prove value of good will acquired by stock which the company had issued for good will.

The only exception to the rule that only the original document will satisfy is the case of public records. The inconvenience of bringing them into court, and their accessibility for the purpose of comparison of copies, led to the practice of receiving exemplified copies whereever it became necessary to prove them in evidence. It should be observed that the best evidence rule applies with even more strictness to such copy than the original in the case of other writings, for the reason that the law does not recognize any excuse for failure to produce an exemplified copy.[1]

If destruction be the excuse, and it is suf-

1. In re Appeal of Ettenson Winnig Dry Goods Company, 3 B. T. A. 897.

ficiently proved that the writing is no longer in existence, secondary evidence is at once admissible. Destruction at the instance, and by the hand of the party offering the proof is not sufficient unless reasonable cause be shown for his destroying it. What is sufficient fo show loss or destruction is largely a discretionary matter with the court.[1] Proof of reasonable effort to find it or of probable destruction is sufficient. In other words if loss be claimed, it must be shown that diligent search has been made, and every reasonable effort exhausted to find it.[2]

If the writing is out of the jurisdiction, and not under the control of the party offering the proof, so that it cannot be reached by a subpoena duces tecum, secondary evidence is admissible. Where it is in the hands of the adverse party, all that is required in order to lay the foundation for secondary efidence

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1. In re Appeal of Peters Mfg. Company, 1 B. T. A. 1198 ("Where books of a corporation's branch office, were lost and loss was explained, statements of financial condition of branch office, as shown by its books, which had been forwarded to main office in regular course, when corroborated by witnesses familiar with lost records, are admissible to establish surplus of branch office.")
2. In re Appeal of Denhom & McKay Company, 2 B.T.A. 444.

is reasonable demand on him to produce it. A somewhat different question arises where the writing is in possession of a third person and such person on being served with a subpoena duces tecum, refuses to produce it. The general rule is that the non-production is not excused unless the third person has some legal right to the document or the contents would be incriminating to him.[1]

Note should be carefully taken of the fact that there is a preliminary matter to be taken care of before secondary evidence becomes admissible. That is, proof of the actual existence of the writing at a former time must be given. If the previous existence of a document is not questioned, evidence of a diligent search for it is sufficient to let in secondary evidence. If however, it be denied that the writing ever existed, either in fact or in law, a question is presented which requires certainty of proof before proof of the contents

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1. In re Appeal of George C. Heimerdinger Company, 2 B. T. A. 383.

can be introduced. Where the writing is one under which parties to the suit claim rights, as in case of a contract, deed or will, the contents must be proved with certainty or the courts cannot give effect to the instruments, even if its previous existence be sufficiently proved.

Where the circumstances are such that secondary evidence may be introduced, a question arises as to what sort of secondary evidence will be allowed. Many decisions leave one with the impression that there are different kinds of secondary evidence and that the best kind must be produced. However, the impractibility of classifying this sort of evidence seems sufficient for not extending the principle of the rule beyond the original writing.[1] This of course does not mean that the door will be opened to evidence that is uncertain or unreliable for the Board requires that the evidence offered must be of a kind that will fairly justify re-

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1. Cornett v. Williams, 20 Wall (U. S.) 226 at 246.

lief.[1] A copy of a letter press or a photostat copy has been allowed where it appeared that a copy was a correct transcript.[2]

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1. Bonta Narragansett Realty Company, 1 B.T.A. 208 (ex parte affidavits and letters offered in support of a petition are inadmissible.)
2. Frederick H. Butts Estate, 1 B.T.A. 415.

