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EVIDENCE — MAILING — INFERENCE OF MAILING RAISED THROUGH PROOF OF OFFICE CUSTOM — In a suit on an accident insurance policy the defense of the insurer was that timely notice had been given of the revocation of the renewal privilege. At the trial, in order to raise the presumption that the notice was delivered to the insured, proof was offered that the letter was dictated and addressed in the large home office and given to the mail boy for posting according to the office custom. The letter was traced no further. On this evidence the court allowed the jury to find that the notice had been received. Plaintiff appealed. *Held*, reversed. The evidence of the office custom was insufficient proof of the mailing unless coupled with testimony of the mail clerks that they complied with the established routine. *Frank v. Metropolitan Insurance Co.*, 227 Wis. 613, 277 N. W. 643 (1938).

When the mailing of a properly stamped and addressed letter is proved, it is presumed to have been delivered in due course.[1] But routine methods of handling mail in large offices leave direct proofs of mailing unavailable, so that

[1] Henderson v. Carbondale Coal & Coke Co., 140 U. S. 25, 11 S. Ct. 691 (1891); Lowry v. Saginaw Specialty Co., 128 Mich. 246, 87 N. W. 194 (1901); 22 C. J. 96 (1920); 1 WIGMORE, EVIDENCE, 2d ed., § 95 (1923). The presumption is one of fact, i. e., the court takes judicial notice of the custom of the post office. The force of a proved office custom is very similar.

actually the presumption can be raised only upon inferences drawn from circumstantial evidence.[2] Thus, proofs of the preparation of the letter and of the office custom in handling mail, coupled with the testimony of clerks as to their compliance with the custom, is the best evidence which the circumstances permit.[3] If the testimony of compliance is omitted it is doubtful, as in the instant case, whether evidence of the preparation and the office mailing routine will be allowed to go to the jury.[4] Historically, the strict rule of exclusion developed from a decision of Lord Ellenborough in 1815.[5] Theoretically, the logic of the rule is not compelling and appears to be without analogy in other uses of habit evidence, though it is the rule of the majority of courts.[6] Whether

[2] The issue ordinarily arises either as a preliminary question of fact when a copy of the alleged letter is offered—Mankin v. Perry, 70 Pa. Super. 558 (1919)—or as a substantive issue when the question of notice is basic—Backdahl v. Grand Lodge A.O.U.W., 46 Minn. 61, 48 N.W. 454 (1891).

[3] ". . . it would be only by the merest chance that it would be possible . . . to prove by direct evidence that a letter shown to have been written was deposited in the post office. . . . We think this fact of proper mailing may be shown by circumstances." Smith v. F. W. Heitman Co., 44 Tex. Civ. App. 358 at 363, 98 S. W. 1074 (1907). Accord: J. I. Case Co. v. Sinning Bros. Motor Co., 137 Kan. 581, 21 P. (2d) 328 (1933); Whitney Wagon Works v. Moore, 61 Vt. 230, 17 A. 1007 (1889).

