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Review of Pennsylvania Legislation 1939 - Evidence

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V. EVIDENCE

The Act of May 4, 1939,[1] known as the "Uniform Business Records as Evidence Act," effects a radical change in some familiar rules of evidence. Under one of these rules, known as the "shop book rule," books of original entries, when properly kept by a party or his clerk, are competent evidence of work done or goods sold and delivered in the ordinary course of the business of the person on whose behalf they are offered, including merchants, shopkeepers, tradesmen, mechanics and farmers.[2] The "shop book rule" is an exception to the hearsay rule. Prior to the legislation[3] making parties competent witnesses in their own behalf, books of original entries were admitted in evidence on the ground of necessity, inasmuch as it was frequently impossible for a plaintiff to furnish any other evidence than that afforded by his own books of account. The book entries were admitted upon the verifying oath of the party himself. If the book was kept by a clerk, it was necessary to call the clerk, whose testimony was the primary evidence, and the entries could be used to corroborate him or to refresh his memory, or if he had no present memory the entries were admissible as past recollection recorded.

Since the Act of 1869[4] the party himself has been in the same category as the clerk. If the plaintiff had personal knowledge of the transaction, his testimony was the primary evidence, and the book entries could be used to corroborate or to refresh memory,[5] or if he had no present recollection, the entries themselves could be admitted as past recollection recorded, if all the requirements thereof were met. Since the Act of 1869[6] there has largely disappeared the necessity for admitting entries under the "shop book rule" itself. This necessity would still exist where a merchant had no clerk and kept his own books and was seeking to establish a claim against a decedent's estate, or where the executor of such a merchant sued to recover for goods sold and delivered.

In any case, if the books were kept by the party himself or by a clerk, and the one who kept the books was unavailable as a witness through death, absence from the jurisdiction or for any other reason, the entries were admissible on proof of his handwriting alone.[7]

Under a companion rule of evidence, also an exception to the hearsay rule, entries made by a third person in the ordinary course of business at the time a transaction occurred, and of matters within the knowledge of the person making the entry, which he had no motive to misrepresent and which it was his duty to make, are admissible in any proceeding where the subject matter is relevant to

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[1] P. L. 42, 28 PURD. STATS. (Pa.) 91.
[2] HENRY, PENNA. TRIAL EVIDENCE (2d ed. 1926) 122.
[3] Act of April 15, 1869, P. L. 30.
[4] P. L. 30.
[5] Perry v. Ryback, 302 Pa. 559, 153 Atl. 770 (1931).
[6] P. L. 30.
[7] Foster v. Weber, 114 Pa. Super. 101, 173 Atl. 712 (1934).

the issue.[8] This rule was originally one of necessity, and before entries could be admitted under this rule it was necessary to show that the entrant was dead or out of the jurisdiction. Later decisions relaxed this requirement in the interest of changed business conditions. If the entrant is available, he should be produced. But if he has no present recollection, the entries are admissible as past recollection recorded. If the entrant is unavailable, the entries are admissible on proof of his handwriting.

The recent case of *Paxos v. Jarka Corp.*,[9] held that such entries were admissible only when the following probative elements are present: (1) they were made contemporaneously with the acts which they purport to relate; (2) at the time of making, it was impossible to anticipate reasons which might subsequently arise for making a false entry; and (3) the entrant had personal knowledge of the truth of the statements. Accordingly it was held that hospital records were inadmissible to prove injuries unless the foregoing probative elements were present.

The "Uniform Business Records as Evidence Act" provides: "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 regular 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." It is also provided that the term "business" shall include "every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not."

Prior to this Act, the "shop book rule" and the rule concerning regular entries were constantly refined and limited by judicial decision and were confused with each other. The changes wrought by the Uniform Act are at once apparent. It is no longer necessary to call the entrant himself or to prove his handwriting or to establish that the entrant had personal knowledge of the facts recorded. Hence, where the entrant knows nothing personally, but records data furnished by many others, the entries may be admitted without calling the entrant and all those who furnished the information. Likewise, under this act, hospital records may be admitted, if the requirements of the Act are met, without showing that the entrant had personal knowledge.

This new legislation keeps step with the rapid changes in business practices, but its real efficacy will depend on the liberality of the courts in applying and construing it.

Important changes have also been effected by the "Uniform Judicial Notice of Foreign Law Act" of May 4, 1939.[10] This Act is the culmination of a movement that has been going on for the past decade to correct two outworn common law rules of evidence. The first is the rule forbidding judicial notice of the laws

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[8] HENRY, PENNA. TRIAL EVIDENCE (2d ed. 1926) 121.
[9] 314 Pa. 148, 171 Atl. 468 (1934).
[10] P. L. 42, 28 PURD. STATS. (Pa.) 291.

of a sister state, and the second is the rule that the decision upon such laws is a question of fact for the jury and not of law for the judge.