CHAPTER IV

THE HEARSAY RULE

The rule is generally stated in the following manner: Statements, oral or written, made by persons not eye witnesses are not admissible to prove the truth of the facts stated, except in those cases where they are rendered necessary by the difficulty of other proof and where the circumstances under which they are made furnish some guaranty of their reliability, other than the mere fact of their having been made.[1]

In studying this rule we should carefully distinguish between statements, the making of which is in dispute, and statements which relate to the facts in dispute. Anything which is in issue may be proved, whether it be a physical fact, or the making of a statement. In the latter case the testimony of the witness

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1. "Where books of account are neither produced nor used to refresh recollection of witness, testimony of witness as to contents of books and his opinion that entries therein were erroneous is inadmissible." First Nat'l Bank of Manchester, 3 B.T.A. 751 also Walker Creamery Products Company Appeal, 2 B.T.A. 751. "Bankruptcy claims list, introduced to show that taxpayer had not filed claim against bankrupt, is incompetent where certificate of court shows that list is only a second page of schedule of distribution." Harry Gottlieb's Appeal, 1 B.T.A. 674.

that such statement was made becomes original evidence of a fact in dispute. Evidence within the personal knowledge of the witness testifying is, of course admissible.[1] It is no exception to the hearsay rule, because it ha s nothing to do with it.

Statements may be original circumstantial evidence of facts in issue, and are then admissible. They are admissible because the fact of their having been made throws light upon the question of the truth or falsity of the disputed facts--not because they state anything in regard to the existence or non-existence of such facts, but because they in some way illustrate an attitude of mind or other evidentiary fact from which the main fact may be inforred.

Where statements, oral or written, indicate a

1. Testimony of employee who was not in charge of books when expenditures were made and whose knowledge of the nature of expenditures were made and whose knowledge of the nature of expenditures was obtained through discussions with officers, held; hearsay and insufficient. Appeal of Gazette Company, 6 B. T. A. 1016, see also Appeal of Chalmers Publishing Company, 1 B. T. A. 699; Appeal of Elmer E. Scott Company, 1 B. T. A. 1339; Appeal of Neuse Manufacturing Company, 1 B. T. A. 769.

quality or characteristic the existence of which is in issue, it is no objection to the proof of such quality or characteristic that it is founded upon hearsay if that is the only mode of proof available.[1] As illustrative of this, we have that feature of salable article known as "market value."

In the Matter of One Hundred Twenty Five Baskets of Champagne[2] Judge Huffman defined market value of goods to be,

> "The price at which the owner of the goods or the purchaser holds them for sale; the price at which they are freely offered in the markets to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade."

The Supreme Court of the United States recognizes any legitimate method of establishing market value.[3] The court in that case specifically approves the following methods of proof: the recognized market price or quotations for a given day; amounts realized on sales, public or private; and in some instances costs of production.

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1. 94 Kansas 302.
2. 70 U.S. (3 Wall 114) 125.
3. Huser v. Magone, 155 U.S. 240 at 249.

Proof of market value rests, as far as it can be testified to, upon statements oral or written, made by persons dealing in such articles. A witness may testify directly that the market value of an article is a certain sum, but, if inquiry be made as to what his statement is based upon, it will almost invariably bring out the fact that some sale, offer, or oral or printed quotation, which he has heard or read, is relied upon. How far evidence of this sort may be introduced is a question of some uncertainty.[1] It is not hearsay, in the strict sense. The facts that a sale took place, that an offer was made, and that the market

1. "Retrospective appraisels made upon basis of cost of reproduction, less estimated depreciation, are not of themselves competent evidence of fair market price or value." Red Wing Linseed Company's Appeal, 5 B. T. A. 390.

"Where return was made from books and books were thereafter destroyed by fire, categorical statements of witnesses who had charge of ther and made them therefrom, that books truly reflected income, held; insufficient to establish correctness of return." Appeal of The Pennant Cafeteria Company, 5 B.T.A. 293.

"Amount at which property acquired for stock is charged on books is prima facie evidence that market value at time of acquisition was not greater than that amount." Appeal of The Fidelity Storage & Warehouse Company, 2 B. T. A. 371.

quotation was such a figure, are distinct facts, upon which men familiar with such matters, and whose business it is to deal with them, are accustomed to rely. The court is therefore justified in admitting them.[1]

It is not every offer or sale, however, which will be competent. The element of publicity which gives importance to the transactions as criterions of market value must be present. In general, it may be said that both sales and public offers to purchase or sell, in places where the commodities are ordinarily dealt in my be proved as evidence of market value.[2] Mere private offers, on the other hand, are inadmissible

There is a distinction to be noted between matter which is brought out by way of qualifying a witness as competent to speak upon the question of market value, and testimony of matters given by a witness as evidence in itself of value. The distinction

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1. Muser v. Magone, supra.
2. Cliquots Champagne, 3 Wall 114, 115.

between the former class of evidence and hearsay will be seen by assuming that the witness testifying has not himself heard the offer, but that it has been reported to him that such offer was made. Here we would have a case of hearsay, and he would not be permitted to prove the fact, namely, that a certain offer was made, by testimony that X told him such was the case. It is not essential that matters which an expert considers in forming his opinion should be admissible as independent evidence. A dealer in a certain class of merchandise may derive much of his knowledge from hearsay, and yet be competent to testify to value.

