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Business Records as Evidence in West Virginia

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STUDENT NOTES

BUSINESS RECORDS AS EVIDENCE IN WEST VIRGINIA

"Hearsay evidence is testimony in court or *written evidence*, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."¹ As a general rule, hearsay evidence is inadmissible.² There are many exceptions to the hearsay rule,³ one of which is broadly termed the "regular entries" exception.⁴ This exception has two branches: (1) the so-called "shopbook" rule, which deals with entries by a litigant in his own books, and (2) the so-called "regular entries" rule, which originally dealt only with entries made by one not a party to the suit, but now also deals with entries made by a litigant.⁵ There is now no justification for the existence of two

¹ MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 225, at 460 (1950) (emphasis added).

² Rohrbaugh v. Rohrbaugh, 136 W. Va. 708, 68 S.E.2d 361 (1951); Wade v. Haught, 112 W. Va. 469, 164 S.E. 662 (1932); Charlton v. Pancake, 98 W. Va. 363, 127 S.E. 70 (1925). Thayer theorizes that the hearsay rule is but an exception to the rule that "whatsoever is relevant is admissible". THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 522 (1898).

³ The Uniform Rules of Evidence list thirty-one exceptions.

⁴ 5 WIGMORE, EVIDENCE § 1517 (3d ed. 1940).

⁵ Norville, *The Uniform Business Records as Evidence Act*, 27 ORE. L. REV. 188, 189 (1948).

separate branches of this exception.⁶ In West Virginia there is no clear line of distinction made between the two branches.⁷ The application of the broadly termed "regular entries" exception has been burdened with many technicalities, some of them hair-splitting.⁸

The historical development of the "regular entries" exception to the hearsay rule will not be traced herein.⁹ Not all of the technicalities which have cropped up in the various jurisdictions will be considered. No attempt will be made to draw fine distinctions between the two branches of this exception. The scope of this note will be, rather, a discussion of the existing West Virginia law pertaining to the admissibility in evidence of business records, a discussion of the Uniform Business Records as Evidence Act,¹⁰ and, finally, a discussion of the desirability of adopting the Uniform Business Records as Evidence Act in West Virginia.

The early West Virginia case of *Vinal v. Gilman*¹¹ set forth the following requirements for the admissibility of book entries into evidence: (1) the book must be a book of original entries; (2) the entry should be made when the transaction occurred; (3) the entry must be made in the regular course of one's business, duty or employment; (4) there must be personal knowledge of the transactions on the part of the one making the entries.¹²

(A) ORIGINAL ENTRIES REQUIREMENT

In *Deitz v. McVey*¹³ the plaintiff, in an action of assumpsit on account for lumber, kept tally slips as the lumber was loaded on wagons; these slips were kept until a certain quantity was made up, and then plaintiff's bookkeeper made the appropriate book entries to ascertain the amount due; and then the tally slips were destroyed. It was held that these book entries were original, and hence were admissible.

⁶ *Id.* at 192; 5 WIGMORE, EVIDENCE § 1517. See also McCORMICK, *op. cit. supra* note 1, § 282, at 598.

⁷ See 5 WIGMORE, EVIDENCE § 1561 n.5.

⁸ See Norville, *supra* note 5, at 189-96.

⁹ For a comprehensive treatment of the "regular entries" exception to the hearsay rule, see 5 WIGMORE, EVIDENCE §§ 1517-61.

¹⁰ This act was adopted in 1936. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 175 (1936).

¹¹ 21 W. Va. 301 (1883).

¹² *Vinal v. Gilman*, 21 W. Va. 301, 314-15 (1883).

¹³ 77 W. Va. 601, 87 S.E. 926 (1916).

In at least one case,¹⁴ an account book has been held inadmissible on the ground that it was not a book of original entries. There, the first book had been destroyed by fire, and a later account book had been made by the plaintiff from memory.

Other West Virginia cases emphasize that a book entry must be an original one in order to be admissible.¹⁵

It thus appears to be firmly established that in West Virginia the entry must be an original one. However, in a given case it may be difficult to predict whether or not the entries will be held to be original.¹⁶ It can be safely stated, though, that, if the contention is made that certain entries are not original, the court will be compelled to consider the contention and ascertain whether the "original entry" requirement is met.

