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Comments and Casenotes

Best Evidence Rule — Unsigned Carbon Copy Of Letter As Duplicate Original

Parr Construction Co. v. Pomer[1]

The plaintiff Construction Company brought suit against the defendant Construction Company and its president to recover the balance due under an oral contract to perform certain excavation work at a price of thirty-five cents per cubic yard, being unable to agree as to the actual quantity which plaintiff had excavated. The defendant engineer estimated 12,673 cubic yards, whereas the plaintiff estimated 18,000 cubic yards. The plaintiff agreed with the defendant to refer the dispute to one Matz as an impartial arbitrator.

The issue here in question concerns the admissibility in behalf of the plaintiff of an *unsigned* carbon copy of a letter from Matz to the defendant giving Matz's estimate of the quantity of earth excavated as 14,340 cubic yards. After a previous effort to introduce the copy into evidence, the plaintiff called the defendant's president as a witness and had him identify the carbon copy as a copy of the letter received by him. The defendant objected to the admission of the copy on two grounds: first, that it violated the best evidence rule; and second, because the arbitrator was not present to testify as a witness and explain the method used in making his calculation.[2] The trial court overruled the defendant's objections and admitted the letter into evidence. The Court of Appeals, in affirming the trial court said:

> "The objection based on the best evidence rule is without merit. (Defendant's president) was called as a witness by (the plaintiff) and identified the unsigned carbon copy as a copy of the original letter received by him. * * * A carbon copy of a letter is considered to be a duplicate original; and, as such, it constitutes primary rather than secondary evidence."[3]

The court appears to have based its holding upon two alternative grounds: (1) that the unsigned carbon copy

[1] 217 Md. 539, 144 A. 2d 69 (1958).

[2] Only the first objection, in regard to the best evidence rule, falls within the scope of this note.

[3] *Supra*, n. 1, 542.

was admissible as a duplicate original; and (2) that the defendant's president had admitted that the carbon copy was accurate and authentic.

In general terms, the Best Evidence Rule is one requiring the production of the best evidence obtainable in accordance with the nature of the case.[4] As it exists today, the rule applies only where writings are offered in evidence,[5] and so McCormick states the rule to be that:

> "[I]n proving the terms of a writing, where such terms are material, the original writing must be produced, unless it is shown to be unavailable for some reason other than the serious fault of the proponent."[6]

Following the view expressed by this rule, the original document or writing is admitted as primary evidence of the terms contained therein, and any other evidence, unless given the status of a duplicate original, is considered to be secondary evidence.[7] The instant case appears to expand the duplicate original rule to include unsigned carbon copies.

At the inception of the original document rule, the most reliable method of reproduction was hand copying.[8] Therefore, all copies were susceptible to the possibility of human error and production of the original document was strictly required.[9] However, with the advent of modern machine reproduction methods, the courts have been faced with the problem of determining what methods of reproduction will create documents that can be considered duplicate originals

[4] THAYER, PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW, 489 (1898); 3 BLACKSTONE, COMMENTARIES, (1765) 368; MCCORMICK, EVIDENCE, (1954), 408, § 195.

[5] MCCORMICK, *op. cit., ibid.*, 409.

[6] *Ibid.*

[7] Primary evidence is the best evidence obtainable and secondary evidence is that which may be admitted in the absence of the best evidence only when a satisfactory excuse for such absence has been given. Anglo-American Packing and Provision Co. v. Cannon, 31 F. 313 (C.C.A. Ga., 1887); U.S. v. Reyburn, 31 U.S. 352 (1832). It is noted that in most American jurisdictions there exist certain preferences in secondary evidence where such is admissible. The problem of preference among various kinds of secondary evidence is outside the scope of this note. It is involved in Robinson v. Singerly Pulp Co., 110 Md. 382, 72 A. 828 (1909). For a more complete discussion see 4 WIGMORE, EVIDENCE (3rd ed. 1940) §§ 1265-1280; 2 JONES, EVIDENCE, §§ 859-862 (2d ed. rev. 1926); MCCORMICK, EVIDENCE (1954), 421, § 207; *Note, Degrees of Secondary Evidence*, 38 Mich. L. Rev. 864 (1940).