The distinguishing feature of the admission of all declarations regarding market value is that they must have some badge of truthfulness besides the mere fact of having been made. In the case of such declarations made in the regular course of business, this guaranty of special reliability is found in the

correctness which usually appertains to the performance of routine work. A regular practice with respect to the conduct of a business usually assures a high degree of correctness.[1]

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1. Chapter VI.

CHAPTER V

BOOKS OF ACCOUNT

The identification of books of account and the foundation which should be laid for their introduction in evidence, is an intensely practical matter, and one that must generally be left largely to the sound discretion of the tribunal. It is really an exception to the hearsay rule but of such importance in our present discussion that a whole chapter is devoted to it. The vital questions are: Do the books probably represent truly the facts which they purport to show? Are they the best and most available evidence?

In determining the answers to these questions, several definite and specific requirements have grown up in the law, relative to the admission of books of account in evidence when the person who made the entries in the books is unavailable as a witness. The first general requirement is that the entry must have been made in the regular course of business.[1]

1. In re: Appeal of J. M. Loftis, 6 B.T.A. 725.

In other words the entries must have been made as a natural part of one's mode of obtaining a livelihood. The entry offered as evidence also must of course be a part of a system of entries, not a casual or isolated one.[1] The Board determines the regularity of the entries by inspection of the books. Another requirement is that the entry should have been made at or near the time of the transaction recorded.[2] The rule fixes no precise time, so each case must depend on its own circumstances.[3] The rule that the books must be books of original entry is adhered to by the Board more or less rigidly.[4] "That the statement admissible under the present exception must be a written statement has been generally assumed in the United States.[5]

It should be kept in mind that such account book evidence is not conclusive but is just ordinary evidence to be given such weight as the Board wishes.[6]

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1. In re Appeal of North Stree Trust, 6 B. T. A. 947.
2. Kamm v. Rees (1920) 9 C. C. A., 177 Fed 14 at p. 22.
3. In re Appeal of Jas. L. Eastlack, 3 B. T. A. 41.
4. In re Appeal of The Munising Motor Co., 1 B.T.A. 286.
5. Tennerstein's Champagne, 3 Wall (U.S.) 149.
6. In re Appeal of Huning Lumber Company, 5 B.T.A. 752; Henry Myer Thread Mfg. Co, 2 B.T.A. 665; M.E.Farr, 3 B.T.A. 110; Harry N. Gifford, 3 B.T.A. 334.

There are three fairly well defined rules now in use in the various jurisdictions for determining the admissibility of books of account where the one making the entry had no knowledge of the truth of the transaction recorded. The strict rule followed by the Massachusetts courts is that the books of account are inadmissible as evidence if the transactor is not present and is otherwise capable of testifying.[1] In California and in jurisdictions following the California rule, books of account are admissible if the system of making the entries were explained and it appeared that accuracy would probably follow from it and the entries were made in the regular course of business.[2]

The federal courts seem to have adopted a more liberal attitude in regard to this matter. In the case of Billingley v. United States, the Circuit Court of Appeals said, "These books were properly kept--in

1. Kapean v. Gross, 223 Mass. 152.
2. Montgomery & Mullen Lumber Company v. Ocean Park Scenic Company, 32 Cal App 32.

the regular course of business by a person employed for that purpose. It is wholly unimportant whether the witness Levy made any or all the entries therein or not, and equally unimportant whether or not he had any recollection in reference to the particular sales."[1]

The increasing complexity of the conditions under which modern business is carried on, has called for a liberal construction of the rules governing the introduction in evidence, of books of account and entries in the course of business. The federal courts have been awake to this fact and it is clearly recognized by leading authorities. Professor Wigmore in his work on Evidence (Section 1530) says:

> "Suppose an offer of books representing transactions during several months in a large establishment. In the first place, the employees have in many instances changed and the former ones cannot be found; in the next place, it cannot always be ascertained accurately which employee was concerned in each one of the transactions represented by the hundreds of entries; in the third place, even in they could be ascertained, the production of the scores of employ-

1. Billingsley v. United States, (C.C.A. 1921) 274 Fed. 86.

> ees, to attend court and identify in tedious succession the detailed items of transactions would interrupt and derange the work of the establishment, and the evidence would be obtained at a cost practically prohibitory; and finally, the members of such persons, when summoned, would usually afford little real aid."
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> "If unavailability or impossibility is the general principle that controls, is not this a real case of unavailability? Having regard to facts of mercantile and industrial life, it cannot be doubted that it is."

The entries must be properly authenticated by the testimony of the bookkeeper or in case of his death or other disability, by proof of his handwriting, was the old rule. The federal courts now seem to hold that it is sufficient if the books were verified on the stand by a supervising officer who knew them to be books of regular entries kept in that establishment, and that the production on the stand of a regiment of subordinate employees, may be dispensed with.[1] No doubt much should be left to the discretion of the Board--production may be required for cross examination, where the nature of the controversy seems to require it. But

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1. Cub Fork Coal Company v. Fairmont Company, 19 Fed (2nd) 273; United States v. Mammoth Oil Company, 14 Fed (2nd) 705, at 732 (8th C.C.A.); E. I. Dupont, DeNemours & Company v. Tomlinson, 296 Fed 634; Straus v. Victor Talking Machine Company, 297 Fed 791; Rutan v. Johnson, 231 Fed 369 at 378.

the important thing is to realize that upon principle there is no objection to regarding this situation as rendering in a given case the production of all persons practically as impossible as in the case of death. The court in the leading federal case cited above,[1] said:

> "The conclusion is, then, that where an entry is made by one person in the regular course of business, recording an oral or written report made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so. Why should not this conclusion be accepted by the court? Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life.
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> They are the ultimate basis of calculation, investment and general confidence in every business enterprise; nor does the practical impossibility obtaining constantly and permanently the verification of every employee affect the trust that is given to such books. It would seem that expedients which the entire commercial world recognizes as safe could be sanctioned and not discredited, by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the court room."

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1. Cub Fork Coal Company v. Fairmont Company, 19 Fed (2nd) 273.

Jones in his work on Evidence,[1] also recognized the impracticability of the former strict rule.

The United States Board of Tax Appeals in following the federal rule seem to have liberalized it and adopted a statement of the rule as given by the Legal Research Committee under the Commonwealth Fund and applied it to books of account kept by attorneys, physicians and other professional men as well as in the ordinary buying and selling trades.[2] The rule as stated by that committee is:

> "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of such if the trial judge shall find that it was made in the regular course of 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, include its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind."

There are some restrictions on the rule under

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1. Jones on Evidence, Volume 3, page 569.
2. In re: Appeal of Gaukler v. Stewart, 1 B.T.A. 578; The Law of Evidence, Some Proposals for Its Reform (page 63) by Edmund M. Morgan, Zechariah Chafee, Jr., Ralph W. Gifford, Edward R. Sunderland, Charles M. Hough, Edward W. Hinton, John H. Wigmore and William A. Johnston.

discussion held by the average co urt but which do not exist in matters before the United States Board of Tax Appeals, which should be kept in mind. One is the restriction placed on the rule by most courts that in the case of entries showing cash items, the limit in amount is usually small or about ten dollars. No such restriction is made in the admission of account book evidence before the Board.[1] The restriction generally held to the rule that account book entries are admissible only to prove items of goods sold or labor and services performed and not to show any other matter for which the entries might be relevent is not adhered to by the Board. In the Appeal of Estate of David R. Daly,[2] account book entries were admitted to show that payment was intended as a gift. The Board's ruling on this matter is also shown in the Appeal of the Twin City Tile Company[3] where the taxpayer was allowed to introduce account book entries to prove time of service and

1. In re Appeal of Union Market, Inc. 2 B.T.A. 429.
2. 3 B. T. A. 1042.
3. 6 B.T.A. 1238; also Gordon Furniture Company, 3 B.T.A. 311.

rate of wages.