(B) AT TIME OF TRANSACTION REQUIREMENT

A book entry made in 1892 concerning business transactions in 1885 and 1886 is not admissible as a book entry made in due course of business.¹⁷ The original requirement in *Vinal v. Gilman*,¹⁸ that the entry should be made when the transaction occurred, is altered in a later case: "the entry [must be] co-temporaneous, or practically so, with the transaction."¹⁹ It is not necessary to make the entries at the time of the transaction, as long as they are made as promptly as it is convenient to do so, owing to the character of the business.²⁰ And where book entries are made from tally sheets it is not essential that the entries be made even shortly after the transaction occurred.²¹

The requirement now apparently is that the entry must be made at or about the time of the transaction with the nature of the particular business being taken into consideration in determining whether the requirement is sufficiently satisfied.

¹⁴ *Martufi v. Daniels*, 99 W. Va. 673, 129 S.E. 709 (1925).

¹⁵ See e.g., *State v. Martin*, 102 W. Va. 107, 112, 113, 134 S.E. 599, 601 (1926); *State v. Larue*, 98 W. Va. 677, 690, 691, 128 S.E. 116, 121 (1925); *Griffith v. American Coal Co.*, 75 W. Va. 686, 695, 84 S.E. 621, 625 (1915).

¹⁶ Cf. *Deitz v. McVey*, 77 W. Va. 601, 87 S.E. 926 (1916); *Martufi v. Daniels*, 99 W. Va. 673, 129 S.E. 709 (1925).

¹⁷ *Rowan v. Chenoweth*, 49 W. Va. 287, 292, 38 S.E. 544, 546 (1901) (dictum).

¹⁸ 21 W. Va. 301, 314 (1883).

¹⁹ *West Virginia Architects and Builders v. Stewart*, 68 W. Va. 506, 508, 70 S.E. 113, 114 (1911) (emphasis added).

²⁰ *Parkersburg & Marietta Sand Co. v. Smith*, 76 W. Va. 246, 256, 85 S.E. 516, 520 (1915).

²¹ *Deitz v. McVey*, 77 W. Va. 601, 603, 87 S.E. 926, 927 (1916).

(C) REGULAR COURSE OF BUSINESS REQUIREMENT

No case has been found substantially testing the "regular course of business" requirement. However, it can be definitely stated that is essential, for it is so stated in most of the business records cases.²²

(D) PERSONAL KNOWLEDGE REQUIREMENT AND PRODUCTION OF WITNESSES REQUIREMENT

It was stated in an early case that there must be "personal knowledge of the transactions on the part of the one making the entry."²³ In that case the entrant was not available as a witness, being a nonresident; but his handwriting was proven, and it was proven that he had actually taken part in the transaction which was recorded. It was held that the "personal knowledge" test was satisfied even though the entrant had not testified.²⁴

There is a series of cases which demonstrates a modern, liberal attitude of the West Virginia court toward the technicalities and restrictions governing the admissibility of business records. In order to more fully understand and appreciate this attitude, it is necessary to mention another common law restriction. Originally the one making the entry, and any one furnishing information to the entrant, had to be produced as a witness at the trial, or proven to be unavailable as a witness before the business records could be received as evidence.²⁵

The "personal knowledge" requirement and the "production of witnesses" requirement are being considered together as it is difficult to separate the two.

In *West Virginia Architects and Builders v. Stewart*²⁶ it was contended that certain book entries were inadmissible as the entrant, the plaintiff's bookkeeper, had no personal knowledge of the transaction recorded. Her entries were made from information given to her by the president and a foreman of the plaintiff corporation. The president's testimony was excluded on the ground that it related to a transaction with a decedent. The foreman was not called as

²² See, e.g., *State v. Martin*, 102 W. Va. 107, 113, 134 S.E. 599, 601 (1926); *West Virginia Architects and Builders v. Stewart*, 68 W. Va. 506, 508, 70 S.E. 113, 114 (1911).

²³ *Vinal v. Gilman*, 21 W. Va. 301, 315 (1883).

²⁴ *Id.* at 301.

²⁵ *McCORMICK*, *op. cit. supra* note 1, § 288, at 605.

²⁶ 68 W. Va. 506, 70 S.E. 113 (1911).

a witness. The court held that the books were admissible, relying heavily upon Professor Wigmore.²⁷

In a criminal case²⁸ it was held that certain book entries of an employer, which were verified by department supervisors, were admissible without calling as witnesses either the employees having personal knowledge of the transaction or the employees who made the entries.

In a later criminal case,²⁹ to establish an alibi, work records of a repair shop, made out by mechanics, were admitted upon the production and verification of the records by supervisors, without calling as witnesses the mechanics who did the work and made the entries.

