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EVIDENCE-STATUS OF MICROFILMED BUSINESS RECORDS

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EVIDENCE—STATUS OF MICROFILMED BUSINESS RECORDS—Many businesses today are turning to microfilm to record their essential papers in an effort to achieve ease and economy of operation through a reduction in storage requirements. Sixteen hundred pages of letter-press, transcripts or manuscripts can be reproduced on 100 feet of 35 mm. film to make a roll three inches in diameter. This is the equivalent of four thousand sheets of standard foolscap paper.[1] Further illustrating the space savings is the fact that, on an average, the contents of 120 four-drawer file cabinets can be condensed into a single file cabinet and still leave some room for expansion[2]. Moreover, the cost of microfilming is comparatively insignificant. For example, the Registrar's Office at Temple University put over 300,000 records on microfilm at a cost less than the value of the filing cabinets released.[3] With these

[1] GREENWOOD, DOCUMENT PHOTOGRAPHY, 2d ed., 11 (1943).
[2] MICROFILM FOR PUBLIC RECORDS, Pub. No. 114, Research Dept., Kansas Legislative Council, p. 3 (March 1942).
[3] Id. at 4.

advantages, and with the constantly increasing effectiveness of viewing devices, it may be asked what there is to stop a unanimous shift to microfilm. The answer to this question appears largely to be uncertainty among businessmen and their lawyers as to the evidentiary status of microfilmed records. It is the purpose of this comment to present a summary of the leading views on this subject in several jurisdictions in an effort to remove some of this uncertainty.

1. *Admissibility Under Statutes*

In a number of states, by statute, microfilm has expressly been made admissible without the requirement of complying with the traditional best evidence rule.[4] A typical example of these statutes is the Wisconsin law:

> "Any photostatic, microphotographic or photographic reproduction of a writing or record made in a manner and on film that complies with the minimum standards approved . . . by the national bureau of standards, whether in the form of an entry in a book or otherwise, and made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of such act, transaction, occurrence or event, if made in the regular course of any business and if it was the regular course of such business to make such memorandum or record or photostatic, microphotographic, or photographic reproduction at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, or photostatic, microphotographic, or photographic reproduction thereof, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight but not the admissibility thereof. . . ."[5]

In a number of other states, the Uniform Business Records as Evidence Act has been passed.[6] This act is quite similar to a federal statute which reads as follows:

[4] Ark. Stat. Ann. (1947) §§16-501, 16-502; Conn. Gen. Stat. Rev. (1949) §§8887, 8888; Ill. Stat. Ann. (1935) c. 51, §3, amended by Ill. Laws (1949) S.B. No. 631, §1; Iowa Acts (1947) c. 268; Md. Ann. Code (1947 Cum. Supp.) Art. 35, §68; Mich. Stat. Ann., §27.902; Mo. Rev. Stat. Ann. (1948 Cum. Supp.) §§1880.1, 1880.2; Ohio Gen. Code (1948 Cum. Supp.) §§12102-23, 12102-23a; R.I. Gen. Laws (1938) c. 538, §15, added by c. 2087, Acts 1948; S.C., Acts 1948, No. 842, §2. In addition, Mass. Laws Ann. (1948 Cum. Supp.), c. 233, §76A authorizes the introduction in evidence of photostats of documents, records, etc. filed with the Securities Exchange Commission.

[5] Wis. Stat. (1945) §327.29.

[6] Ala. Code (1940) §415; Cal. Civ. Code (1945) §1953e-h; Del. Rev. Code (1935) §4704A added by c. 252, Laws 1944-45; Idaho Code (1948) §9-414; Minn. Stat. Ann. (1942)

> "In any court of the United States . . . any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible as evidence of said act, transaction, occurrence or event, if it shall appear that it was made in the regular course of business. . . ."[7]

It may be noted this and the Wisconsin statute are nearly identical, save that this lacks the express authorization for the admission of microfilm which the newer acts possess. The status of microfilm under this type of act was discussed by Justice Sutherland, sitting on the bench of the Second Circuit Court of Appeals in the famous *Judge Manton* case.[8] Judge Manton and several other persons were convicted under an indictment charging them with a conspiracy to obstruct the administration of justice and to defraud the United States; he appealed, partly on the ground that certain microfilmed facsimiles of checks were improperly admitted in evidence. It was argued that the checks themselves were the best evidence and that their absence should have been accounted for as a condition precedent to admission of the microfilms, but Sutherland said:

