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EVIDENCE-USE OF PHOTOSTATIC COPIES IN PROVING BOOKS OF ACCOUNT-MODEL STATUTE

EVIDENCE — USE OF PHOTOSTATIC COPIES IN PROVING BOOKS OF ACCOUNT — MODEL STATUTE — Private records, books of account, and documentary evidence in general present an evidenciary problem in litigation if one, in proving his case, must use the records and books of account of a third person outside the jurisdiction of the forum. A *subpœna duces tecum* is limited to the boundaries of the state of the forum.[1] Written evidence in the hands of a third person outside the state where the litigation is being pursued can only be obtained by permission of the owner, and even if the owner does permit the transportation of records and books of account necessary to the proof of a suit, the problem of inconvenience and expense arises which invariably results in a burden to the litigants.

As a matter of convenience the books of the Bank of England (legally a private institution) were not required to be produced.[2] The same rule was applied to the books of the East India Company.[3] Likewise a few exceptions were made in England regarding valuable documents, but always where the owner was a public or quasi-public institution.[4]

Many jurisdictions in the United States and Canada have followed this principle regarding the books of banks, either by common law decision [5] or by statute.[6] These exceptions to the regular common law

[1] Evans v. Mosely, 2 Dowl. 364 (1834).
[2] Mortimer v. M'Callan, 6 M. & W. 58 at 67, 151 Eng. Rep. 320 (1840).
[3] Wynne v. Middleton, cited in 2 Dougl. 594, 99 Eng. Rep. 375 (1781).
[4] 1724, Downes v. Mooreman, Bunb. 189, 145 Eng. Rep. 643 (1724).
[5] Crawford v. Branch Bank, 8 Ala. 79 (1845).
[6] Examples of such statutes are: *Canada*—2 Newf. Consol. Stat. 1916, c. 92, pp.

rule have been confined to banks and certain types of public corporations, as a matter of policy. Private corporations and individuals have been forced to satisfy the requirements of the "best evidence" rule without exception. In no way have the courts taken advantage of mechanical and scientific devices which would both satisfy the requirements of the "best evidence" rule and permit the litigants to avoid the inconvenience and in most cases the heavy expense attendant upon a strict compliance with the "best evidence" rule.

The camera and related photographic devices have been widely used in the field of criminal law. Although progress has been highly successful in that field, the civil branch of the law has either ignored or made little use of the possibilities of accurate reproduction and duplicate originals. The reasons for the adoption of a rule permitting the use of photostatic copies in civil actions are manifest: litigation demands frequent use of records and books of account of business houses and corporations, and, the mere existence of such records does not suffice — the records must be producible in the courtroom. There is a psychological effect and a circumstantial guarantee of trustworthiness about an original document. But if the original records are not to be obtained by judicial order or if their removal to court will seriously interfere with the normal business operations of the owner or result in burdensome expense, some rule of convenience should satisfy the needs of the litigants. The "best evidence" rule is in effect a means to avoid fraud and deception.[7] Early common law writers maintained that the production of the original writing had a magical effect. In following the rule courts have lost sight of the object sought and the rule has become an end itself instead of a means to an end.

As a basis for legislation allowing the use of photostatic copies, the writer points to the limited exceptions made at the common law, and to the slightly broader limitations permitted in Canada by statute,[8] al-

1104-1105; *United States*—Kan. Gen. Stat. 1915, sec. 7288; Mass. Gen. Laws 1920, c. 233, No. 77; Pa. Laws 1883, June 22, p. 154; Wis. Stat. 1919, sec. 4189b.

[7] Parke, B., in Slatterie v. Pooley, 6 M. & W. 664, 151 Eng. Rep. 579 (1840).

[8] Alberta Stat. 1910, 2nd Sess., c. 3, sec. 50, pp. 11-12; Ont. Rev. Stat. 1914, c. 76, sec. 49, p. 995. Both provinces have the same statute which provides:

> "A party intending to prove the original of a telegram, letter, shipping bill, bill of lading, delivery order, receipt, account, or other written instrument used in business or other transactions, may give notice to the opposite party, ten days at least before the trial or other proceeding in which the proof is intended to be adduced, that he intends to give in evidence as proof of the contents a writing purporting to be a copy of the documents, and in the notice shall name some convenient time and place for the inspection thereof.
>
> "Such copy may then be inspected by the opposite party, and shall without further proof be sufficient evidence of the contents of the original document, and be accepted and taken in lieu of the original, unless the party receiving the

though the effectiveness of such a statute is dependent on the consent of the opposite party.

In some jurisdictions the courts overcome the difficulty by holding that, where a proffering party cannot obtain the originals, depositions as to their contents from bookkeepers, clerks, etc., may be introduced,[9] but the strength of proof is lost in the failure to produce the original or to prove the existence of the original. Although some circumstantial guarantee of trustworthiness may be present, there is always the element of doubt in past recollection and the suspicion with which oral proof of the contents of a written document is generally viewed. Can there be a choice between a photographic or photostatic copy of the original record and the present or past recollection of a witness as to its contents?

"Original" is a relative term. It does not have a static dictionary meaning confining it to the thing itself. In the light of commercial expediency and business customs, rules of evidence should meet the particular needs and purposes of equity and justice. Upon a liberal interpretation of "original" the enactment of a statute somewhat as follows might solve the problem:

> Whenever, in connection with the deposition of a witness, taken without the state for use in the trial of an action or proceeding pending in this state, it shall seem desirable to any party to use the records or books of account of any person, partnership or corporation and such records or books of account are not themselves obtainable for use at such trial or proceeding, photostatic copies of the same may be presented and attached to such deposition and received in evidence the same as if the originals of such records or books had been presented and attached, provided, that the person in whose custody such records or books are kept shall testify to the authenticity of such original records or books and that the photostatic copies so produced have been prepared by him or under his direction and are true and correct reproductions of such original documents in the custody of such witness.

A statute similar to the one suggested, if passed by the various states, would simplify litigation and render it less expensive. If law is

notice within four days after the time mentioned for such inspection gives notice that he intends to dispute the correctness or genuineness of the copy at the trial or proceeding, and to require proof of the original; and the costs attending any production or proof of the original document shall be in the discretion of the court."

[9] Hauenstein v. Gillespie, 73 Miss. 742, 19 So. 673 (1896); Petersburg Sav. & Ins. Co. v. Manhattan Fire Ins. Co., 66 Ga. 446 (1880); Hudson v. Carman, 41 Me. 84 (1856).

a means to an end there is little justification in pursuing a policy which makes of the "best evidence" rule an impediment to the prompt and convenient adjudication of rights and interests. The objection to the use of secondary evidence of any kind is founded upon the desire of the courts to avoid perjury and conjured means of proof. Modern methods provide a means to prevent the evils which the law in early times had to combat by restrictive rules. If antiquated rules and interpretations of those rules create major difficulties and thwart the purpose of the "best evidence" rule, there is little justification if any for continuing to follow an antique and obsolescent system of producing evidence of written documents.

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