[8] For detailed historical development see 4 WIGMORE, EVIDENCE (3rd ed. 1940) §§ 1177-1179, 1 JONES, EVIDENCE (4th ed. 1938) § 209.

[9] A party claiming a right resting upon a document was required to produce the document or lose his claim. Thomas of Utred v. Anon, Y.B. 24 ed. III, fol. 24, Pl. 1 (1350).

and be admissible as primary evidence. Due to their varying degrees of reliability, letterpress copies[10] and photographic copies[11] have been generally held to be secondary evidence and inadmissible without accounting for the original, whereas printing press copies are uniformly held to be duplicate originals, and, as such, primary evidence if printed from the same type at the same time.[12]

The holdings are not so well-defined in the case of carbon copies. It is generally stated that for such a copy to be given the status of a duplicate original, the writer must have so intended.[13] As a corollary, it has often been indicated that such intent cannot be found unless the copy is signed as well as the original.[14] Recognizing these views McCormick, in discussing the use of carbon copies, says:

> ". . . Here the copy is made by the same stroke of the pen or pencil as the original, and there is an analogy to the practice of signing counterparts where each copy was intended to be an equal embodiment of the contract or other transaction. Indeed, today counterparts usually consist of an original and one or more carbon copies, all duly signed in multiplicate. What makes them counterparts is the signing with intent to make them equal."[15]

However, it cannot be said that the majority of courts require that the copies be counterparts in the manner indicated by McCormick, since many courts have admitted copies without making any mention as to whether they are signed or not.[16] It may well be that they were, but none-

[10] Marsh v. Hand, 35 Md. 123, 127 (1871); Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381 (1885); Chesapeake and Ohio Ry. Co. v. F. W. Stock and Sons, 104 Va. 97, 51 S.E. 161 (1905); Westinghouse Co. v. Tilden, 56 Neb. 129, 76 N.W. 416 (1898). *Cf.* McAuley v. Siscoe, 110 Kan. 804, 205 P. 346, 347 (1922), which appears to express a more liberal view.

[11] Hensel v. Smith, 152 Md. 380, 136 A. 900 (1927); Union Cent. Life Ins. Co. v. Mendenhall, 183 Ark. 25, 34 S.W. 2d 1078 (1931); Cohen v. Elias, 163 N.Y.S. 1051, 176 App. Div. 763 (1917).

[12] People v. Chicago R.I. and P.R. Co., 329 Ill. 467, 160 N.E. 841 (1928).

[13] MCCORMICK, *supra*, n. 4, 419-420, § 206; Lockwood v. L. & L. Freight Lines, 126 Fla. 474, 171 So. 236 (1936); McDonald v. Hanks, 52 Tex. Civ. App., 140, 113 S.W. 604 (1908).

[14] Oberlin v. Pyle, 114 Ind. App. 21, 49 N.E. 2d 970, 972 (1943); International Harvester Co. of America v. Elfstrom, 101 Minn. 263, 112 N.W. 252 (1907); Chrismer v. Chrismer, 103 Ohio App. 23, 144 N.E. 2d 494, 499 (1956); Morrow v. State, 190 Md. 559, 562, 59 A. 2d 325 (1947); Lockwood v. L. & L. Freight Lines, *supra*, n. 13.

[15] MCCORMICK, *supra*, n. 4, 419-420.

[16] Massachusetts Bonding & Ins. Co. v. State, 82 Ind. App. 377, 149 N.E. 377, 384 (1925); Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 238 Ky. 322, 37 S.W. 2d 856 (1931); Carter v. Carl Merveldt & Son, 183 Okla. 152, 80 P. 2d 254 (1938); Totten v. Bucy, 57 Md. 446 (1882); Goodman v. Saperstein, 115 Md. 678, 81 A. 695 (1911); See also 65 A.L.R. 2d 342, 355 (1959).

theless the courts have not all drawn the distinction; some seem only to require that the copies be created simultaneously.[17]

The Maryland court has unquestionably given the carbon copies which have come before it the status of duplicate originals.[18] The leading Maryland case on point, *Goodman v. Saperstein*,[19] disposed of the question by stating:

> "Proof was given by the witness . . . of the mailing of the originals . . . and carbon copies of such letters when their custody is properly proven are regarded as duplicate originals."[20]

It is noted that in so holding the court made no mention as to whether the copies were signed or not, which might indicate that the court did not feel that the question of signing was important.