> "With this contention we cannot agree. These recordaks are made and kept among the records of many banks in due course of business and are within the words of 28 U.S.C. §695, 28 U.S.C.A. §695."[9]

The microfilmed reproductions of the checks were therefore properly admitted despite the lack of a foundation for them as secondary evidence. It would seem likely that in those states possessing similar statutes, this decision would carry a great deal of weight.

2. *Admissibility in the Absence of Statute*

There is much in the opinion of the court in the *Manton* case which would seem to justify the admission of microfilm without com-

§§600.01-04; Mont. Rev. Code Ann. (1935) §10598.2; N.Y. Civ. Prac. Act §374a; N.M. Stat. (1941 Ann., 1947 Cum. Supp.) §20-219; N.D. Rev. Code (1943) §31-0801; Ore. Comp. Laws Ann. (1943 Supp.) §2-819a; Pa. Stat. Ann. (1948 Cum. Supp.) Tit. 28, §91b; S.D. Code (1939) §36.1001; Vt. Stat. (1947) §1754; Wash. Laws (1947) c. 53, §2; Wyo. Comp. Stat. Ann. (1945) §3-3123.

[7] 28 U.S.C. §695, 28 U.S.C.A. §695. Title 28, U.S.C., entitled "Judicial Code and Judiciary," was revised, codified, and enacted into law effective Sept. 1, 1948, and §695 was replaced by §1732. There are no appreciable differences in language in the two sections, however.

[8] United States v. Manton, (C.C.A. 2d, 1939) 107 F. (2d) 834, cert. den. 309 U.S. 664, 60 S.Ct. 590 (1940).

[9] Id. at 844.

pliance with the bothersome regulations prescribed for admitting secondary evidence under the best evidence rule. Speaking of the microfilmed records of the checks, Justice Sutherland said:

> "Their accuracy is not questioned. They represent, in the course of a year, perhaps millions of transactions. No one at all familiar with bank routine would hesitate to accept them as practically conclusive evidence. *As proof of payment, they constitute not secondary but primary evidence.*"[10]

The court went on to state that the best evidence rule was not intended to mean that secondary evidence was not competent, since such evidence became at once admissible where the best evidence was not available. Moreover it said, if " . . . what is called the secondary evidence is equal in probative value to what is called the primary proof, and . . . fraud or imposition, reasonably, is not to be feared, the reason upon which the best evidence rule rests ceases, with the consequence that in that situation the rule itself must cease to be applicable, in consonance with the well established maxim—*cessante ratione legis cessat ipas lex.*"[11]

Finally, it concluded, quoting the Supreme Court in *Funk v. United States*:[12] " 'The fundamental basis . . . upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth'. . . . There is not the slightest reason to suspect that this fundamental basis was affected in the present instance."[13]

The language in this decision, then, would seem to be authority for the admissibility of microfilm records as primary evidence, or, equally, for their exemption from the best evidence rule as being equal in probative value to the so-called best evidence.[14] In the only case on this question, however, the contention that such records ought to be admitted was rejected by the Illinois Supreme Court.[15] That court quoted Sutherland's opinion wherein he arrived at the conclusion that such reproductions were primary evidence, but went on to say:

[10] Id. at 844, 845. Italics added.

[11] Id. at 845.

[12] 290 U.S. 371 at 381, 54 S.Ct. 212 (1933).

[13] United States v. Manton, (C.C.A. 2d, 1938) 107 F. (2d) 834 at 845.

[14] The Manton case was cited in United States v. Kushner, (C.C.A. 2d, 1943) 135 F. (2d) 688 at 674, where the Court said, referring to certain photostatic copies, that they were "obviously . . . no whit less reliable than the originals." And again, in United States v. Cipullo, (C.C.A. 2d, 1948) 170 F. (2d) 311 at 312, the Court said that the language of Justice Sutherland in the Manton decision "would seem to justify the use of the photostat at the trial. . . ."

