

## Best Evidence Rule—Oral Proof of Contents of Writings

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ing certain modes of procedure, in federal cases, it is submitted that there is nothing in the Fourteenth Amendment that forbids a state from keeping its rules of procedure and evidence abreast of the most enlightened views of modern jurisprudence.

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BEST EVIDENCE RULE—ORAL PROOF OF CONTENTS OF WRITINGS.

It is common learning in the law of evidence that a writing or document is the best evidence of what it contains. "Indeed the term 'best evidence' has been described as a convenient short description of the rule as to proving the contents of a writing."<sup>1</sup>

Therefore, generally, oral testimony will not be admitted to prove what was contained in a writing; the document itself must be produced and offered in evidence.<sup>2</sup> The reasons for this rule are founded on the uncertainty of oral testimony based on recollection, and the inability to reproduce properly such characteristics as form, handwriting and physical appearance.<sup>3</sup> But, like most laws of a pseudo-science, this general rule has several exceptions, and it is with one of these exceptions that we are concerned.

Broadly stated it may be said that when the writing is not in issue and is merely collateral to the subject of the action, parol evidence of its contents is admissible without otherwise accounting for its absence.<sup>4</sup> Expediency demands that we curtail our inquiry from examining into every writing, no matter how remote.<sup>5</sup> Briefly

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<sup>1</sup> Jones, *Law of Evidence* (3rd ed. 1924), p. 286.

<sup>2</sup> *Arizona Fire Ins. Co. v. Dillingham*, 23 Ariz. 508, 205 Pac. 589 (1922); *Butler v. Mail & Express Pub. Co.*, 171 N. Y. 208, 63 N. E. 951 (1902); *Mahaney v. Carr*, 175 N. Y. 454, 67 N. E. 903 (1903); *Matter of Smith*, 61 Hun 101, 151 N. Y. Supp. 425 (1891); 2 *Wigmore on Evidence* (1923 Sec. 1178. (The rule has been held to apply to Workmen's Compensation cases.) *Baum v. Industrial Commission*, 288 Ill. 516, 123 N. E. 625, 6 A. L. R. 1243 (1919). (The application of this rule should not be confused with the parol evidence rule which is binding only on parties to the instrument but not on third persons.) *Follinsbee v. Sawyer*, 157 N. Y. 196, 51 N. E. 994 (1898). (The best evidence rule applies to all who seek to use a writing whether or not they are parties to it.) *Infra* note 33; *cf. Miles v. Walker*, 179 N. C. 479, 484, 102 S. E. 884, 886 (1920).

<sup>3</sup> 2 *Wigmore*, *supra* note 2, Sec. 1179.

<sup>4</sup> *Coonrod v. Madden*, 126 Ind. 192, 25 N. E. 1102 (1890); *Gilbert v. Duncan*, 29 N. J. L. 133 (1861); *Fairchild v. Fairchild*, 64 N. Y. 471 (1876); *Grover v. Morris*, 73 N. Y. 473 (1878); *Daniels v. Smith*, 130 N. Y. 696, 29 N. E. 1098 (1892); *Bowen v. Newport National Bank*, 11 Hun 226 (N. Y., 1877); *Cullinan v. Furthman*, 70 App. Div. 110, 75 N. Y. Supp. 90 (1st Dept. 1902); *Thayer's Cases on Evidence* (1900), p. 747; 2 *Wigmore*, *supra* note 2, Sec. 1252.

<sup>5</sup> *Massey v. Farmer's National Bank*, 113 Ill. 334, 338 (1885).

stated as the rule is, its application is attended by much uncertainty, and the purpose of this paper is to attempt a more definite and comprehensible rule which will satisfy the exigencies of trial practice.

