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Laying a Foundation for the Introduction of Secondary Evidence in West Virginia

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The best evidence rule, at its inception, encompassed every aspect and type of proof, and litigants were required to produce the very best evidence that the nature of the case would permit. Frequently, the rule was enforced when oral evidence was offered to prove an issue that was capable of proof in some other manner.[1] By its very nature, the rule was capable of misuse because of wide discretion in the court for its application. In fact misuse of the rule caused the gradual devolution to the more narrow rule of today. During the latter part of the seventeenth and throughout the eighteenth centuries, when rules of evidence were shaping into a system for use in jury trials, the best evidence rule emerged in a narrowed form, applying only to the proof of a writing. The original rule remained in the law as an underlying principle to guide, but not to control, the reception of evidence. As applied in the courts today, the best evidence rule requires that, when one wishes to prove the contents of a writing, he must produce the original writing or satisfactorily explain its absence before the court will receive secondary evidence to prove the same matters.[2]

The general purpose of this note is to set out the various conditions precedent to the introduction of secondary evidence and to suggest ways to lay the foundation for such evidence in a West Virginia court.

West Virginia decisions are generally in accord with the rule as previously explained. The best evidence rule in this state obtains only in cases in which one attempts to prove the contents of a writing.[3] In such cases the original writing must be produced or its absence explained satisfactorily to the court.[4] Upon satisfactory explanation and if the evidence be not otherwise subject to valid objection, the court will admit the secondary evidence. The types and kinds of evidence will vary but must of necessity be a substitute for stronger and better proof which is not presently available.[5]

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[1] 1 JONES, EVIDENCE 383 (4th ed. 1938); see also 1 JONES, EVIDENCE § 231 (5th ed. 1958).

[2] 1 GREENLEAF, EVIDENCE 169 (16th ed. 1899).

[3] State v. Holbert, 137 W. Va. 883, 74 S.E.2d 772 (1953); State v. Davis, 74 W. Va. 657, 82 S.E. 525 (1914); 32 C.J.S. *Evidence* § 782 (1942); 20 AM. JUR. *Evidence* § 405 (1939).

[4] State v. Lowry, 42 W. Va. 205, 24 S.E. 561 (1896).

[5] O'Connor v. United States, 11 Ga. App. 246, 75 S.E. 110 (1912).

In order to introduce the secondary evidence, the practitioner will be obliged to show the court that the primary evidence was not available.[6] The procedure here will vary according to the particular facts of the case. For example, the original may have been lost, or it may have been destroyed, or at least a diligent search may have failed to produce it, or it may be in the possession of someone over whom the court does not have jurisdiction.[7] If the original has been destroyed, then the proponent of the secondary evidence would simply establish destruction thereof by the best evidence available, perhaps by a witness who saw the destruction take place.[8] If the document has been lost or allegedly destroyed, then the person seeking the aid of the secondary evidence need not exhaust every hypothesis of the original's whereabouts or prove conclusively that it is no longer in existence.[9] He need only establish a reasonable presumption that the writing is lost or destroyed.[10] Establishing such a presumption is a preliminary question and is addressed to the sound discretion of the court.[11]

Possession of the original by one other than a party to the action presents another variation of the unavailability of such a primary document. If the person holding the original is within the jurisdiction of the court, the original should be required for the court could compel it to be brought in. If, on the other hand, the original is held by one residing outside the jurisdiction of the court and the court cannot compel its production, a copy of the original, properly authenticated, should be accepted by the court as secondary evidence. In such a case it has been held that the proponent of the secondary evidence need not show any special efforts to get the original or to induce the holder of such evidence to bring it into court, since the success or failure of such efforts would not depend upon the proponent but rather upon a stranger to the action.[12]

When a party to the action holds documentary evidence that another party wishes to introduce into evidence, the proponent of that evidence must make a demand upon that party holding the primary evidence to produce it. Such a demand must be reasonable in respect to the time and distance factors. What is a reasonable