[15] People v. Wells, 380 Ill. 347, 44 N.E. (2d) 32 (1942).

"The defendant in error cites no authority in Illinois, neither does search prevail to support its contention that the facsimiles of checks are admissible as primary evidence, and we are not at all impressed with his position that this ruling should have weight in Illinois, unless we could, as well, find some encouragement by legislative authority. . . .

"The question then presents itself as to the rules of evidence in this State as to the admissibility of photographic representations of writings of the same size as the original writing, and we find such photographic representation should be excluded if the original document is produced or is obtainable and not produced, on the ground that the photograph in such case is but secondary evidence. . . ."[16]

Thus, the Illinois court felt that the decision in the *Manton* case was entirely based upon the federal statute, and that lacking a comparable statute, microfilm must be treated as secondary evidence.

Continuing, the court indicated that, in its view, there was no difference between primary and secondary evidence as to weight. The difference, it stated, was in the preliminary proof necessary to lay the foundation for the introduction, which meant that in the case of secondary evidence of a written instrument, the person in whose possession it last resided must be introduced unless that be impossible, in which case diligent search for the document must be proved. In the instant case, since no attempt had been made by the state to justify the introduction of the recordaks, the court held that they were improperly in evidence. In the absence of other decisions, the Illinois case is indicative of the views which will prevail among the states without pertinent statutes. It is, moreover, the traditional view, expressed in *Corpus Juris Secundum:*

"Photographs of written instruments can be used only as secondary evidence. . . . However, . . . such copy is admissible when the absence of the original is accounted for. . . . "[17]

The well-known rule as to secondary evidence in general is succinctly set forth as follows:

"Secondary evidence becomes admissible where the writing containing or constituting the primary evidence of the fact to be proved is satisfactorily shown to have been lost or destroyed without the fault of the party desiring to prove the fact."[18]

[16] Id. at 354-355.
[17] 32 C.J.S., Evidence, §815 (1942).
[18] Id. §823.

This rule as to secondary evidence is incorporated into the statutes of several states,[19] and is followed as a matter of common law by the rest. An early example of the attitude of those courts having no statutory way of justifying photographic reproductions may be found in the language of the Oregon court in *Parker v. C. A. Smith Lumber & Mfg. Co.*[20]

> "When a written instrument is admissible as evidence in a case, and cannot be produced, and a proper foundation is laid for the admission of a copy, a photographic copy of the instrument, shown to be a true copy by the person who took the photograph, or some other person who knows that it is a true copy is admissible as secondary evidence."[21]

In this view, microfilm would be admitted, but only after "a proper foundation" was laid. It was lack of foundation which was the basis of the Illinois court's holding in the *Wells* case and it has been this deficiency which has defeated secondary evidence in many other cases.[22]

If, pursuant to the general rule set forth above,[23] the loss or destruction of the original must be "without the fault of the party desiring to prove the fact," the problem becomes what sort of evidence will lay the proper foundation. There are a few cases in which courts have flatly stated that voluntary destruction of the original will bar the later introduction in evidence of secondary materials by the party so destroying the original,[24] but it is stated by Wigmore:

> "The view now generally accepted is that (1) a destruction in the ordinary course of business, and, of course, a destruction by mistake, is sufficient to allow the contents to be shown as in other cases of loss, and that (2) a destruction otherwise made will equally suffice, provided that the proponent first removes, to the satisfaction of the judge, any reasonable suspicion of fraud."[25]

[19] Ga. Code (1933) §§38-212, 38-702; Nev. Comp. Laws (1929) §8964.

[20] 70 Ore. 41, 138 P. 1061 (1914).

[21] Id. at 48.