These last three cases cut deeply into the "personal knowledge" requirement, and also cut deeply into the "production of witnesses" requirement. Two of the cases³⁰ do not even require the presence of the entrant as a witness. Not only is personal knowledge of the entrant not always required, but his presence as a witness and the presence as a witness of those having personal knowledge of the transaction recorded are not required.

These West Virginia cases have been liberal, and justifiably so, as records of business establishments are normally considered reliable in the business world. Those having dealings with business firms do not normally ask that the entrant or informant be produced to explain the entries before reliance is placed on them. Surely then the courts should likewise give credence to these records. Professor Wigmore offers several reasons for dispensing with the "personal knowledge" requirement and the "production of witnesses" requirement: (1) employees may have left the services of the employer; (2) it cannot always be ascertained who made the entries; (3) the production in court of numerous employees would interrupt the work of a business establishment; (4) the cost of the evidence may be prohibitive; and (5) the memory of such persons usually affords little aid.³¹

²⁷ 5 WIGMORE, EVIDENCE § 1530, at 379.

²⁸ *State v. Larue*, 98 W. Va. 677, 128 S.E. 116 (1925).

²⁹ *State v. Martin*, 102 W. Va. 107, 134 S.E. 599 (1926).

³⁰ *Ibid.*; *State v. Larue*, 98 W. Va. 677, 128 S.E. 116 (1925).

³¹ 5 WIGMORE, EVIDENCE § 1530, at 378.

Types of Business Records Admitted

Records of various types of business have been admitted in West Virginia. Among them have been records of an oil company,³² building contractor,³³ physician,³⁴ lumber manufacturer,³⁵ private banker,³⁶ cement company,³⁷ and a garage.³⁸

It can not be definitely stated, however, just what types of business or endeavor will be included in the "regular entries" exception to the hearsay rule. A good illustration of this is the uncertainty which exists as to hospital records. There is some doubt whether hospital records will be admissible under the "regular entries" exception to the hearsay rule. In *Cline v. Evans*,³⁹ while holding the records involved inadmissible for other reasons, the court stated, "if properly identified, and shown to have been made up in the regular course of treatment, it may be plausibly argued that by analogy to rules governing the keeping of books and records, the same [a hospital record] may, when properly identified and within proper limits, be admissible as to routine matters, although there is little authority to support such a rule."⁴⁰ In a recent case,⁴¹ the court in discussing the admissibility of entries in hospital records does not lay down any rule, but suggests that "routine entries, and perhaps ordinary diagnostic findings, based upon objective data, and not presenting a question of obvious difficult interpretation, should be admitted."⁴²

The Uniform Business Records as Evidence Act

Throughout the United States the application of the "regular entries" exception had developed "a mass of detailed petty limitations that have no relation to the practical trustworthiness of the documents offered";⁴³ this resulted in "a mass of technicalities which serve no useful purpose in getting at the truth."⁴⁴ Remedial legis-

³² *Vinal v. Gilman*, 21 W. Va. 301 (1883).

³³ *Parkersburg & Marietta Sand Co. v. Smith*, 76 W. Va. 246, 85 S.E. 516 (1915); *West Virginia Architects and Builders v. Stewart*, 68 W. Va. 506, 70 S.E. 113 (1911).

³⁴ *Griffith v. American Coal Co.*, 75 W. Va. 686, 84 S.E. 621 (1915).

³⁵ *Deitz v. McVey*, 77 W. Va. 601, 87 S.E. 926 (1916).

³⁶ *DiBacco v. Benedetto*, 82 W. Va. 84, 95 S.E. 601 (1918).

³⁷ *State v. Larue*, 98 W. Va. 677, 128 S.E. 116 (1925).

³⁸ *State v. Martin*, 102 W. Va. 107, 134 S.E. 599 (1926).

³⁹ 127 W. Va. 113, 31 S.E.2d 681 (1944).

⁴⁰ *Cline v. Evans*, 127 W. Va. 113, 120, 31 S.E.2d 681, 684 (1944).

⁴¹ *Keller v. Wonn*, 140 W. Va. 860, 87 S.E.2d 453 (1955).

⁴² *Id.* at 872, 87 S.E.2d at 460.

⁴³ 5 WIGMORE, EVIDENCE § 1520, at 361.

⁴⁴ *Ibid.*

lation was needed. In 1927 a model act was published by a committee of the Commonwealth Fund of New York.⁴⁵ This act was the model for the Federal Business Records Act⁴⁶ and for statutes in several states.⁴⁷ Another remedial act, The Uniform Business Records as Evidence Act (sometimes hereinafter called the uniform act), was adopted in 1936 by the Commissioners on Uniform State Laws.⁴⁸

This act provides:

“§ 1. Definition.—The term ‘business’ shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

“§ 2. Business Records.—A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

“§ 3. Uniformity of Interpretation.—This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

“§ 4. Short Title.—This act may be cited as the Uniform Business Records as Evidence Act.