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[6] Thompson v. Coal & Coke Co., 104 W. Va. 134, 139 S.E. 642 (1927).
[7] State v. Lowry, *supra* note 4.
[8] Edgell v. Conaway, 24 W. Va. 747 (1884).
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] Vinal v. Gilman, 21 W. Va. 301 (1883).

demand is of course determined by the particular facts of the case. A prudent practitioner would undoubtedly make the demand as soon as he realized the need for such primary evidence. In the case of *Waddell v. Trowbridge*,[13] two examples merit consideration on the question of what is or is not reasonable notice. The case, tried in West Virginia, involved an automobile insurance policy, the terms of which became important in the case. Defendant made a demand for the insurance policy for the first time when the witness was on the stand in the midst of the trial. At this time it was learned that the policy was in Pasadena, California, and that it could not possibly be obtained without a delay in the trial. The defendant then sought to produce a standard form of the policy which purported to contain the same terms as the plaintiff's policy. The proper foundation was not laid for the introduction of secondary evidence, for here the demand was not timely made in view of the distance factor. Reasonable notice is a relative factor and depends upon the facts of the individual case.[14] Without the proper effort to procure the best evidence available in the case, secondary evidence is not admissible. In the same trial, plaintiff attempted to introduce into evidence a carbon copy of a letter from the agent of the insurance company to the defendant, after making a demand at the trial for the original which defendant admitted he had received. Defendant answered that he could not say for sure where the original was, but that, if he had it, it was probably in his desk at home. The trial was in progress in Charleston and the defendant's residence was less than ten miles away and within reach of the court in a short time by car or trolley, yet the original was not produced. Under these circumstances, the court decided that the demand for the original letter at the trial was reasonable and, since the defendant did not produce it, the plaintiff had laid a proper foundation and could introduce the carbon copy as secondary evidence. Related to the rules recognized in this case is the corollary principle that denial of receipt and possession of a letter or telegram will excuse a demand for the production thereof as a step preliminary to proof of its contents.[15]

Even when the state is attempting to convict a person of forgery and the forged instrument is in the possession of the defendant or his friends, the state must show a proper demand upon

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[13] Waddell v. Trowbridge, 94 W. Va. 482, 119 S.E. 290 (1923).
[14] Burton v. Seifort & Co., 108 Va. 338, 61 S.E. 993 (1908).
[15] Cobb v. Dunlevie, 63 W. Va. 398, 404, 60 S.E. 384, 386 (1908).

the defendant or his counsel before evidence of the existence, character, and contents is admissible.[16]

Many of the cases pertaining to the introduction of secondary evidence involve letters or telegrams. The usual business practice is to make a carbon copy of the letter mailed or otherwise sent out. How then, as a practical matter, is the foundation laid for the receipt into evidence of a carbon copy of a letter? If the original letter is allegedly in the hands of the party opposing the introduction of this secondary evidence and that party denies receipt of the original, the proponent's problem is twofold.[17] He must show that the carbon copy he is offering as evidence is in fact authentic, and he must also show that the original was received by the addressee. Proof that the original was received by the addressee is of course not necessary when the addressee admits receipt of the letter but fails to produce it for some other reason.

To prove authenticity, the contents of the copy should be viewed in relation to the facts of the issue to be resolved, and, if the relationship is credible, the copy should be received. To establish authenticity, it is not necessary to prove the copies beyond a reasonable doubt but only to introduce enough evidence, which, when uncontradicted, would satisfy all reasonable minds of the genuineness of the secondary evidence offered.[18] In the absence of any direct evidence, the facts to be drawn from the writing itself may prove its authenticity.[19] Direct evidence, such as by a witness who testifies that the carbon is an exact copy of the original sent to the addressee, is of course preferred.