In support of its holding, the court cited *International Harvester Co. v. Elfstrom*[21] where the duplicate copy was signed, the signature being reproduced by the carbon process. In the *Harvester* case the document in question was a contract executed in duplicate by means of carbon paper. In holding the carbon copy to be primary evidence, the Court said:

> "If the reproduction is complete there is no practical reason why all the products of the single act of writing a contract and affixing a signature thereto should not be regarded as of equal and equivalent value. In this instance the same stroke of the pen produced both signatures."[22]

Furthermore, in *Totten v. Bucy*,[23] which was decided prior to the *Goodman* case, the duplicate had been expressly designated as a "duplicate", and in the more recent case of *Morrow v. State*[24] the duplicate was signed. Although prior to the instant case the Maryland court had not expressly made a distinction between signed or copies otherwise indicating that they were intended to be duplicate

[17] Rudolph Wurlitzer Co. v. Dickenson, 247 Ill. 27, 93 N.E. 132 (1910); Oberlin v. Pyle, 114 Ind. App. 21, 49 N.E. 2d 970 (1943); 51 A.L.R. 1498, 65 A.L.R. 2d 342, 355-356 (1959).

[18] Morrow v. State, 190 Md. 559, 59 A. 2d 325 (1948); Totten v. Bucy, 57 Md. 446 (1882); Goodman v. Saperstein, 115 Md. 678, 81 A. 695 (1911); Parr Construction Co. v. Pomer, 217 Md. 539, 144 A. 2d 69 (1958); 65 A.L.R. 2d 342, 356 (1959).

[19] *Supra*, n. 18.

[20] *Ibid.*, 683.

[21] 101 Minn. 263, 112 N.W. 252 (1907).

[22] *Ibid.*, 264.

[23] *Supra*, n. 18.

[24] *Supra*, n. 18.

originals and unsigned copies or mere file copies, the conclusion could have been drawn that the copies had to show the writer's intent that they be treated as duplicate originals. However, the court in the principal case indicated that an unsigned carbon copy constitutes a duplicate original. It cannot be said that such was the clear holding of the court, since an alternative ground for admitting the letter from the arbitrator was also indicated, and no clear statement was made as to which ground was actually the basis for the opinion.

As an alternative to admitting the letter as a duplicate original, the court indicated that the policy of the best evidence rule was satisfied by the defendant's president admitting on the witness stand that the paper offered was a copy of the original, without suggesting that it was inaccurate in any way. In such circumstances the policy of the best evidence rule is satisfied.

The leading case on this point is *Slatterie v. Pooley*[25] where it is stated:

> "If such evidence were inadmissible, the difficulties thrown in the way of almost every trial would be insuperable. The reason why such parole statements are admissible . . . is that they are not open to the same objection which belongs to parole evidence from other sources where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth arising from the very nature of the case where better evidence is withheld; whereas what a party himself admits to be true may reasonably be presumed to be so."[26]

It is noted that this case involved an out of court admission, but that the Maryland Court of Appeals has expressly adopted the rule of the case in regard to admissions made both in and out of court.[27] Although the majority of jurisdictions have fully adopted the rule,[28] there are numerous holdings in which the principle had been repudiated, but usually only in respect to oral admissions made out of court.[29] While it is true that there may be valid objections

[25] 6 M. and W. 664, 151 Eng. Rep. 579 (1840).

[26] *Ibid.*, 664.

[27] Marine Bank v. Stirling, 115 Md. 90, 80 A. 736 (1911).

[28] Fontenot v. Lloyds Casualty Insurer, 31 So. 2d 290 (La. App. 1947); Haas v. Storner, 47 N.Y.S. 1100 (1897); Norcum v. Savage, 140 N.C. 472, 53 S.E. 289 (1906); Gardiner v. City of Columbia Police Dept., 216 S.C. 219, 57 S.E. 2d 308 (1950).

