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EVIDENCE-BEST EVIDENCE RULE-USE OF SUMMARIES OF VOLUMINOUS ORIGINALS

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EVIDENCE — BEST EVIDENCE RULE — USE OF SUMMARIES OF VOLUMINOUS ORIGINALS — The best evidence rule usually requires that in proving the contents of documents, the documents themselves must be produced.[1] However, the doctrine is firmly established that where the fact or facts to be ascertained can only be determined by the inspection of a large number of records, papers, books of account, or other like documents, the best evidence rule will be relaxed, and an oral or written summary of such voluminous mass of data may be allowed in evidence.[2] This is done on the basis that the production of

[1] 2 WIGMORE, EVIDENCE, 2d ed., § 1178 (1923).

[2] 66 A. L. R. 1206 (1930); 22 C. J. 1017, § 1303 (1920); 2 WIGMORE, EVIDENCE, 2d ed., § 1230 (1923). There has also been some statutory development of this rule. See Cal. Code Civ. Proc. (1937), § 1855: "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases. . . . 5. When the original consists of numerous accounts or other documents, which cannot be examined without great loss of time, and the evidence sought from them is only the general result of the whole." The same statute is found in the following: Colo. Code Civ. Proc. (Courtright's Mills, 1933), § 407 (5); Idaho Code Civ. Proc. (1932), § 16-411 (5); Mont. Code Civ. Proc. (1935), § 10516 (5); Nev. Comp. Laws (1929), § 8964 (5); Ore. Code (1930), § 9-211 (5); Utah Rev. Stat. (1933), § 104-48-15. The Committee on Evidence Acts of the National Conference of Commissioners on Uniform State Laws, in 1933, recommended the adoption of a Composite Reports as Evidence Act which provides, in part, "Section 1. A written report or finding of facts containing the conclusions resulting wholly or partly from written information furnished by the cooperation of several persons acting for a common purpose, such as the report of an auditor upon the financial condition of a bank or other business, shall be admissible when testified to on the stand by the person, or one of

the originals is impractible, inexpedient and time-devouring,[3] and because the summary will render the multifarious materials much more comprehensible to judge and jury.[4]

> "Most courts require, as a condition," says Professor Wigmore, "that the mass thus summarily testified to shall, if occasion seems to require it, be placed at hand in court, or at least be made accessible to the opposing party, in order that the correctness of the evidence may be tested by inspection if desired, or that the material for cross-examination may be available."[5]

To what extent do the courts require that the materials summarized be "placed at hand in court, or at least made accessible to the opposing party"? Probably all courts would agree that if the data summarized are in court, and have been admitted in evidence, the "condition" has been satisfied.[6] Similarly, where the books are in court, though not offered in evidence, most courts would hold this to be sufficient.[7]

the persons, making such report or finding, without calling as witnesses the persons who furnished the information, and without producing the books or other writings on which the report of finding is based. Section 2. If the report or finding deals with a number of separate transactions, then it shall be necessary to introduce only those portions that are material to the controversy. . . ." WIGMORE, EVIDENCE, 2d ed., § 752a (Supp. 1934). About the farthest extent to which this rule has been carried is in State v. Hightower, 187 N. C. 300, 121 S. E. 616 (1924), where an expert was allowed to state, after having examined various books of account, that the company in question was insolvent.

[3] State v. Brady, 100 Iowa 191, 69 N. W. 290 (1896); New La Junta & L. Canal Co. v. Kreybill, 17 Colo. App. 26, 67 P. 1026 (1902); Cleveland, C. C. & St. L. R. R. v. Woodbury Glass Co., 80 Ind. App. 298, 120 N. E. 426 (1918); Pierce Petroleum Corp. v. Osage Coal Co., 133 Okla. 130, 271 P. 675 (1928).

[4] Bissett v. Bryant Lumber Co., 156 N. C. 162, 72 S. E. 205 (1911); Cleveland, C. C. & St. L. R. R. v. Woodbury Glass Co., 80 Ind. App. 298, 120 N. E. 426 (1918).

[5] 2 WIGMORE, EVIDENCE, 2d ed., § 1230 (1923).

[6] State v. Rhodes, 202 N. C. 101, 161 S. E. 722 (1932); Aetna Casualty & Surety Co. v. Wilmington, 17 Del. 285, 157 A. 208 (1931); Hartford Accident & Indemnity Co. v. Shaw, (Tex. Civ. App. 1928) 8 S. W. (2d) 196; Bell v. Tackett, 134 Okla. 164, 272 P. 461 (1928); Wishek v. Guaranty Co., 55 N. D. 321, 213 N. W. 488 (1927); Baird v. National Surety Co., 54 N. D. 91, 209 N. W. 204 (1926); Cooper v. United States, (C. C. A. 8th, 1925) 9 F. (2d) 216; Carrey v. Haun, 111 Ore. 586, 227 P. 315 (1924); Cochran v. Hamblen, (Tex. Civ. App. 1919) 215 S. W. 374; Shea v. New Orleans Sewerage Board, 124 La. 299, 50 So. 166 (1909); Blum v. State, 94 Md. 375, 51 A. 26 (1901); Rollins v. Board of Commrs., (C. C. A. 8th, 1898) 90 F. 575; San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 P. 410 (1898); State v. Brady, 100 Iowa 191, 69 N. W. 290 (1896); Bicknell v. Millett, 160 Mass. 328, 35 N. E. 1130 (1894); Lynn v. Mayor of Cumberland, 72 Md. 449, 26 A. 1001 (1893); Smith v. Peoria County, 59 Ill. 412 (1871).