Many courts hold that account books cannot be used in evidence to prove a negative.[1] The United States Board of Tax Appeals holds to the rule, however that the absence of an entry which would naturally have been made is some evidence that the fact to be recorded did not occur.[2] This rule is also taken in the case of public records, which are generally held to be admissible to prove a negative fact.[3] The federal courts also admit books for this purpose when the entrant is deceased.[4]

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1. 24 Michigan Law Review 506.
2. Tisdale Lumber Company, 5 B.T.A. 752.
3. Ches. & Del. Canal Company v. United States, 250 U.S. 123.
4. American Surety Company v. Pauly, 72 Fed 470.

CHAPTER V11

THE PAROL EVIDENCE RULE

Where parties enter into a written contract, their rights must be controlled thereby, and, in the absence of fraud or mistake, all evidence of contemporaneous oral agreement on the same subject matter varying, modifying or contradicting the written agreement is inadmissible.[1]

There is a distinction between proving the existence of a contract in writing and proving matter which tends to modify the terms of a contract already in evidence. The document itself, once properly authenticated, tells its own story; but, if the document is not produced, its existence and terms must be proved by other evidence, and conflicting evidence may be introduced as to such matters, from which the tribunal must infer what the terms of the contract in fact were. Thus if it is necessary to prove the terms of the contract by secondary evidence of an oral nature,

1. Van Ness v. City of Washington, 29 U.S. 232, 7 L. Ed. 842; DeWitt v. Berry, 134 U. S. 306, 10 Sup Ct 536, 33 L. Ed. 896.

there is little opportunity to apply the rule as to varying the terms of the written instrument by parol testimony; but if the existence and terms of the contract be proved by the original paper or by accurate written copies, the rule finds a ready application, and any parol testimony tending to modify it is excluded.[1]

The parol evidence rule is based upon an assumed intention on the part of the contracting parties, evidenced by the existence of the written contract, to place themselves above the uncertainties of oral testimony, and on a disinclination of the courts to defeat this object. It sometimes happens, however, that writings are procured to be executed by fraud, or do not contain all the agreements between the parties, having been used only to cover certain matters, while others are left to oral understanding; or there may be other circumstances which

1. Burnes v. Scott, 117 U.S. 682, 6 Sup Ct 865, 29 L. Ed 991.

make it unjust to confine the parties strictly to writings between them. In such cases the courts have admitted oral testimony for those purposes, but not for the purpose of proving fact which affect the standing of the parties with respect to the writings.[1]

If it appears that the parties did not intend the writing to embody the whole transactions as do not purport to be covered by the document but which are collateral to it may be proved.[2] Here, there is no varying of the terms of the written instrument. It is only because it has been sought to stretch the rule to cover cases that it never was intended to cover that we have this apparent exception to it. Any oral agreement relating to the document itself, and made subsequent to it, may be shown. Such an agreement, as only modifying, rescinding, or in some other way affecting the written agreement, is thus admissible. There are some peculiarities in the application of this principle.

1. Appeal of The Amalgamated Sugar Company, 4 B.T.A. 568; Goodwin v. Fox, 129 U.S. 601, 9 Sup Ct 367; Richardson v. Hardiwick, 106 U.S. 252, 1 Sup Ct 213.
2. Appeal of Arthur B. Gover, 3 B.T.A. 508; Appeal of Amalgamated Sugar Company, supra.