At the outset we must note the distinction between this rule and other rules which permit oral evidence of independent facts, the occurrence of which has been recorded in writing.<sup>6</sup> If an event, happening, personal status or legal relationship has been reduced to writing, oral testimony is still admissible to prove the event, etc., just as it is always admitted to prove any other fact.<sup>7</sup> In our discussion the writing is the fact<sup>8</sup> itself, and is, therefore, the best evidence of what it relates. Examples of the latter are deeds,<sup>9</sup> contracts,<sup>10</sup> letters<sup>11</sup> and the like. Again we note that the existence,<sup>12</sup> execution,<sup>13</sup> and delivery<sup>14</sup> of documents are all facts which co-exist apart from the contents of the writing and may be proved independently thereof by oral testimony. Testimony which relates of the existence of a deed does not prove its contents. Our problem is proving the contents themselves, not any of the "collateral" facts. Though this distinction is clear and unmistakable, judicial opinions have not been overcareful to preserve it. Much confusion has arisen from the indiscriminate use of the word "collateral."<sup>15</sup>

<sup>6</sup> Jones, *supra* note 1, Sec. 203. "If the essential fact to be proved is not the contents of a written instrument, but an independent fact to which the writing is merely collateral, or of which it is merely an incident, there is no reason for the application of the rule under discussion. In such cases the contents of the document are no part of the issue, and there is no agreement that the writing shall be the sole repository of the fact."

<sup>7</sup> *Southwick v. Hayden*, 7 Cowen 334 (N. Y. 1827); *Steele v. Lord*, 70 N. Y. 280 (1877), (receipt of money or goods); *State v. McDonald*, 65 Me. 466 (1876); *Weinhandler v. Eastern Brewing Co.*, 46 Misc. 584, 92 N. Y. Supp. 792 (1905), (stenographer's minutes of testimony on former trial); *Commonwealth v. Dill*, 156 Mass. 226, 30 N. E. 1016 (1892), (marriage); *Stubblefield v. Roper*, 136 Miss. 831, 101 So. 852 (1924), (partnership if said is between partner and third person, but *contra* if between partners); *McCall v. Moschowitz*, 14 Daly, 16, 25 (N. Y. 1886), (membership in Stock Exchange); *Gwathmey et al. v. Burgiss*, 104 S. E. 816 (1916).

<sup>8</sup> *Commonwealth v. Dill*, *supra* note 7; *Tice v. Reeves*, 30 N. J. L. 314 (1863), (divorce); *Carter v. Pitcher*, 87 Hun 580, 34 N. Y. Supp. 549 (1895), (deed).

<sup>9</sup> *Volhard v. Volhard*, 119 App. Div. 226, 104 N. Y. Supp. 578 (1st Dept. 1907); *Carter v. Pitcher*, *supra* note 8.

<sup>10</sup> *Mahaney v. Carr*, *supra* note 2.

<sup>11</sup> *Brown v. Jewett*, 18 N. H. 230 (1846).

<sup>12</sup> *Wessel v. Cook*, 132 Minn. 442, 157 N. W. 705 (1916); *Bardin v. Stevenson*, 75 N. Y. 164, 166 (1878); *Bishop v. Kelly*, 7 Alb. Law Jour. 94 (N. Y. 1873); *Reynolds v. Kelly*, 1 Daly 283 (N. Y. 1863); 22 C. J. 986 note 4.

<sup>13</sup> *Leon v. Kerridan*, 47 Fla. 178, 36 So. 173 (1904); *Uhl v. Moorhouse*, 137 Ind. 445, 37 N. E. 366 (1893); *Heimerdinger v. Lehigh Valley R. R. Co.*, 26 Misc. 374, 56 N. Y. Supp. 188 (1899); 17 Cyc. 477.

<sup>14</sup> *Commonwealth v. Best*, 180 Mass. 492, 62 N. E. 748 (1902); *Smith v. Bank*, 45 Nebr. 444, 63 N. W. 796 (1895).

<sup>15</sup> 2 Wigmore, *supra* note 2, Sec. 1253.

Its great breadth of meaning has caused it to be employed as a catchword by Courts without regard to definite rule.

The word "collateral" has been used to describe two separate and distinct relations. *First*, it is used to define the relation between the document itself and the events which exist independent of it, *viz.*, execution and delivery. *Secondly*, it is used to describe the relation which the contents of the writing bears to the main issues of the case. Lexicographically its use is justified in either case, but for clarity of judicial expression it would be better if its use were confined only to one of these relations. We would prefer "collateral" to be used in reference to the first class, and that some other term such as "subordinate," or the common expression "not in issue"<sup>16</sup> indicate the second; not that it is more descriptive but merely to distinguish the two classes. However this may be we have yet to determine just when the contents of the writing are "not in issue," "collateral" or "subordinate."