[4] 25 A. L. R. 9 (1923); 1 WIGMORE, EVIDENCE, 2d ed., § 95 (1923); 49 L. R. A. (N. S.) 458 at 463 (1914); 19 Ann. Cas. 651 (1911). For excluding the evidence or holding it insufficient to go to the jury: Birmingham News Co. v. Moseley, 225 Ala. 45, 141 So. 689 (1932); Stewart Bros. v. Brewer, 177 La. 389, 148 So. 657 (1933), qualifying the rule in the case of a series of communications; Suits v. Order of United Commercial Travelers, 139 Minn. 246, 166 N. W. 222 (1918), but see Backdahl v. Grand Lodge A.O.U.W., 46 Minn. 61, 48 N. W. 454 (1891); Collins v. Hoover, 205 Mo. App. 93, 218 S. W. 940 (1920); Wm. Gardam & Son v. Batterson, 198 N. Y. 175, 91 N. E. 371 (1910); Henry H. Cross Co. v. Bell Oil & Gas Co., 129 Okla. 188, 263 P. 1105 (1928); Commercial Bank of Albany v. Strong, 28 Vt. 316 (1856), but cf. Whitney Wagon Works v. Moore, 61 Vt. 230, 17 A. 1007 (1889); Farrow v. Dept. of Labor and Industry, 179 Wash. 453, 38 P. (2d) 240 (1934); Federal Asbestos Co. v. Zimmerman, 171 Wis. 594, 177 N. W. 881 (1920). Cf. W. T. Rawleigh Medical Co. v. Burney, 25 Ga. App. 20, 102 S. E. 358 (1920). For admitting the custom evidence without proofs of compliance: Dunlop v. United States, 165 U. S. 486, 17 S. Ct. 375 (1896); Myers v. Moore-Kile Co., (C. C. A. 5th, 1922) 279 F. 233; J. I. Case Co. v. Sinning Bros. Motor Co., 137 Kan. 581, 21 P. (2d) 328 (1933); Lawrence Bank of Pittsburgh v. Raney & Berger Iron Co., 77 Md. 321, 26 A. 119 (1893); McKay v. Myers, 168 Mass. 312, 47 N. E. 98 (1897); Swampscott Machine Co. v. Rice, 159 Mass. 404, 34 N. E. 520 (1893); Smith v. F. W. Heitman Co., 44 Tex. Civ. App. 358, 98 S. W. 1074 (1907); Skilbeck v. Garbett, 7 Q. B. Div. 846, 115 Eng. Rep. 706 (1845).

[5] Hetherington v. Kemp, 4 Camp. 193, 171 Eng. Rep. 62 (1815). The language of Lord Ellenborough does not seem to justify the strict rule attributed to him. He refused to admit evidence that a letter was left on a table to be mailed without some proof that the letter was taken therefrom, saying that testimony by a clerk that he always saw to mailing letters so left would be amply sufficient. The language has been repeatedly cited for the rule that evidence is insufficient without testimony of each party in the mailing process.

[6] 25 A. L. R. 9 (1923). Alabama, Missouri, New York, Oklahoma, Washington,

the objection to the evidence is directly to its admissibility or indirectly in the form of a motion for a directed verdict after the evidence has been heard, the issue is whether the proofs of the custom alone satisfy the requirements of circumstantial evidence.[7] The initial question is relevancy. On this ground many courts exclude the evidence, saying that failure to prove compliance leaves a "gap" in the chain of evidence.[8] But it is submitted that proof of a mailing routine is no more lacking in probative force to indicate the mailing of a properly prepared letter than is habit evidence in any case where direct proof is lacking.[9] If the relevancy of the evidence be granted, still exclusion may be proper under an "auxiliary probative policy" on an objection for incompetency.[10] The decisions do not present this theory directly, but when the custom is not clearly established and the evidence is more nearly of a duty or probable action than of actual custom, it is submitted that this should be the basis for an objection.[11] Were the objection on this theory, then the trial court would be best able to determine whether a custom was safely established and its ruling ought to be conclusive. Often additional factors such as the return of the receipt of a

Wisconsin and Georgia are clearly in support of the strict rule, with Louisiana, Minnesota and Vermont less certainly in accord. The federal courts, and Kansas, Maryland, Massachusetts and Texas reject the rule. For citations, see note 4.

[7] 1 WIGMORE, EVIDENCE, 2d ed., 92 (1923). Cf. ibid., § 43.

[8] Wm. Gardam & Son v. Batterson, 198 N. Y. 175, 91 N. E. 371 (1910); Birmingham News Co. v. Moseley, 225 Ala. 45, 141 So. 689 (1932). Without proof that the letter entered the routine there would, of course, be such a "gap." Central Trust Co. v. City of Des Moines, 205 Iowa 742, 218 N. W. 580 (1928). But evidence of compliance appears not so much to link the custom to the case as to make direct evidence out of circumstantial evidence.