[29] Plunkett v. Dillon, 4 Del. Ch. 198 (1871); Haliburton v. Fletcher, 22 Ark. 453 (1861); Swing v. Cloquet Lumber Co., 121 Minn. 221, 141 N.W. 117 (1913).

to dispensing with production in cases where the admission has been made out of court,[30] there seems to be no logical basis for requiring production when the admission of the party or his authorized agent is made from the witness stand.

In *Maurice v. Worden*[31] the action was for libel, the statements in question being endorsed upon a written resignation submitted by the plaintiff to the defendant as Commandant of the United States Naval Academy. It was necessary to prove this libelous endorsement made by the defendant in order to sustain the action. The original document was not available and the plaintiff offered to prove the endorsement by an oral admission which had been made by the defendant to the wife of the plaintiff. The lower court refused to admit the testimony of the wife to this effect. The Court of Appeals, in reversing the decision, said:

> "This evidence is not secondary but comes within the class of primary evidence. The admissions of a party freely and voluntarily made, are always evidence, which may be introduced by the opposite party."[32]

This holding was followed in *Marine Bank v. Stirling.*[33] In this case the admission was made from the witness stand. The plaintiff attempted to introduce a newspaper containing a published report of the condition of the defendant bank. The president of the bank testified that he did not have the original report, but identified the newspaper as a copy of the report. The court disposed of the defendant's contention that the report was inadmissible as a copy, stating:

> ". . . it would be difficult to prove the authenticity of a statement so published in a more definite way than was done in this case — being proved by the president who attested it. It cannot be said that such a publication is a copy in the sense that there is an original which must be produced instead of the copy. . . ."[34]

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[30] See WIGMORE, *op. cit., supra*, n. 3, § 1255.

[31] 54 Md. 233, 258 (1880).

[32] *Ibid.*, 256, citing Slatterie v. Pooley, *supra*, n. 25; Loomis v. Waldhams, 8 Gray 557, 562 (1857); Smith v. Palmer, 6 Cush. 513, 520 (1850), in which the court said:

> "A party's own statements and admissions are in all cases admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed, or record."

[33] *Supra*, n. 27.

[34] *Ibid.*, 100.

The rule is apparently well settled in Maryland that such an admission to the content of a writing will serve to dispense with the production of the original. In the case at hand the president of the defendant corporation apparently identified the carbon copy as an accurate reproduction of the letter received by him. On this ground alone, under the rule of *Slatterie v. Pooley*,[35] as adopted by the Maryland Court, the copy was clearly admissible. There is a third line of reasoning which might have been applied to the facts of the subject case. The fundamental purpose of the best evidence rule has confined its application to the proof of the terms of a writing when the dispute is about what those terms are. Some courts have held that the rule does not operate to bar evidence of a transaction merely because a written memorandum exists, unless that memorandum, as opposed to the transaction, is the thing which itself is to be proved.

The leading case illustrating this distinction is *Herzig v. Swift and Co.*[36] In this case action was brought under the Florida wrongful death statute by the administratrix of a deceased partner for a partnership accounting. In proving damages the plaintiff offered the testimony of one of the surviving partners as to the amount of partnership earnings. This testimony was rejected by the trial court on the basis of the best evidence rule, the books of the firm being thought to be the best evidence of its earnings.

This ruling was reversed on appeal. The court, citing numerous authorities in support of its holding, stated:

> "Here there was no attempt to prove the contents of a writing; the issue was the earnings of the partnership, which for convenience were recorded in the books of account after the relevant facts occurred. Generally this differentiation has been adopted by the courts. . . . The federal courts have generally adopted the rationale limiting the 'best evidence rule' to cases where the contents of the writing are to be proved."[37]

The distinction has been recognized by the Maryland Court of Appeals in several instances.[38] Perhaps the strongest case on the point is *Cramer v. Shriner*.[39] Here the

[35] *Supra*, n. 25.

[36] 146 F. 2d 444 (1945).

[37] *Ibid.*, 446.

[38] Glenn v. Rogers, 3 Md. 312 (1852); Cramer v. Shriner, 18 Md. 140 (1861); Beall v. Poole, 27 Md. 645 (1867).