Proof of the sending of the original to the addressee must be accomplished in accordance with the facts of the particular case. If the letter were delivered by a messenger, the testimony of the party who delivered the letter to the addressee should be offered in evidence.[20] The more common method of delivery is by use of the mails, which presents a somewhat different problem. Registered or certified mail receipts are evidence that the original was

[16] State v. Lowry, *supra* note 4.
[17] Rubenstein v. Ins. Co., 118 W. Va. 367, 190 S.E. 531 (1937).
[18] Fayette Liquor Co. v. Jones, 75 W. Va. 119, 83 S.E. 726 (1914).
[19] 7 WIGMORE, EVIDENCE § 2148 (3d ed. 1940).
[20] While no case authority is offered in support of this specific proposition, it seems to be a valid theory of proof when compared to W. VA. CODE ch. 56, art. 3 § 11 (Michie 1955), which permits service of process by any credible person. For a case on this point, see Peck v. Chambers, 44 W. Va. 270, 28 S.E. 706 (1897); W. VA. R.C.P. 4(c).

received by the addressee, but, in the course of regular mails, such receipts are not available. A witness may testify that he properly addressed, stamped, and deposited the letter in the post office,[21] and, unless this evidence is objected to on valid grounds or shown not to be credible on cross-examination of the witness,[22] the presumption then obtains that the letter was in fact received.[23]

Telegrams present a similar problem in proof, yet by the nature of a telegram the proof that it was received is not as difficult to establish.[24] Authentication of the copy of a telegram is accomplished in the same manner as in the case of any letter or copy of any record. There is an added problem in the introduction into evidence of a copy of a telegram. As has been previously pointed out herein, the proponent of secondary evidence must normally show the court that he has made every reasonable effort to acquire the primary evidence before the court will hold that the proper foundation has been established to permit the introduction of the copy in evidence.[25] What is primary evidence in relation to a telegram? Is it the written copy delivered at the place of transmission or is it the printed copy that is received by the addressee? The answer to this question would seem to depend on which party is responsible for its transmission, or for whom the telegraph company was acting as agent in sending the telegram. If the proponent wishes to prove a contract by telegrams, the best evidence of this contract is the telegram containing the offer as it was received by the addressee and the written telegram accepting the offer as it was delivered to the telegraph company for transmission. If there is only one communication between the parties to the action, the telegram as delivered to the addressee is the best evidence of what was in that telegram.[26] Authenticity of the telegram must be shown, whether the original or a copy is introduced in evidence, that is, it must be shown that the purported sender of the telegram did in fact commission the telegraph company to act as his agent in sending the telegram. This may be accomplished through the testimony of the telegraph company's agent who accepted the order to send the telegram.[27]

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[21] Phoenix Ins. Co. v. Thomas, 103 W. Va. 574, 138 S.E. 381 (1927).
[22] Showalter v. Chambers, 77 W. Va. 720, 88 S.E. 1072 (1916).
[23] Fayette Liquor Co. v. Jones, *supra* note 18, at 125.
[24] 52 AM. JUR. *Telegraphs and Telephones* §§ 117-126 (1944); Annot., 63 A.L.R. 808 (1929).
[25] Thompson v. Coal & Coke Co., *supra* note 6.
[26] Cobb v. Glenn Boom & Lumber Co., 57 W. Va. 49, 49 S.E. 1005 (1905).
[27] National Bank v. National Bank, 7 W. Va. 544 (1874).