Under the Pennsylvania decisions both of the rules have been strictly followed. There are many decisions holding that the law of another state is not a matter of judicial notice and also that the law of another state is a matter of fact for the jury and like any other fact, must be pleaded and proved.[11]

Under the new Act every court of this State shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States. It is provided that the court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid in obtaining such information. To avoid any doubt that hereafter the matter shall not be treated a question of fact, the Act provides that the determination of such laws shall be made by the court and not by the jury, and shall be reviewable like any other question of law.

A change is also effected in the former requirement that the law of another state must be alleged in the pleadings. The Act provides that while a party may present to the trial court any admissible evidence of such laws, yet to enable a party to offer evidence of such laws or to ask that judicial notice be taken thereof, reasonable notice shall be given to adverse parties either in the pleadings or otherwise. What shall constitute reasonable notice and in what form it shall be given will probably be regulated by rule of court.

The Act has another important provision. It provides that the law of a foreign country shall be an issue for the court and not the jury, but that the court cannot take judicial notice thereof. It follows, therefore, that it will still be necessary to plead and prove the law of a foreign country as heretofore, but that the determination of the question is for the court and not the jury.

Another legislative enactment which might be thought to affect the law of evidence is found in the Act of June 6, 1939,[12] which in section 9 adds a new section, 730, to the Act of April 9, 1929,[13] relating to the finances of the state government and providing for the settlement assessment, collection and lien of taxes, bonus and other accounts due the Commonwealth.

Section 730 provides: "Any information gained by any administrative department, board, or commission, as a result of any returns, investigations, hearings or verifications required or authorized under the statutes of the Commonwealth imposing taxes or bonus for state purposes, or providing for the collection of the same, shall be confidential except for official purposes, and any person or agent divulging such information shall be deemed guilty of a misdemeanor, and, upon

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[11]Jones v. Maffet, 5 S. & R. 523 (Pa. 1820); Phillips v. Gregg, 10 Watts 158 (Pa. 1840); Tenant v. Tenant, 110 Pa. 478, 1 Atl. 532 (1885); Spellier Electric Time Co. v. Geiger, 147 Pa. 399, 23 Atl. 547 (1892); In re Baughman's Estate, 281 Pa. 23, 126 Atl. 58 (1924); In re Craver's Estate, 319 Pa. 282, 179 Atl. 606 (1935); Midwest Piping Co. v. Thomas Machine Co., 109 Pa. Super. 571, 167 Atl. 497 (1933); and other cases collected in 15 VALE'S PA. DIG., EVIDENCE § 35.

[12]P. L. 261, 72 PURD. STATS. (Pa.) § 503.

[13]P. L. 343, 72 PURD. STATS. (Pa.) § 1.

conviction thereof, shall be sentenced to pay a fine not in excess of $500.00, or to undergo imprisonment for not more than three years, or both, in the discretion of the court."

It is submitted that this act does not make such information privileged and therefore inadmissible in evidence. The obvious purpose of the Act is to prevent the voluntary divulging of such information, and giving such information in response to a subpoena would not violate the act.[14]

The Act of February 11, 1895,[15] (since repealed and replaced by the Act of May 15, 1933,)[16] made it a misdemeanor to divulge records of the Banking Department. In an opinion by the Attorney General,[17] it was held that the Commissioner of Banking was bound to obey a subpoena and that divulging the records of the Department as a witness did not violate the Act.

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VI. FIDUCIARIES AND DECEDENTS' ESTATES

a. *Investments by Fiduciaries*

The Fiduciaries' Act of 1917[1] as respects the legal investments which a fiduciary, having funds in his hands available for investment, is authorized to make, was again amended at the 1939 session of the General Assembly.

The section dealing with investments for fiduciaries, known as 41 (a) of the Act of 1917[2] was elaborately amended in 1935[3] to enumerate the various types of obligations which constituted legal investments for a fiduciary. These new provisions were set forth in a number of subsections to paragraph 1 of section 41 (a) of the Act of 1917. Subsection 7 of the amendatory act validated investments by fiduciaries in fractional undivided interests in any investment in which a fiduciary was authorized to invest trust funds. This subsection has been retouched by the 1939 amendment.[4]

The amendment continues the authorization to invest in fractional undivided interests in legal investments or a common trust fund of such investments. However, the new Act stipulates that such common trust fund may include a mortgage investment fund containing legal investments and other assets. Minute statutory provisions regulating the creation and maintenance of common trust

14 70 C. J. 453.
15 P. L. 12.
16 P. L. 565, § 302, 71 PURD. STATS. (Pa.) § 733.
17 13 Dauph. 151 (1910).

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1 Act of June 7, 1917, P. L. 447, 20 PURD. STATS. (Pa.) § 321, *et seq.*
2 20 PURD. STATS. § 801.
3 Act of July 2, 1935, P. L. 545, 20 PURD. STATS. (Pa.) § 801.
4 Act of June 24, 1939, P. L. 718, 20 PURD. STATS. (Pa.) § 801.