[39] *Supra*, n. 38.

plaintiff offered to prove solely by testimony that a settlement of all accounts between defendant and himself had taken place on a certain day in the presence of the witness. The witness testified that the settlement was based on figures contained in a memorandum which was in possession of the plaintiff at the time of settlement. Although the witness saw the memo he had no knowledge of its contents and his testimony was based entirely upon the declarations of the parties made to each other in his presence. Defendant objected to any parole evidence of the amounts and items of settlement contained in the memo without production of the memo or proof of its loss. The trial judge admitted the testimony over defendant's objection. This ruling was affirmed on appeal. The Court citing *Glenn v. Rogers*,[40] stated:

> "According to our construction of this exception, it presents the single question, whether it was competent for the witness, Titlow, to testify as to the settlement made between the parties, without the production of the memorandum used by them in the course of the settlement. . . . The testimony was not offered to prove the contents of the memorandum, but to prove a settlement for the wheat included in defendants receipts, and it does not seem to be objectionable, on the ground that it tended to prove the contents of the memorandum as material to the plaintiff's case.
>
> "It is difficult to see how the non-production of the memorandum, at the trial could render the testimony of Titlow, as to the settlement and its subject matter, *derived from the declarations and admissions of the parties to each other,* inadmissible. * * * Facts are sometimes proved by parole of which there is evidence in writing."[41]

In *Grey v. State*[42] oral testimony of a confession which had been reduced to writing and signed by the defendant was rejected by the Court of Appeals on the basis of the best evidence rule. Such a decision might appear to involve a repudiation of the prior rule, but it is believed that there are grounds for special treatment of confessions. In a sense, a confession reduced to writing may be compared to a written integrated contract; the oral proceed-

[40] *Supra*, n. 38.
[41] *Supra*, n. 39, 146, 147.
[42] 181 Md. 439, 30 A. 2d 744 (1943).

ing may be regarded as preliminary matter superseded by the writing. We want to show the contents of the writing for its own sake. We are dealing with an original which is a writing. The desire for precision in what may be a matter of great length, and of great importance, and the suspicion which arises when the prosecution in a criminal case does not produce such a writing may also explain the decision in the *Grey* case.[43]

The distinction between evidence of the contents of a writing and evidence of other facts which happen to have been written down, has thus been recognized by the Maryland Courts as well as other reliable authorities.[44] This ground alone would have provided sufficient basis for the admission of the unsigned carbon in the instant case without resort to the duplicate original doctrine. Although not admissible to prove the contents of the original letter the copy could certainly be admitted as other evidence of the facts in issue, *i.e.* the findings of the arbitrator. The fact that the arbitrator had written down these findings in the original letter should not bar any other evidence of the arbitration agreement or its result.[45]

It is difficult to say whether the instant case constitutes authority for the future admission in evidence of unsigned carbon copies where there is no admission of their accuracy. The opinion of the court, when read along with the cases it cites, seems to adopt alternative grounds for admitting the letter. It would have been clearer if the court had merely adopted the second alternative, or have admitted it as additional evidence of the terms of the arbitration agreement.

ROBERT E. POWELL

J. WILLIAM SCHNEIDER, JR.

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[43] For decisions contra, see: Alexander v. State, 37 Ala. App. 533, 71 So. 2d 520 (1954); State v. Bruni, 79 R.I. 311, 88 A. 2d 162 (1952).

[44] WIGMORE, *op. cit., supra*, n. 7, § 1242; MCKELVEY, EVIDENCE (5th ed. 1944) § 345; A.L.R. MODEL CODE OF EVIDENCE, Rule 602 (4).

[45] If the decision of the arbitrator, and not his letter reporting that decision, is the original, however, the court could not have avoided a hearsay problem. Any letter would then be admissible only to prove the truth of its contents — that the arbitrator had decided that the quantity was 14,340 tons. Since Matz was not produced for cross-examination, the letter is hearsay. If the letter itself is regarded as the decision, there is no hearsay problem in proving what the decision was, if the letter or a "duplicate original" is produced. However, it is probably unrealistic to regard the letter as the decision of the arbitrator in the sense that a court judgment "is" the decision of the court. It does not appear to be something which *itself* creates a legal relationship and thus escapes the hearsay rule as an operative fact. See MCCORMICK, *op. cit., supra*, n. 7, § 228.