They arise out of other rules of law not connected with evidence, which prevent the introduction, that which so far as the rule of evidence goes, would be admissible. Thus it is held, though the authorities are conflicting, that where a contract is such as the statu te of frauds requires to be in writing no collateral oral agreement will be allowed to be shown.[1]

If the document is merely a memorandum, and it does not appear that it was intended to contain all the terms of the agreement between the parties, parol evidence as to the agreement is admissible. The fact that a writing exists does not shut out oral testimony unless it appears that the writing was intended to embody the terms of the agreement between the parties.[2]

It sometimes happens that the custom of a part-

1. Harmon v. Harmon, 51 Fed. 113; Goodwin v. Fox, supra; Richardson v. Hardiwick supra;
2. "Where a written contract does not purport to contain all the stipulations between the parties, parol evidence is admissible to show such additional stipulations as are not inconsistent with the writing." McCulloch v. Girard, Federal Case # 8737, see also Gilson Quartz Mining Company v. Gilson, 51 Cal 341; Lafette v. Shawcross 12 Fed 519.

icular trade is such that contracts are made with reference to it, and, though not expressed therein, it is understood to be always observed and binding upon the parties. If, in such case, it becomes material to show the existence of the custom as a part of the contract, it may be done by parol evidence.[1] So also the language used may contain terms which, by custom in the locality where the instrument is executed, have a certain meaning. Such meaning may be proved by parol evidence.

The relations between two persons who have contracted in writing may be brought in issue collaterally in a suit between others. In such case the parol evidence rule does not apply.[2] The facts may be proved as they exist, regardless of the oral evidence

1. Appeal of J. W. Solof, 1 B. T. A. 776.
2. "The rule against varying or contradicting writings by parol evidence obtains only in suits between and is confined to parties to the writing and their privies and has no operation with respect to third persons." Appeal of Converse & Company, 1 B. T. A. 742, see also Mitchell v. McShane Lumber Company, 220 Fed. 878; Siqua Iron Company v. Greene, 88 Fed 207.

varying the terms of any writing between the parties. The rule is one enforced for the benefit of parties who have agreed upon written expression of their relations, and the reason for its application ceases when the rights of others are involved who have neither made the writing nor claim anything under it.

CHAPTER VII

OPINION EVIDENCE

The general rule as to opinion evidence is that upon questions of the existence or non-existence of any fact in issue, whether a main fact or evidentiary fact only, the opinion of a witness as to its existence or non-existence is inadmissible.[1]

Whatever is presented to the senses of a witness, and of which he therefore received direct knowledge, he may state, provided it is relevant to the issue, and not excluded on any other ground. This is strictly a matter of fact. What he has seen or heard or felt, he knows, in the sense in which the law requires knowledge on the part of the witness testifying. What he thinks in regard to the existence or non-existence of a fact in issue is matter of opinion, and he cannot state it.[2]

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1. "Testimony as to value given by non-expert and based largely upon statements of others is inadmissible." In re: Appeal of Tibby-Brewer Glass Company, 2 B.T.A. 918.
2. "Anyone having knowledge of a fact is competent to testify as to value." In re: Appeal of American Express Company, 2 B.T.A. 498.

Evidence of the latter sort is sometimes confused with expert evidence. It is in no sense expert evidence, and, if a witness put on the stand as an expert testifies to such facts, he leaves his character as an expert, and testifies only to what any ordinary witness, who has had the opportunity to acquire the knowledge, can testify to. It is a method of placing before the Board, in a general and broad way, a group of facts which, in detail would be difficult of description, but which, as a whole, make up a certain conception, grasped at once by the mind. Of course, the admissibility of such evidence does not extend to cases where it would not prove helpful to the Board.[1] In those cases which are just on the line between opinion and fact the Board generally allows the admission of opinion evidence too.[2]

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1. Opinions of real estate operator and accountants as to value of leasehold, based on computations involving doubtful and unknown factors, will not be accepted. Appeal of Lenox Land Co., 5 B.T.A. 1206.
2. Value in 1913 determined upon basis of testimony of members of local real estate board and reputable business men. Appeal of J. H. McKnight, 2 B.T.A. 1060.

