The Archivist and "Ancient Documents" as Evidence

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A GENERATION or more after the occurrence of a certain event, when all of the witnesses have passed from the scene, litigation stemming from that event normally must proceed on the basis of documents created contemporaneously with the event. As the custodian of needed documents, an archivist may very well find himself embroiled in litigation that requires the use of evidentiary documents in his care. The archivist's involvement ordinarily results from the question of custody, one of the several conditions affecting the admissibility of a document as evidence in a court of law under the common-law ancient documents rule.

For some three centuries judges have accepted the validity of the common-law rule that an ancient document, under certain conditions, may be taken as sufficiently genuine to be submitted to a jury as evidence without further authentication of its genuineness.[1] The reason for such a rule, of course, is the impossibility of obtaining living testimony to prove that the document is indeed genuine. Until a certain lapse of time, after which all of the living witnesses are gone, there is no necessity for the application of the rule.

From such necessity evolved the common-law ancient documents rule. At first the requirement was simply that the document must be "ancient." In time a more precise standard became desirable; and since the absence of a living witness able to declare the document to be genuine was the justifying fact, and since it could safely be assumed that such a witness presumably would have died after a lapse of 40 or at the most 50 years, the period of 40 years was accepted in the eighteenth century as the period after which a document was recognized by the courts to be an "ancient docu-

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[1] John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 7:581 (Boston, 1940).

ment." By 1800 this measure of time had been found to be too strict. Since the witness was then assumed to have been a mature person of at least 30 years, rather than merely of age, and since it could be assumed that his normal span of life would be 60 years, the courts found that 30 years sufficed to constitute an ancient document.[2] Thus, the first of the qualifications for a document to be admitted as evidence under the ancient documents rule is that it must be proved to the satisfaction of the judge that the document is at least 30 years old.[3]

A second qualification for the admissibility of a document as evidence under the ancient documents rule is that the judge must find that it is unsuspicious in appearance.[4] There must be nothing about the document that would indicate that it is not what it purports to be. The kind of paper used, the ink, and the style of writing, as well as the contents of the document, must be such as to sustain the opinion of the judge that the document is in truth authentic.

Finally, it must be proved that the document, at the time of its original discovery, was in a place where it would be natural to find a document of such a nature as the one offered in evidence. That is, the document must have come from a natural custody. It is assumed that a forger, no matter how great his skill in creating a document that is "unsuspicious in appearance," would not readily be able to place that forgery in such a natural custody. This, coupled with the fact that the document must have been in this natural custody for 30 years, would tend to be a further safeguard against the admission of a false document. The age requirement alone tends to give it some verity, since it is unlikely that a forgery would be created "to come to fruition" a generation hence. Therefore, if an age of 30 years and a proper custody during those 30 years can be proved, judges have readily admitted as evidence under the ancient documents rule materials that under other conditions would not have been admissible as evidence.[5]

But this is only part of the problem. In his article "Ancient Documents and Hearsay" Prof. Joseph A. Wicker points out that the use of ancient documents in evidence involves two distinct problems. First, is an ancient document admissible in evidence

[2] Wigmore, 7:583-584.

[3] The time is figured from the execution of the writing, not from the time it goes into effect as in the case of a will, and to the time of its being offered as evidence, not from the time of initiating the litigation. Charles T. McCormick, *Handbook of the Law of Evidence*, p. 401 (St. Paul, Minn., 1954).

[4] McCormick, p. 401-402.

[5] Wigmore, 7:585.

without corroborating authentication? As noted above, when the requirements of age, custody, and freedom from suspicion in appearance have been met, the courts have generally answered, "Yes," and admitted the ancient document. Second, assuming that the ancient document is admissible in evidence without direct proof of authenticity, "Are the recitals in such a document competent evidence of the facts recited?"[6] No one contends that something that was false 30 years ago has suddenly through the passage of time become true. The fact that the document may fulfill all of the requirements of the ancient documents rule does not give it verity.