From an analysis of many cases it might be supposed that a clear test would be whether the evidence made out a *prima facie* case or a defense.<sup>17</sup> Such a criterion would be relatively easy of application since the essential elements of a suit are readily ascertainable. If a *prima facie* case cannot be made out without it, the writing is indispensable; if the *prima facie* case is established without reference to it, oral evidence is admissible. Many cases would fall within such a rule. Thus in a case<sup>18</sup> of criminal prosecution for assault arising out of a dispute over the right to possession of land, the state showed by oral testimony that the right of possession was in the complaining witness.

"The issue as to the ownership or right of possession to said land was only collaterally involved. The principal issue was: Did appellant assault Calendar with the intent to kill him?"<sup>19</sup>

So too when a person has been assaulted while at the house of the defendant under a writ of detinue, the writ need not be produced since the assault, and not the writ, is the issue.<sup>20</sup>

But the application of the rule has been even broader than that. The best evidence is not needed to prove every element of a *prima*

<sup>16</sup> Issue has been defined as "some question; either fact or law, disputed between the parties, and mutually proposed and accepted by them as the subject for decision." *Riggs v. Chatin*, 7 N. Y. Supp. 765 (1889); *Hays v. Hays*, 23 Wend. 363, 370 (N. Y. 1840).

<sup>17</sup> The only case which suggests this test in so many words is *Richardson v. Chas. A. Jones, etc.*, *infra* note 25.

<sup>18</sup> *State v. Goodrich*, 24 N. Mex. 176, 176 Pac. 813 (1918); see also *Woodward Iron Co. v. Collins*, 200 Ala. 553, 76 So. 911 (1917).

<sup>19</sup> *State v. Goodrich*, *supra* note 18 at 179; 176 Pac. at 814.

<sup>20</sup> *Griffin v. State*, 129 Ala. 92, 29 So. 783 (1901).

*facie* case. It has been held<sup>21</sup> that the plaintiff may prove the extent of his damages by oral proof of writings. In an action for slander to plaintiff's title to real property it was held error to exclude oral testimony of a contract which plaintiff claims to have made for the sale of the property.<sup>22</sup>

"This false representation is what the plaintiff complains of. This is the gravamen, the grievance (cit.). The sale to Isbell \* \* \* is collateral to the gravamen, the issue in action; and is only material as to the measure of damage to which plaintiff would be entitled if he sustains the issue as to the slander \* \* \*." <sup>22a</sup>

Apparently then the issue which determines the admissibility of the evidence is the briefest possible statement of the single point litigated. Thus when a plaintiff sued for a death benefit, and relied on an absence of seven years to establish the death of the insured, though it was necessary for her to prove that she made a diligent search for the deceased, oral evidence was sufficient to show the publication of notices in the paper.<sup>23</sup> The issue was the death of the insured, not whether plaintiff had made sufficient inquiry, though it was necessary to prove the search.

All testimony which generally supports or explains a case or defense is admissible. Oral evidence has been held to be admissible to prove a person's ability to pay,<sup>24</sup> to show origin of title,<sup>25</sup> to contradict or impeach a witness,<sup>26</sup> to prove method of payment,<sup>27</sup> to explain other evidence,<sup>28</sup> or to show a motive for one's acts.<sup>29</sup> While proof of these facts gives vitality and sustenance to a case, it is quite plain that they are not the basis of the suit, in which case it is unanimously held that if the writing is the foundation of the action, it must be produced.<sup>30</sup> Though this is true, it is often stated

<sup>21</sup> *Forest Preserves of Cook County v. Kean*, 298 Ill. 37, 131 N. E. 117 (1921); *Tallahatchie Lumber Co. v. Cecil Lumber Co.*, 124 Miss. 897, 87 So. 449 (1921); *Carden v. McConnell*, 116 N. C. 875, 21 S. E. 923 (1895).