In each case the Board must decide the question of whether or not certain evidence shall be admitted on a careful consideration of the particular circumstances under which it arises, and if, in the judgment of the Board, it would be materially helped by the admission of the evidence, it will be received.[1] In determining this matter, it is the nature of the subject-matter under examination, rather than the particular facts put before the Board, which must be looked to.[2]

Cases arise in which the particular facts may be clear and undisputed, and yet the Board be utterly unable to draw any intelligent conclusion from them without the aid of outside opinion. For example issues is respect to the value of the good will of a banking business present instances of this sort.[3] In such a case there is no difficulty. It

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1. In re Appeal of Lizzie Goldman, 6 B.T.A. 940; In re Appeal of Moore & Scivor Co, 2 B.T.A. 368; In re Appeal of Somers Lumber Company, 2 B.T.A. 106; In re Appeal of Geo. A. Giles, 4 B.T.A. 335.
2. In re Appeal of Lafayette Hotel Co., 5 B.T.A. 800; Appeal of W. S. Bogle & Company, 6 B.T.A. 541.
3. Fidelity Trust Co.'s Appeal, 3 B.T.A. 292.

is in those cases which are nearer the line that the difficulties arise. When for example, a witness is put on the stand to give his opinion as to what the useful life of an office building is,[1] the Board is presented with the question whether the opinion of the witness would aid them in arriving at a conclusion. All that need be said is that it rests in the sound discretion of the tribunal as to whether the subject is one which permits of opinion testimony being given, for the prerogative of the Board to form their own opinions as to the weight to be given expert testimony as well as ordinary testimony is well guarded.[2]

When a witness is offered as an expert, the court is confronted with two preliminary questions: First, whether the subject is one upon which expert testimony is admissible; Second,

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1. Appeal of Elsie S. Eckstein, 2 B. T. A. 19.
2. Sian Oil & Gas Co.'s Appeal, 3 B. T. A. 670; Appeal of Heral Despatch Company, 4 B.T.A. 325; Appeal of James A. Bradley, 4 B.T.A. 1179; Appeal of Georgia Mfg. Company, 5 B.T.A. 893.

whether the person offered as a witness is an expert. As heretofore explained, if the evidence offered will materially aid the Board in arriving at a conclusion it will be received. The question is one for the tribunal's determination upon all the facts as they appear.

If it be determined that the subject is one for the introduction of expert testimony, the next question is whether or not the witness offered is an expert. If he is not, of course his opinion cannot be used. Preliminary evidence must there fore be used to show that the witness is an expert. This evidence is confined to testimony of the witness himself as to his special qualifications. There is no strict rule which may be laid down as to what is sufficient qualification for an expert witness. The only thing which can be said is that the principle of helpfulness to the Board is to be kept in mind as a guiding principle.[1] The courts are gov-

1. "Opinion testimony as to value is not entitled to much weight where witnesses are unable to show a very high degree of qualification as experts." Appeal of Richard Carney, 6 B.T.A. 457.

erned by the same principles which obtain throughout the fabric of business and social life, and what is of importance in the one place has the same importance in the other. Where the ordinary business man goes for help upon these questions, there may also the Board go, and he who is qualified to give an opinion in the one case may also give an opinion in the other.[1]

There are two classes of witnesses who are ordinarily spoken of as experts. The one embraces those persons who, by reason of special opportunities for observation are in a position to judge of the effect of certain matters pertinent to the controversy. Among the subjects upon which expert testimony of this class has been held proper is that of the foreign law--using the word "foreign" in a sense relative to the jurisdiction in which the

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1. Appeal of H. C. Walker, Jr., 6 B.T.A. 1142.
2. Liverpool & G.W.Steam Co. v. Pheniz Ins. Co., 129 U.S. 397 at 445, 9 Sup Ct 469.

question arises. The unwritten foreign law may be proved by so-called experts in such law; that is, by lawyers or judges practicing under or administering it. Yet what is given in evidence when proof of this kind is offered is facts, and not opinions. This is recognized in most of the cases cited. The interpretation of statutory or written foreign law sanctioned by practice or decision in the foreign jurisdiction constitutes a part of the unwritten law, and may be proved in the same way. It has also been held that the written or statute law may be proved by experts, who may testify orally without producing an exemplified copy.