“§ 5. Repeal.—All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.

⁴⁵ “Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind.”

⁴⁶ 28 U.S.C. § 1732 (1952).

⁴⁷ McCORMICK, *op. cit. supra* note 1, § 289 n.7. The states listed therein are Connecticut, Maryland, Massachusetts, Michigan, Nebraska, New Mexico, New York and Rhode Island.

⁴⁸ HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 175 (1936). West Virginia was one of the states voting in favor of adoption. *Ibid.*

“§ 6. Time of Taking Effect.—This act shall take effect
.....”⁴⁹

This act has met with wide approval.⁵⁰

It is generally thought that the basic motivation for remedial legislation was the burdensome requirement of producing as a witness the entrant and all who had personal knowledge of the facts recorded, or showing justifiable unavailability.⁵¹ It has been shown previously that the West Virginia court has greatly relaxed this requirement, and has adopted a liberal attitude toward this restriction.⁵² However, this was not the only weakness, or unduly technical requirement which was meant to be changed by the uniform act. A comparison should then be made between the existing West Virginia law and the uniform act to ascertain whether any change in the former would be effected by adopting the latter, and to ascertain whether the change, if any, would be desirable.

It has been shown that one of the West Virginia requirements is that the entry be an original one.⁵³ No mention is made in the uniform act that the entry must be original. This is one aspect of the West Virginia law which would be changed by the uniform act. This would surely be an improvement. The court should not be concerned with whether or not an entry is original; it should instead be primarily concerned with the reliability and trustworthiness of the record offered.

Another West Virginia requirement is that the entry be made at or near the time of the transaction recorded.⁵⁴ The uniform act contains a very similar requirement: “at or near the time of the act, condition or event.”⁵⁵ Here, no change would result.

Also the “regular course of business” requirement appears in the uniform act⁵⁶ as well as in the West Virginia cases.⁵⁷

⁴⁹ 9A UNIFORM LAWS ANN. 299, 313 (1957).

⁵⁰ The following are listed as having adopted the act. Arizona, California, Delaware, Florida, Georgia, Hawaii, Idaho, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, Washington and Wyoming. 9A UNIFORM LAWS ANN. 297 (1957).

⁵¹ McCORMICK, *op. cit. supra* note 1, § 289, at 607; Norville, *supra* note 5, at 195 n.45.

⁵² See notes 24-26, 28, 29 *supra*.

⁵³ See notes 13-15 *supra*.

⁵⁴ See notes 17-21 *supra*.

⁵⁵ Uniform Business Records as Evidence Act § 2.

⁵⁶ *Ibid.*

⁵⁷ See note 22 *supra*.

The "personal knowledge" and "production of witnesses" requirements nowhere appear in the uniform act, and as stated heretofore, the West Virginia cases have greatly relaxed these requirements.⁵⁸ Thus, no appreciable change in the law would be effected here.

The uniform act provides that, "The term 'business' shall include every kind of business, profession, occupation, calling or *operation of institutions*, whether carried on for profit or not."⁵⁹ This language makes it clear that hospital records are included. Indeed, it has been so held.⁶⁰ It is, at best, doubtful at the present time whether hospital records are admissible in West Virginia as an exception to the hearsay rule.⁶¹ Hence, the West Virginia law would be clarified by adopting the act, at least to the extent that hospital records would come within the purview of the statutory "regular entries" exception, and would not be inadmissible on the sole ground that they are not business records of the type contemplated to be admissible.⁶² This would seem to be a desirable clarification. The fact that the record is not one of a business concern should not affect its admissibility. The test should be whether or not the particular record is reliable and trustworthy.

Another observation to be made is that, although the West Virginia cases have relaxed the "personal knowledge" and "production of witnesses" requirements, still the records were produced and verified by supervisors in whose department and under whose supervision the records were kept.⁶³ A situation could arise where the supervisor, as well as all entrants and persons having knowledge of the transactions recorded, would be unavailable as a witness. Whether the West Virginia court would permit another employee to verify the records is a matter of conjecture. But the uniform act would allow the custodian or other qualified witness to testify to the identity of the record and to the mode of its preparation.⁶⁴ This approach, likewise, seems desirable.

⁵⁸ See notes 24-26, 28, 29 *supra*.