[9] 1 WIGMORE, EVIDENCE, 2d ed., § 92 (1923); Burch v. Americus Grocery Co., 125 Ga. 153, 53 S. E. 1008 (1906); Jay v. Phillips, Mills & Co., [1916] 1 K. B. 849. Cf. Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 S. Ct. 909 (1891), in which case a statement of intention was considered relevant to show that an act was done. Similarly, intentions of suicide are admissible to show that probably the deceased was not murdered. Commonwealth v. Santos, 275 Pa. 515, 119 A. 596 (1923).

[10] 1 WIGMORE, EVIDENCE, 2d ed., §§ 42, 29a (1923). Professor Wigmore speaks of the necessity that evidence meet the test of an "auxiliary probative policy" beyond the mere statistical relevancy required as a minimum. Thus in reality the exclusion of circumstantial evidence may be based on incompetency rather than irrelevancy if its influence would be dangerous or prejudicial beyond a point justified by its probative force.

[11] It has been said that proof of a duty alone is admissible to show the performance of an act: "proof of a usage to deliver . . . or of the duty of a certain messenger to deliver . . . creates a presumption the paper in question was actually so delivered. Business could hardly be carried on without indulging in the presumption that employes, who have certain duties to perform and are known generally to perform such duties, will actually perform them . . . in a particular case." Dunlop v. United States, 165 U. S. 486 at 495, 17 S. Ct. 375 (1896). But if the custom is not clearly established, the danger is clear in allowing testimony of the probable actions of a clerk without requiring the scarcely arduous task of producing the clerk. Cf. 1 WIGMORE, EVIDENCE, 2d ed., § 95, note 4 (1923); Ward v. Lord Londesborough, 12 C. B. 252, 138 Eng. Rep. 900 (1852).

registered letter, or evidence of the later knowledge of the contents of the letter by the addressee will protect the ruling of the trial court in admitting custom evidence without proof of compliance.[12] Practically, it appears that the reason for requiring evidence of compliance is the demand of the courts that a litigant present his best evidence and show his bona fides by producing all clerks involved in the office routine for cross-examination, a requirement that rarely will be burdensome.[13] But however understandable the hesitancy of the courts to presume receipt from an inference of mailing, it is not at all in harmony with accepted business reliance on routines which are well known. It is scarcely wise for the courts to reject evidence which the practical world respects and relies upon. Indeed, judicial confidence is ordinarily placed in the trustworthiness of business records and routines, so that the rule of the instant case seems peculiarly narrow and anomalous.[14] The decision is in accord with prior Wisconsin cases,[15] but fortunately the rule is not one which a doctrine of stare decisis need maintain, and business policy points the way for judicial reliance on the performance of a business routine when the trial court is satisfied that a custom has been safely established.

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[12] Whitney Wagon Works v. Moore, 61 Vt. 230, 17 A. 1007 (1889); Lawrence Bank of Pittsburgh v. Raney & Berger Iron Co., 77 Md. 321, 26 A. 119 (1893); In re Wiltse, 5 Misc. 105, 25 N. Y. S. 733 (1893).

[13] ". . . all who had anything to do about the matter of depositing the notice, should be called." Commercial Bank of Albany v. Strong, 28 Vt. 316 at 322 (1856). This rule is neither mentioned nor followed in the later case of Whitney Wagon Works v. Moore, 61 Vt. 230, 17 A. 1007 (1889), but it seems to be the clear demand of the court for the fullest proofs available, not for the sake of relevancy, but out of a sense of fairness.

[14] Under a well established exception to the hearsay rule, business entries and records are admissible as being guaranteed by the reliability which business requires. E. I. DuPont de Nemours & Co. v. Tomlinson, (C. C. A. 4th, 1924) 296 F. 634. Further, today most courts do not require identification of records by each clerk, when the record is the result of the entries of many, but only sufficient identification to prove the mode and reliability of the mode of compilation. The Spica, (C. C. A. 2d, 1923) 289 F. 436. This confidence reposed in business methods is not extended to other kinds of records. Lord v. Moore, 37 Me. 208 (1854).

[15] Federal Asbestos Co. v. Zimmerman, 171 Wis. 594, 177 N. W. 881 (1920).