[22] Maclean v. Scripps, 52 Mich. 214, 17 N.W. 815, 18 N.W. 209 (1883); Cohen v. Elias, 176 App. Div. 763, 163 N.Y.S. 1051 (1917); Miller v. Ins. Co. of N. America, 202 N.Y.S. 295 (1923); Biggerstaff v. State, 108 Tex. Cr. 631, 2 S.W. (2d) 256 (1927); Union Cent. Life Ins. Co. v. Mendenhall, 183 Ark. 25, 34 S.W. (2d) 1078 (1931); Linden Silk Co. v. Paterson Silk Throwing Co., 119 N.J.L. 482, 197 A. 57 (1938); Black Mountain Corp. v. Parsons, 277 Ky. 486, 126 S.W. (2d) 874 (1939); Wilson v. Glen Falls Ins. Co., 309 Ill. App. 286, 32 N.E. (2d) 961 (1941); Olson v. N.Y. Life Ins. Co., 229 Iowa 1073, 295 N.W. 833 (1941); Gaskins v. Firemen's Ins. Co., 206 S.C. 213, 33 S.E. (2d) 498 (1945).

[23] 32 C.J.S., Evidence, §823 (1942).

[24] Broadwell v. Stiles, 8 N.J.L. 58 (1824).

[25] 4 WIGMORE, EVIDENCE, 3d ed., §1198 (1940).

Although many authorities may be cited to this general effect,[26] the precedents are not harmonious.[27]

3. *Conclusion*

Fortunately, in approximately one-half the states, and, apparently, in the federal courts,[28] microfilm will be admitted without any question as to the whereabouts of the original records, either on the basis of a specific statute, or by following the reasoning of Justice Sutherland under some form of Business Records as Evidence Act. It is to be hoped that more states will adopt statutory provisions to simplify the admission of microfilm as evidence, but meanwhile, if a declaration of intent, showing that the films were made in good faith and as a regular business procedure, and a certificate of authority are included on every roll of film, it is highly probable that the film will be admissible as secondary evidence. As to the future, in view of microfilm's convenience and space-saving qualities, it seems likely that business necessity, which has often shaped the law in the past, will lead to a general exception in the traditional rules of evidence to facilitate its extended use in the keeping of business records.

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[26] 32 C.J.S., Evidence, §824; Riggs v. Tayloe, 9 Wheat. (22 U.S.) 483 (1824); Bagley v. McMickle, 9 Cal. 430 (1858); Bagley v. Eaton, 10 Cal. 126 (1858); Tobin v. Shaw, 45 Me. 331 (1858); "The Count Joannes" v. Bennett, 87 Mass. (5 Allen) 169 (1862); Blake v. Fash, 44 Ill. 302 (1867); Anderson v. Maberry, 58 Tenn. 653 (1871); Seller v. Clellan, 2 Colo. 532 (1875); Wright v. State, 88 Md. 436 (1898); Shields v. Lewis, (Ky. 1899) 49 S.W. 803, 20 Ky. L. Rep. 1601; State v. Welch, 22 Mont. 92, 55 P. 927 (1899); Stephan v. Metzger, 95 Mo. App. 609, 69 S.W. 625 (1902); Beem v. Beem, 193 Ind. 481, 141 N.E. 81 (1923); Nelson v. Blake, (R.I. 1934) 173 A. 625. Re Estate of James O. Baker, 144 Neb. 797, 14 N.W. (2d) 585 (1944) contains the following statement at 806: ". . . even if their destruction is voluntary secondary evidence of their contents may be given if the circumstances accompanying the act are free from suspicion of intent to defraud and consistent with an honest purpose."

[27] Broadwell v. Stiles, 8 N.J.L. 58 (1824) has never been overruled and was cited in Clark v. Hornbeck, 17 N.J.Eq. 430 at 451 (1865): ". . . voluntary destruction . . . would exclude all evidence of its contents."

[28] The question as to the status of microfilm in the federal courts has been obscured somewhat by the decision in United States v. Kaibney, (C.C.A. 2d, 1946) 155 F. (2d) 795. While the question there involved photostatic copies rather than microfilmed copies, the same court which handed down the decision in United States v. Manton, [(C.C.A. 2d, 1938) 107 F. (2d) 834] did not take the broad view that Justice Sutherland adopted in the earlier case. Instead, it held that the photostatic copies were admissible as secondary evidence because it had been shown that the originals were unavailable. This suggests a return to the old rule as to photographic copies, but the court did not mention the Manton holding, and may have been forgetful of it. Moreover, there is no indication that the court would have looked at microfilm in the same way it did photostats.