The rules as herein discussed will suffice to lay a foundation for the ordinary writings such as letters, telegrams and most routine papers. Copies of these writings may be made in a variety of ways, the more common methods today being either by a photographic copying machine or by carbon copies from a typewriter. In some jurisdictions,[28] including West Virginia,[29] carbon copies made on a typewriter have been given special consideration as evidence. They are considered primary rather than secondary evidence, and the proponent need not lay any foundation for their introduction in evidence. The West Virginia court held in *Elias & Bro. v. Boone Timber Co.*,[30] that duly authenticated carbon copies of such papers may be admitted in evidence as primary evidence of the facts they contain and that the proponent of such evidence need not explain to the court the whereabouts of the original or even make a demand on the party supposedly holding the original. If the copies are identified as resulting from the same mechanical operation of the typewriter by the use of properly adjusted carbon papers, the court reasons that the copies could not differ in substance and form and, in such a case, they are all basically original writings. Thus, if any one of these copies is admissible for any purpose, all the others are likewise admissible. Some jurisdictions have admitted carbon copies in evidence as originals when the carbons were signed.[31] While the *Boone Timber Co.* case plainly states the rule in West Virginia to be that carbon copies may be considered as primary evidence, few, if any, subsequent cases can be found in this jurisdiction which treat carbon copies as original evidence. It would seem that the offer of such evidence as secondary is prudent procedure and that, in the event of some deficiency in laying the foundation for such secondary evidence, the proponent could always rely upon this rule to get the carbon copy into evidence. The use of this evidence as primary does have at least one further ramification insofar as degrees of secondary evidence are concerned. Some jurisdictions hold that there are no degrees of secondary evidence.[32] Others contend that evidence next best after the original is the carbon copy and, after that, oral evidence may be introduced to prove the contents of the

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[28] Annot., 65 A.L.R.2d 343 (1959).

[29] Elias & Bro. v. Boone Timber Co., 85 W. Va. 508, 102 S.E. 488 (1920).

[30] *Ibid.*

[31] Cole v. Ellwood Power Co., 216 Pa. 283, 65 Atl. 678 (1907).

[32] Baroda State Bank v. Peck, 235 Mich. 542, 209 N.W. 827 (1926).

writing.[33] Thus, if West Virginia adheres to the rule that a properly authenticated carbon copy is primary evidence, it would seem to follow that in West Virginia there are no degrees of secondary evidence.

The West Virginia practitioner has at least three general areas where he needs to lay a proper foundation for the introduction of secondary evidence. If the primary evidence be outside the jurisdiction of the court, he will be obliged to show that he has made an effort to obtain this evidence and that such effort was reasonable in light of all circumstances in the case. If the primary evidence be lost or destroyed, it would be well to establish the facts of destruction by a witness to erase any doubt that the original was in existence and to remove any shadow of fraudulent destruction by the proponent of the secondary evidence. In a case where there is no substantial evidence to show the disposition or location of the original, competent evidence should be offered to establish that a diligent search has been made and that the original can not be located. If an adverse party holds the primary writing, sufficient demand for its production at trial should be timely made. Reasonableness of the notice for production will depend upon where the writing is located, what length of time will be required to get it into court, and whether the proponent of the secondary evidence made the demand as soon as he realized the need for the writing. Notice is of course not necessary when the adverse party denies receipt and possession of the evidence.

Rule 70 (1) of the Uniform Rules of Evidence[34] succinctly lists the elements considered necessary to a foundation upon which secondary evidence may be received in court. Strong arguments for uniformity in this area of the rules of evidence are readily noted. To promote such uniformity, Rule 70 (1) is here quoted for study and consideration by the Bench and Bar.

> "As tending to prove the content of a writing, no evidence other than the writing itself is admissible, except as otherwise provided in these rules, unless the judge finds (a) that the

[33] A majority of states has adopted the American rule which holds that a copy of the lost writing is the next best evidence and, if it is available, the court will not hear any oral evidence on the point. For a discussion of the American rule see 4 WIGMORE, EVIDENCE § 1268 *et seq.* (3d ed. 1940).

[34] Drafted by the National Conference of Commissioners on Uniform State Laws and approved at its annual conference, 1953. Approved by the American Bar Association, 1953.

writing is lost or has been destroyed without fraudulent intent on the part of the proponent, or (b) that the writing is outside the reach of the court's process and not procurable by the proponent, or (c) that the opponent, at a time when the writing was under his control has been notified, expressly or by implication from the pleadings, that it would be needed at the hearing, and on request at the hearing has failed to produce it, or (d) that the writing is not closely related to the controlling issues and it would be inexpedient to require its production or (e) that the writing is an official record, or is a writing affecting property authorized to be recorded and actually recorded in the public records as described in Rule 63, exception (19)."

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