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Evidence--Business Entries--Unavailability of Witnesses

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STUDENT NOTES AND RECENT CASES

EVIDENCE — BUSINESS ENTRIES — UNAVAILABILITY OF WITNESSES.—A is on trial for statutory rape. The prosecutrix testifies that the crime was committed in a Hudson car, on the morning of August 30. The defendant swears that, on this particular morning, he had left his car with a motor company, and that, at the time the act is alleged to have taken place, said car was in the possession of the motor company. To corroborate A's testimony, he offers as evidence the records of the motor company, including three cards purporting to have been made out by workmen who made the repairs and showing the hours during which the work was done. These cards were initialed by one Diest, a foreman, whose own records were admitted. The cards, together with testimony offered by the president of the company to the effect that the entries were made in the regular course of the business, the records of which were under his care, were excluded by the lower court on the ground that the men who did the work were not produced as witnesses. Exception. *Held,* written reports of mechanics to the company, made in the regular course of employment and preserved as original papers among company's records, produced and verified by proper custodian, are admissible in evidence between third parties without producing witnesses whose whereabouts were unknown. *State* v. *Martin,* 134 S. E. 599 (W. Va. 1926).

A question which has frequently arisen in cases such as the principal case is, what constitutes unavailability of a witness? What is the test to determine whether or not a witness is unavailable? About the time of the Restoration, English courts generally accepted the rule of exclusion as to hearsay evidence. Shortly after the rule had become generally accepted in England, the courts allowed certain exceptions to the rule on the grounds of necessity and trustworthiness; and the case of *Price* v. *Lord Torrington,* 91 English Reprints 252, is most frequently cited as the landmark of the exception that entries of third parties made in the ordinary course of business are admissible *when the*

entrant is dead. In the United States, the early cases of *Welsh* v. *Barrett,* 15 Mass. 380 and *Nicholls* v. *Webb,* 8 Wheat. 326 follow the same rule. In time courts admitted such evidence if the entrant was insane, *Union Bank* v. *Knapp,* 3 Pick. (Mass.) 96; or if the entrant was absent from the jurisdiction, *Vinal* v. *Gilman,* 21 W. Va. 301, although the court in the latter case pointed out that temporary absence from the jurisdiction would not suffice.

In the case of *Roberts* v. *Claremont Power Company,* 78 N. H. 491, the court said that the test of unavailability depended on whether the entrant's testimony can be obtained by process of the court. The West Virginia court in the case of *Vinal* v. *Gilman* (cited supra) states that "if the bookkeeper be living and the court is able to enforce his attendance, the book cannot be used as evidence, unless his testimony as a witness also accompanies its production." Since that time (1883), the West Virginia court has placed a broader interpretation upon the term "unavailability," and in *W. Va. Architects & Builders* v. *Stewart,* 68 W. Va. 506, 70 S. E. 113 (1911) and *State* v. *Larue,* 98 W. Va. 677 (1925), laid down the test that if the mercantile inconvenience of producing the witness would in the particular case outweigh the probable utility of doing so, then mercantile inconvenience is a sufficient form of unavailability. See also *Shirley* v. *Southern R. Co.,* 198 Ala. 102, 73 So. 430, *French* v. *Va. Ry. Co.,* 121 Va. 383.

Which of the two tests is preferable? It would seem that the theory which caused courts in the first instance to admit such extra-judicial statements at all warrants the broader interpretation which has been followed by the West Virginia court. Professor Wigmore justifies such a conclusion largely on the grounds of necessity and trustworthiness. 2 WIGMORE, §1530. The law must develop to meet the exigencies of constantly changing economic and social conditions. The introduction and development of big business enterprises and the specialization of labor has in a large measure precluded the probability or possibility of an employee's remembering any particular transaction; and even though the entrant could be produced, he could tell little without using the record to refresh his memory, and probably even then he could do no more than to sub-

stantiate the fact that he had made the entry. If, therefore, the records are produced and verified by a supervising officer who knew them to be entries kept in the establishment, there would seem to be a sufficient amount of trustworthiness.

In *State* v. *Martin,* the court stated that such entries were admissible *if the whereabouts of the entrants be unknown.* Though the court did not state so, it would seem that affirmative proof must be made by the one offering the evidence to the effect that he has used reasonable diligence to discover the whereabouts of the declarant, and his production as a witness. CHAMBERLAYNE, MODERN LAW OF EVIDENCE §2879. The West Virginia Court has reached a justifiable conclusion. Diest had made out the work card, showing that the car had been brought in; he initialed the mechanic's cards after the work had been done. The president of the company was willing to testify that the cards were kept as part of the permanent records of the company. Unless, therefore, the cards which are substantially trustworthy are admitted, probably injustice is a consequence. To admit them, we are introducing no new doctrine; we are but giving a desirable interpretation of the test of unavailability laid down by Chief Justice Shaw many years ago when he said "the ground [for admitting the entries] is the impossibility of obtaining the testimony, and the cause of impossibility seems immaterial." *North Bank* v. *Abbott,* 13 Pick. (Mass.) 471.

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LANDLORD AND TENANT—TENANCY AT WILL OF THE LESSEE. —Defendant's grantor leased land to plaintiff, who was to plant fruit trees, and care for the premises, and was to be allowed to occupy the premises as long as he pleased. The lease provided that surviving representatives of either's immediate family should have the benefit of the lease so long as they should comply with the terms thereof. Defendant entered on the land, and plaintiff brings this suit to oust him of possession. *Held,* Where a present valuable consideration had been paid, the tenancy being at the lessee's will, the lessee had a freehold interest "approximating a life