[7] Elmer Co. v. Kemp, (C. C. A. 9th, 1933) 67 F. (2d) 948; Butter v. United States, (C. C. A. 10th, 1931) 53 F. (2d) 800; Pierce Petroleum Co. v. Osage Coal Co., 133 Okla. 130, 271 P. 675 (1928); MacPherson v. Great Western Milling Co.,

But it is not always necessary that the materials summarized be in evidence or in court. There is a class of cases where there is a written summary, audit, or compilation, which has been given to the opposite party to enable him to check it against the data which it summarizes, such data being accessible to the other party, though not in court. Under such circumstances, since there is thus an adequate safeguard against falsification in the preparation of the summary, the summary will be admitted.[8] So also where there is a written summary of public records, which, being public, are accessible to the opposing party without any special action on the part of the court.[9]

Another situation where the originals do not need to be brought into court is where they are so extremely voluminous as to "fill the courtroom."[10] A further class of cases is where the materials were not before the lower court, and although no objection was there made, the fact of non-production is urged on appeal as a ground for reversal. In such a situation, it is usually held that if counsel failed to make application to the lower court for an order requiring that the data be produced or made accessible, complaint that the books were not produced before the lower court or made accessible to the opposition at that time will not be heard on appeal.[11]

Then we come to cases where the materials are not only not brought into court, but are not made and are not able to be made accessible to the opposing party. Where the sources of the summary are out of the state, the summary may be admitted.[12] Here the fact that the originals are not available seems to be a ground of admission of the summary,[13] rather than a ground of exclusion. Absence of primary evidence, rather than voluminousness of primary evidence, becomes the ground of admission. There are conflicting decisions where the

44 Cal. App. 491, 186 P. 803 (1919); Lemon v. United States, (C. C. A. 8th, 1908) 164 F. 953; Mendel v. Boyd, 71 Neb. 657, 99 N. W. 493 (1904); New La Junta & Canal Co. v. Kreybill, 17 Colo. App. 26, 67 P. 1026 (1902); Jordan v. Warner's Estate, 107 Wis. 539, 83 N. W. 946 (1900); Woodruff v. State, 61 Ark. 157, 32 S. W. 102 (1895); Wolford v. Farnham, 47 Minn. 95, 49 N. W. 528 (1891).

[8] Edelen v. Muir, 163 Ky. 685, 174 S. W. 474 (1915); Esterman-Verkamp Co. v. Rouse, 211 Ky. 791, 278 S. W. 124 (1925).

[9] Forke v. Homann, 14 Tex. Civ. App. 670, 39 S. W. 210 (1896).

[10] Louisville Bridge Co. v. R. R., 116 Ky. 258, 75 S. W. 285 (1903); State v. Follis, 140 Tenn. 513, 205 S. W. 444 (1918).

[11] State v. Olson, 75 Utah 583, 287 P. 181 (1930); Interstate Finance Corp. v. Commercial Jewelry Co., 280 Ill. 116, 117 N. E. 440 (1917); People v. Gerold, 265 Ill. 448, 107 N. E. 165 (1914); Louisiana Purchase Exposition Co. v. Kuenzel, 108 Mo. App. 105, 82 S. W. 1099 (1904).

[12] Summons v. State, 156 Md. 390, 144 A. 501 (1929); Provident Savings Soc. v. King, 216 Ill. 416, 75 N. E. 166 (1905); Burton v. Driggs, 20 Wall. (87 U. S.) 125, 22 L. Ed. 299 (1873).

[13] Burton v. Driggs, 20 Wall. (87 U. S.) 125, 22 L. Ed. 299 (1873).

originals have been lost, stolen or destroyed.[14] On the rationalization of the cases where the materials summarized are out of the state, it would seem that the summary should be admissible here also.

In all the cases except those where the "mass" is admitted into evidence, the problem of whether the "mass" is admissible matter arises, for the summary, naturally enough, is not admissible if the material summarized is inadmissible.[15] It is not a technical objection that the mass must be shown to be admissible before the summary will be admitted,[16] and one court even went so far as to give a reversal on the ground that a summary was admitted without showing that the data on which it was based was admissible, though no objection was made on this ground in the lower court.[17] In many cases where summaries are admitted, the report does not show to what extent the originals were in court or made accessible to the opposing party. With the holdings running in such wide range, the rule seems capable of formulation in broad terms only, basing the admissibility of the summaries on the discretion of the judge,[18] or on the qualifications that the original data must be in court, made accessible to the opposing party, or its absence satisfactorily explained.[19]

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[14] Admitting the summary: People v. Gerold, 265 Ill. 448, 107 N. E. 165 (1914); Bourquin v. Missouri Pac. R. R., 88 Kan. 183, 127 P. 770 (1912). Dicta: Equitable Life Ins. Co. v. Sieg, (C. C. A. 6th, 1931) 53 F. (2d) 318. Excluding the summary: Stotz v. Scott, 28 Idaho 417, 154 P. 982 (1916).

[15] Morton Butler Timber Co. v. United States, (C. C. A. 6th, 1937) 91 F. (2d) 884; Phillips v. United States, (C. C. A. 8th, 1912) 201 F. 259; Haines v. Goodlander, 72 Kan. 418, 84 P. 986 (1906).

[16] People v. Doble, 203 Cal. 510, 265 P. 184 (1928).

[17] Phillips v. United States, (C. C. A. 8th, 1912) 201 F. 259.

[18] Bicknell v. Millett, 160 Mass. 328, 35 N. E. 1130 (1894).

[19] Bell v. Tackett, 134 Okla. 164, 272 P. 461 (1928).