<sup>22</sup> *Carden v. McConnell*, *ibid.*

<sup>22a</sup> *Ibid.* at 877, 21 S. E. at 924.

<sup>23</sup> *Wehring v. Modern Woodmen of America*, 107 Minn. 25, 119 N. W. 245 (1909).

<sup>24</sup> *Hazel v. Dougherty*, 207 Ky. 89, 268 S. W. 823 (1925); *Oakes v. West*, 64 S. W. 1033 (Texas Civ. Ct. of App. 1901).

<sup>25</sup> *Richardson v. Chas. A. Jones Flour & Grain Co.*, 212 Ala. 492, 103 So. 463 (1925).

<sup>26</sup> *Kershaw Mining Co. v. Lankford*, 213 Ala. 630, 105 So. 896 (1925).

<sup>27</sup> *Little v. Peoples Bank of Mobile*, 209 Ala. 620, 96 So. 763 (1923); *Eyre v. Coal & Iron National Bank of City of N. Y.*, 208 App. Div. 686, 204 N. Y. Supp. (1st Dept. 1924).

<sup>28</sup> *Share v. Coats*, 29 S. Dak. 603, 137 N. W. 402 (1912); *Massey v. Bank*, *supra* note 5.

<sup>29</sup> *Dillinger v. Lee*, 158 Ark. 374, 250 S. W. 332 (1923); *De Bardeleben v. Sellers*, 17 Ala. App. 247, 84 So. 403 (1919).

<sup>30</sup> *Supra* note 2.

that, as a logical deduction from this premise, if the writing is not the foundation of the suit, it need not be produced.<sup>31</sup> Many cases which have admitted oral proof of documents have assigned this as the reason in other cases of which *Taft v. Little*<sup>32</sup> is an example, wherein parol proof of a contract was excluded and the suit was not based on the writing. In this case a subcontractor sued the owner of the house for work done, claiming that it was "extra work," and not included in the contract, and it was held error to permit the plaintiff to give oral proof that the work was not covered by the contract, the latter being held to be the best evidence of what it did or did not contain. It is evident then that the fact that a suit is not based on a writing is no criterion of its admissibility.<sup>33</sup>

No rule of law will reconcile all of the cases. An example of one with whose conclusion we cannot agree was an action for injunction to compel the defendant to remove a barrier in the roadway, a public highway.<sup>34</sup>

"It was necessary for plaintiff to show that they had an interest in the road different from that of the public generally in order to maintain the action."

Yet here plaintiff was permitted to testify orally that he owned lands reached by the road. If the ownership of the land was not the actual basis of the suit, at least it was so much a part of it as to have required the application of the best evidence rule. But it is cases like this which illustrate the judicial temper in reviewing an appeal based on admission of oral evidence of writings. The policy of the courts seems to be to admit as much as possible without a flagrant abuse of discretion by the trial justice.

In summary we can only vaguely suggest the limits of the rule. When the cause of action or the defense interposed is found in the writing or based on it, or when it is direct proof of a vital element of a substantive right, its production is necessary. But when its office is to support or sustain other proof, or make it more intelligible or in any way add or detract from the weight of other evidence or to prove directly other facts which are themselves cumulative evidence, production of the writing will be dispensed with. And, we feel that no statement of the law should confine the free use of the discretion of the trial judge. "The urge of a new group of facts, a new combination of events "bring forth some" unsuspected equity"<sup>35</sup> which demands the experienced discrimination of the judge.

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<sup>31</sup> *Hazel v. Dougherty*, *supra* note 24; *Share v. Coats*, *supra* note 28; *Grover v. Morris*, 73, N. Y. 473, 480 (1878); 17 Cyc. 469.

<sup>32</sup> 178 N. Y. 127, 70 N. E. 211 (1904); (1904) 18 Harv. L. Rev. 560.

<sup>33</sup> *Woolley, Oral Proof of Contents of Writings*, (1907) 9 Bench & Bar 88, 93.

<sup>34</sup> *Shanks v. Robertson*, 101 Kan. 463, 168 Pac. 316, 1 A. L. R. 1140 (1917).

<sup>35</sup> *Cardozo, The Growth of the Law*, (1927) p. 67.