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EVIDENCE - OFFICE CUSTOM TO PROVE FACT OF MAILING

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EVIDENCE — OFFICE CUSTOM TO PROVE FACT OF MAILING — Plaintiff agreed to purchase land from defendant by a contract in which it was stipulated that the performance of the mechanics of purchase would be completed through a third party, Webster. Plaintiff deposited the purchase money with Webster with instructions to deliver it to defendant only after he (Webster) had, *inter alia*, procured a policy of title insurance. Webster absconded with the funds. In a suit to determine the incidence of loss, plaintiff sought to prove that Webster had procured the policy before he absconded and therefore held the purchase money as agent for defendant. The proof that plaintiff relied upon to establish that Webster had received such a policy was: (1) that *X* Insurance Company had received an application from Webster for insurance and that the policy had been properly filled out; and (2) that it was the office custom of *X* Insurance Company to mail such policies when completed. Defendant claimed there had been insufficient proof of mailing. The lower court rendered judgment for defendant. On appeal, *held*, affirmed. Proof of an office custom with respect to mailing is insufficient to prove posting without establishing compliance with that custom in the specific instance. *Lieb v. Webster*, (Wash. 1948) 190 P. (2d) 701.

Courts universally presume receipt of a letter by the addressee upon a showing that the letter, properly stamped and addressed, was posted in the mails.[1] Therefore, it often becomes necessary in the preparation of a case involving this point to determine what will amount to sufficient evidence of posting to sustain a verdict received. The principal case, in stating that mere proof of a business custom of the sender's office to post mail which has been deposited in a particular location is insufficient to raise the presumption of receipt, undoubtedly expresses the majority view.[2] After establishing the existence of such a custom the proof must go farther and show that the custom was complied with on the particular occasion in question.[3] The practical effect of this additional requirement is to compel the sender to produce the testimony of the one whose duty it was to collect outgoing

[1] Executive Committee v. Fidelity & Columbia Trust Co., 273 Ky. 715, 117 S.W. (2d) 958 (1938); Anderson v. Inhabitants of Town of Billeria, 309 Mass. 516, 36 N.E. (2d) 393 (1941); Trust & Guarantee Co., Ltd. v. Barnhardt, 270 N.Y. 350, 1 N.E. (2d) 459 (1936); 1 WIGMORE, EVIDENCE 524, § 95 (1940) and cases cited. This presumption is rebuttable: Keeling v. Traveler's Insurance Co., 180 Okla. 99, 67 P. (2d) 944 (1937).

[2] Brailsford v. Williams, 15 Md. 150 (1859); Federal Asbestos Co. v. Zimmerman, 171 Wis. 594, 177 N.W. 881 (1920); Peirson-Lathrop Grain Co. v. Barker, (Mo. App. 1921) 223 S.W. 941; Cook v. Phillips, 109 N.J.L. 371, 162 A. 732 (1932); Farrow v. Dept. of Labor and Industries, 179 Wash. 453, 38 P. (2d) 240 (1934); Frank v. Metropolitan Life Insurance Co., 227 Wis. 613, 277 N.W. 643 (1938); 25 A.L.R. 9 at 13 (1923); 86 A.L.R. 541 at 544 (1933).

[3] Bell v. Hagerstown Bank, 7 Gill (Md.) 216 (1848); Hughes v. Pacific Wharf & Storage Co., 188 Cal. 210, 205 P. 105 (1922). Sanborn v. Cunningham, (Cal. 1893) 33 P. 894, holds that testimony of compliance with the custom is sufficient proof of mailing. This was a retrial of Ford v. Cunningham, 87 Cal. 209, 25 P. 403 (1890). The first reported case requiring more than a showing of office custom is Hetherington v. Kemp, 4 Camp. 193, 171 Eng. Rep. 62 (1815).

letters from the office and to deposit them in the mails.[4] It is not required that this person should remember posting the particular letter in question, but only that it was his custom invariably to mail all letters of the office and that he did so on this occasion.[5] Frequently, the person whose duty it is to post the office mail is, due to the nature of his position, a transient employee. Therefore, once he has left the sender's employ it may become impossible to locate him and thus procure the required testimony of compliance. On the other hand, a few courts have held that the mere existence of an office custom, without more, is sufficient to warrant a finding by a jury that the particular letter was posted.[6] For these courts the custom may be established by proving the existence of a system of mailing and introducing testimony that it was the invariable office practice to comply with such system. The testimony need not be by the employee whose duty it was to post the letters but may be by an officer of the firm,[7] thus removing the practical obstacle of the majority view. It is inescapable that this is the sounder result, for the majority allows the outcome of the case to depend upon testimony of one person to the effect that he complied with the system on a certain day—testimony that is more likely to be based upon inference than upon recollection of fact. It is difficult to perceive how the majority of courts can allow mere habit to prove the preparation of a document for mailing,[8] or to prove that notice of dishonor was given,[9] and yet disallow it in establishing the fact of mailing.[10] There seems little doubt that habit, once determined, should have probative value to establish the occurrence of related specific acts.[11] It is submitted that the holding of the principal case is unsound in that it tends to require evidence which is only cumulative[12] and fails to recognize the force of modern office procedure.

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[4] Brailsford v. Williams, 15 Md. 150 (1859), indicates that accounting for the absence of such a person might suffice.

[5] Hastings v. Brooklyn Life Insurance Co., 138 N.Y. 473, 34 N.E. 289 (1893); Pierson-Lathrop Grain Co. v. Barker, (Mo. App. 1921) 223 S.W. 941. Contra: W. T. Raleigh Medical Co. v. Burney, 25 Ga. App. 20, 102 S.E. 358 (1920).

[6] Lawrence Bank v. Raney & B. Iron Co., 77 Md. 321, 26 A. 119 (1893); In re Wiltse, 5 Misc. 105, 25 N.Y.S. 733 (1893); Myers v. Moore-Kile Co., (C.C.A. 5th, 1922) 279 F. 233; Prudential Trust Co. v. Hayes, 247 Mass. 311, 142 N.E. 73 (1924); Smith v. F. W. Heitman Co., 44 Tex. Civ. App. 358, 98 S.W. 1074 (1906).

[7] Myers v. Moore-Kile Co., (C.C.A. 5th, 1922) 279 F. 233.

[8] Hitz v. Ohio Fuel & Gas Co., 43 Ohio App. 484, 183 N.E. 768 (1932).

[9] Trabue v. Sayre, 1 Bush (Ky.) 129 (1867).

[10] Hitz v. Ohio Fuel & Gas Co., 43 Ohio App. 484, 183 N.E. 768 (1932).

[11] State v. Railroad, 52 N.H. 528 at 530 (1873); I WIGMORE, EVIDENCE 519, § 92 (1940).

[12] "If the writer of the letter knows what that course of business was, and testifies accordingly, testimony to the same effect by another person connected with the business would be merely cumulative." Myers v. Moore-Kile Co., (C.C.A. 5th, 1922) 279 F. 233 at 235.