In this connection an example from the experience of the North Carolina Department of Archives and History may be useful. In 1734, when one of North Carolina's seaboard counties was established, no definition was made of a western boundary, and the southern boundary was only partially defined. There has, therefore, been a continuing controversy over the boundary, resulting in litigation. In 1961 the Department's Division of Archives and Manuscripts became involved in a court fight stemming from this disputed county line.[7]

In an effort to strengthen his claim, the plaintiff in a land dispute obtained photocopies of several maps now in the custody of the Department of Archives and History and offered them in evidence before the referee appointed by the superior court judge to hear the case. One of the maps was drawn in 1783 and the other three were dated 1808, 1869, and 1882. The State Archivist had certified that the maps were in fact true and correct copies of documents in the custody of the Department of Archives and History. Under then existing legislation this certification ordinarily would have sufficed to meet, at least in part, the ancient documents requirements. A section of the North Carolina statute dealing with the preservation of public records and copies made therefrom provides that "photocopies, microfilm, typescripts, manuscripts, or other copies of . . . [records] shall be made and certified under the seal of the Department [of Archives and History] upon application of any person, which certification shall have the same force and effect as if made by the official or agency by which the records were transferred to the Department." A related statute states that copies of all public records lodged in the the office of the "Governor, Treas-

[6] Joseph A. Wicker, "Ancient Documents and Hearsay," in *Texas Law Review*, 8:451 (June 1930).

[7] At the time of this writing the case has not been decided and probably will not be until it is finally adjudicated by the North Carolina Supreme Court.

urer, Auditor, Secretary of State, Attorney General, or Adjutant General [since amended by the 1961 General Assembly to include the State Department of Archives and History], shall be as competent evidence as the originals, when certified by the keeper of such records or writings under the seal of his office when there is such seal, or under his hand when there is no such seal."[8] These statutes seem to cover adequately the matter of the admissibility of certified copies as evidence, as competent as the originals. Because it was necessary to show that the originals from which the copies were made were at least 30 years old, new certifications were prepared, stating not only that the photocopies were true copies of maps in the custody of the Department, but that departmental records of the 1920's clearly indicated that the maps in question had been transferred to the Department more than 30 years before, and that they therefore had been in the custody of the Department of Archives and History (North Carolina Historical Commission before 1943) for more than 30 years. The certification of the State Archivist cited the reference in departmental records showing the transfer of the maps. The certifications, of course, fulfilled the qualifications of the ancient documents rule that the documents, and hence the photocopies properly certified and having the same force as the originals, were 30 years old and that they had been in a "natural custody." There seemed no reason to think that the documents submitted were "suspicious in nature," and hence the copies seemed to meet the qualifications of the common-law ancient documents rule as to their admissibility as evidence.

But the referee hearing the case would not admit them as substantive evidence, even though under threat of subpena the Assistant State Archivist appeared in court to testify in person to what was written on the certification attached to the photocopies. Substantive evidence is defined as "evidence which may tend to prove, directly or circumstantially, a fact in issue, as distinguished from impeaching or corroborative evidence which bears only on the credibility of a witness or a hearsay declarant."[9] The referee did admit, however, the copies of the maps as exhibits that might be used to corroborate other evidence. Thus, the effort of the plaintiff to enter in evidence under the ancient documents rule copies of maps that appeared to meet the requirements of ancient documents did not meet with success in this particular case. Although meeting the require-

[8] *General Statutes of North Carolina*, 121-5, 8-34.

[9] Dale F. Stansbury, *The North Carolina Law of Evidence*, p. 4 (Charlottesville, Va., 1946).

ments of age, custody, and freedom from suspicion the documents did not appear to the judge to be "competent evidence of the facts recited."

Two cases cited by Wicker[10] are of interest. In an 1899 case in Virginia, *King* v. *Watkins*, the court rejected an ancient survey and report made by a surveyor, offered in evidence for the purpose of showing the boundaries of certain lands. The court said:

> The doctrine of admitting ancient documents in evidence, without proof of their genuineness, is based on the ground that they prove themselves, the witness being presumed to be dead. The doctrine goes no further than this. The questions of its relevancy and admissibility as evidence cannot be affected by the fact that it is an ancient document. It is no more admissible on that ground than if it were a newly-executed instrument.

Again, in *Gwin* v. *Calegaris*, a California case of 1903, the court refused the admittance, for the purpose of identifying certain land insufficiently described in a deed, of an ancient map recorded in the public records. The court said:

> The rule of ancient documents as we understand it, does not impart any verity to the recitals contained in these instruments. The documents themselves are presumed to be genuine, and the rule has no further effect.

The archivist, fortunately, does not have judicial responsibility for deciding on the admissibility of evidence. He does have responsibility, however, for proper custody of public records, and when under the ancient documents rule someone wishes to present as evidence copies of documents in archival custody he does have the responsibility for certifying such copies. In order to do this he needs legislation to establish that the copies he certifies constitute as good evidence as would the originals in any court. He needs to have adequate control of the records in his custody to protect them from any alteration that would in effect make them forgeries. He needs to have adequate accessioning documentation to show when the records came into the custody of the archives and their provenance. Only when these needs are fulfilled can the archivist adequately discharge his responsibilities in the use of ancient documents as evidence.

[10] In *Texas Law Review*, 8:457.