⁵⁹ Uniform Business Records as Evidence Act § 1 (emphasis added).

⁶⁰ *Brown v. Saint Paul City Ry.*, 241 Minn. 15, 62 N.W.2d 688 (1954); *Gallagher v. Portland Traction Co.*, 181 Ore. 385, 182 P.2d 354 (1947).

⁶¹ See notes 39-42 *supra*.

⁶² For an excellent discussion concerning contents of hospital records that are properly admissible under the uniform act, see *Norville*, *supra* note 5, 199-212.

⁶³ See *State v. Martin*, 102 W. Va. 107, 134 S.E. 599 (1926); *State v. Larue*, 98 W. Va. 677, 128 S.E. 116 (1925).

⁶⁴ Uniform Business Records as Evidence Act § 2.

It should be emphasized that the uniform act bestows upon the trial court a wide discretion. The act enumerates certain conditions of admissibility and then goes on to say, "and, if in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission."⁶⁵ Hence, the basic approach in the uniform act appears to be, not a reliance on technical, inflexible requirements, but rather an overall evaluation of all pertinent circumstances in order to determine whether the particular entry or record is sufficiently trustworthy to be admitted into evidence.

The West Virginia law and the Uniform Business Records as Evidence Act have been discussed and compared. It appears that the West Virginia court has been a forward looking court in relaxing the most cumbersome features of the "regular entries" exception, that of requiring personal knowledge on the part of the entrant and that of producing as witnesses all those who had personal knowledge of the transaction recorded.

However, there apparently still exists in West Virginia the notion that an entry must be an original one in order to be admissible. It is also conjectural as to just what types of endeavor will be covered by the West Virginia rule. As a specific illustration, it has been shown that it is doubtful whether hospital records will be admissible. Also, in the absence of the entrant, those having knowledge of the transaction recorded, and the supervisor under whose supervision the record was kept, it is not clear whether any one else could verify the record. It should also be kept in mind that other restrictions imposed in other jurisdictions may somehow find their way into our law.

Under the uniform act there is no "original entry" requirement; hospital records are clearly admissible; and the record may be verified by the custodian or other qualified witness. Moreover, the whole tenor of the uniform act is to liberalize and modernize the law governing the admissibility of business records into evidence.

In order to discard any restrictive remnants of the common law pertaining to business records as evidence which may still be present in West Virginia, to keep other restrictions from filtering into our law from other jurisdictions, and to maintain and continue a modern, forward looking attitude toward the admissibility of busi-

⁶⁵ *Ibid.*

ness records in evidence, it would appear to be highly desirable to urge the West Virginia legislature to enact into law the Uniform Business Records as Evidence Act.

R. M.

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The Constitution of the United States provides that, "The Congress shall have power . . . To promote the Progress of Science and Useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; . . ." ¹ The two primary outgrowths of this provision—patents and copyrights—being so closely bound together in the Constitution, are often considered by the lawyer engaged in a general practice as being beyond the ken of human understanding, and to be avoided due to the complexity and special knowledge required. This is correct as to patents, and the procuring of these is best left to the specialist in that field. There is no reason, however, why the general practitioner of law cannot serve his clients as to copyright matters in the normal course of business.

There is no common law copyright. Although an author has a property right in his unpublished work, the copyright is purely a statutory creature ² and has repeatedly been held so since 1834. ³ The first congressional action pursuant to the constitutional grant was the Copyright Act of 1790, ⁴ giving authors sole rights to publish their books for a term of fourteen years. It was not until 1909, however, that comprehensive legislation was enacted. ⁵ The present copyright law ⁶ is based on the Copyright Act of 1909, and, in general, follows it closely.

A copyright is defined as follows:

"An intangible, incorporeal right granted by statute to the author or originator of certain literary or artistic productions,

¹ U.S. CONST. art. I, § 8, cl. 8.

² *Mazer v. Stein*, 347 U.S. 201 (1954).

³ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

⁴ 1 STAT. 124 (1790).

⁵ Copyright Law of 1909, 35 STAT. 1075 (1909).

⁶ 61 STAT. 652 (1947), 17 U.S.C.A. (Supp. 1957). The copyright law was substantially reenacted in 61 STAT. 652. Hereafter, citation will be made only to 17 U.S.C.A., in the interests of uniformity, unless the Statutes at Large citation is other than 61 STAT. 652. U.S.C. and U.S.C.A. citations are identical as to title and section (§) numbers; again, in the interest of uniformity, citation will be made only to the annotated code, as most of the sections cited are correctly made thereto.