The other class embraces those witnesses who, by reason of a special course of training or education, are qualified to give an opinion, on certain matter, of a peculiar value, of a value much greater than the opinion of a person not specially versed in these subjects. Expert testimony is usually thought of in connection with inquiry as to

technical or abstruse scientific questions--questions requiring, as an essential to intelligent judgment, a special training of the mind,-and this is the field in which the usefulness of such testimony is most often felt. There are many matters however, relating to common, everyday affairs, about which witnesses are permitted to give expert opinions. In a general way, it will be seen from the cases cited in the notes that the ranks of expert witnesses are recruited from physicians, bankers, engineers, lawyers, real estate men, accountants and business men in general, and indeed, almost every class of men engaged in pursuits requiring special experience or education on the part of those carrying them on.[1]

The opinion of an expert must either be based upon admitted facts, about which there is no

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1.(Business man allowed to testify as an expert) Appeal of Arrowhead Mills, Inc. 5 B.T.A. 352; (Real estate men seem to be allowed to testify regardless of qualification, the Board weighing their testimony according to their qualificationss.) Appeal Of Matilda Holzlee, 6 B.T.A. 1132; Appeal of Lenox Land Co., 5 B.T.A. 1206; Appeal of F.W.Gaskins, 4 B.T.A. 619; Island Line Shipping Co., 4 B.T.A.1055; Philip R. Brand, 5 B.T.A. 297; Montgomery Bros & Co., 5 B.T.A. 258 (Banker as expert) Appeal of Fidelity Trust Company, 3 B.T.A. 292; (Engineer as expert) Appeal of A.D.Morton, 6 B.T.A. 1295.

dispute, or upon assumed facts, put for the purpose of obtaining an opinion. If the Board determines the facts to be assumed, the opinion will come into active operation as evidence. If they find they are not proved as assumed, the opinion will have no influence with them.[1]

The evidentiary facts upon which an expert is asked to give an opinion as to a main fact in issue must be distinguished from facts, or more properly speaking, reasons; which form the ground for his opinion. The latter he is always permitted to state in explanation of his opinion. With the former, in his expert capacity he has nothing to do, except to assume them as they are stated to him hypothetically, or as they are called to his attention as having been previously testified to.

Proof of handwriting by opinions of specially qualified experts is often used. When this method is used another element enters into the test-

1. "Opinion of expert as to value not accepted where not reasoned correctly from premises upon which opinion is based and witness's opinion is contradictory" Appeal of Fidelity Storage Co. 2 B.T.A. 371: Kilburn Lincoln Machine Co., 2 B.T.A. 363.

imony besides observation, namely, that of comparison of handwriting,--comparison of the specimen in question with an admittedly genuine specimen. An opinion of an expert, based upon a careful comparision by him of the disputed writing with a genuine specimen, is generally held admissible.[1] An ordinary witness cannot testify from comparison. The rule is confined strictly to experts. It is also held that an expert may without resort to comparison, testify to the genuineness of the writing direct: that is, he may give an opinion as to whether it is a natural or simulated hand.[2]

The English common law doctrine was that specimens of handwriting irrelevant to the issues in the case would not be admitted solely for the purpose of enabling the court to compare them with the writing in dispute, and this was adopted as the proper rule by the United States Supreme Court.[3]

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1. United States v. Darnaud, Federal Case # 14,918.
2. United States v. Holtsclaw, Fed. Case # 15,384.
3. Moore v. United States, 91 U.S. 270.

The general American doctrine allows such comparisons to be made.[1] Even though the Supreme Court has held as stated above, it is an open question as to how the United States Board of Tax Appeals, with its liberal attitude, will decide.

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1. Wigmore on Evidence (2nd) Section 2361.

CONCLUSION

In examining the decisions of the United States Board of Tax Appeals regarding the admission of documentary evidence before that tribunal, one comes to the following conclusions:

(1) The decisions of the federal courts are followed closely enough and with sufficient regularity by the Board, that one is safe in assuming that the Board will decide as the federal courts have decided on those questions which have not as yet come before the Board.

(2) The Board is meeting the need for which it was created to fill. It has given the taxpayer a prompt and efficient mechanism in which to have his tax difficulties adjudicated.

(3) The Board has shown a liberal attitude in admitting account book evidence and everything will be admitted that can be shown to be a part of the regular bookkeeping records of the concern.

(4) The United States Board of Tax Appeals

shows a tendency to have a willingness to hear opinion evidence regardless of formal rules of evidence and then let the qualifications of the witness determine the weight to be given the opinion expressed rather than exclude the evidence altogether if it does not comply with the regular rules of admission as followed by the courts.