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Evidence

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EVIDENCE

Best Evidence Rule—Tape Recording Competent Evidence Where Made From Original Wire Recording. In a recent case[1] the Washington Supreme Court has held, for the first time apparently, that it is not error to overrule an objection of "not the best evidence" where a tape recording was offered into evidence at a time when the inaudible[2] wire recording from which it had been transcribed was already an exhibit. The court made an analogy to the factual situation of the introduction of a photographic positive print and the usual ruling that the negative need not be produced.

For the purpose of this note the opinions discussing the application of the "best evidence rule," where writings are not involved, may be segregated into three problem areas—the first represented by the principal case. It should be pointed out that here the "original" evidence was already an exhibit, so the introduction of the transcription was primarily for convenience. Because of these facts, this is a rather unusual situation for an application of the best evidence rule. It would seem that there really was no necessity for the analogy made by the court which goes further than the facts of the case do.

As Wigmore has pointed out, the best evidence rule generally applies only to writings,[3] and so in factual situations representing the second problem area, accurate reproductions of objects not writings should be admissible without accounting for the original where it is unavailable. The reasoning behind such a result seems to be that where it appears that secondary evidence is clearly equal in probative value to primary proof and that fraud or imposition is not to be reasonably feared, the reason on which the best evidence rule rests ceases, and the rule itself becomes inapplicable.[4] Factually, the closest Washington case to the principal decision is *State v. Witzell*,[5] where it was held that photographs of fingerprints found on a safe could be introduced over objections that the safe itself should be introduced. The court said that objections to the photographs go to the weight and not to the competency of their use as evidence.

A third problem area is that of applying the best evidence rule

[1] State v. Lyskoski, 147 Wash. Dec. 89, 287 P.2d 114.

[2] Actually, the wire recording could have been made audible to the members of the jury had they been furnished with earphones.

[3] WIGMORE ON EVIDENCE, Vol. 3, § 796.

[4] United States v. Manton, 107 F.2d 834 (2nd Cir. 1938), Spector v. United States, 107 F.2d 834 (2nd Cir. 1938), *cert. denied*, 309 U.S. 664, 60 S.Ct. 590, 84 L. Ed. 1012 (1939).

[5] 175 Wash. 146, 26 P.2d 1049 (1933).

to inscribed chattels. The general policy here seems to be that the trial court is allowed a broad discretion in questions of whether secondary evidence concerning an inscribed chattel is to be admissible as opposed to a requirement of introduction of the inscribed chattel itself.[6] It has been suggested by at least one text writer than the trial court also be given this broad discretion in factual situations illustrating the second problem area, *e.g.*, where a party seeks to introduce a subsequent recording where the original recording has been lost or destroyed.[7] One court has held directly contrary to such a suggestion.[8] It would seem that an analogy might well be made from the rules applied in the case of an inscribed chattel, to the situation in the *Lyskoski* case.

The *Lyskoski* case indicates an extension by the Washington court of the rule regarding photographs to the situation of original and transcribed recordings. However, as pointed out above, this indicated extension does not constitute a holding on the facts present in the case. Though this is true, the result reached by the court is altogether reasonable. It is suggested however, that the two tests set out in the cases of problem area two be met before such a result is reached. That is:

1. It should appear that the "secondary" evidence is clearly equal in probative value to the primary proof, and
2. It should appear that fraud or imposition is not to be reasonably feared.

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INSURANCE

Insurance—Effect of a Divorce Decree. In *United Benefit Life Insurance Co. v. Price*[1] the Washington court kept alive one more aspect of the unfortunate doctrine handed down originally in *Occidental Life Insurance Co. v. Powers.*[2] The facts in the case were these:[3]

[6] See, *e.g.*, State v. Lewark, 106 Kan. 184, 186 Pac. 1002 (1920); Mattson v. Minn. & N.W. R. Co., 98 Minn. 296, 108 N.W. 517 (1906).
[7] MCCORMICK ON EVIDENCE, p. 412, n.5 (1954 ed.).
[8] People v. King, 101 Cal. App. 2d 500, 225 P.2d 950 (1950). See criticism of this case in 64 HARV. L. REV. 1369.

[1] 46 Wn.2d 587, 283 P.2d 119 (1955).
[2] 192 Wash. 475, 74 P.2d 27 (1937). The errors inherent in this doctrine have not gone unnoticed by members of the Washington court. In Aetna Life Insurance Co. v. Brock, 41 Wn.2d 369, 249 P.2d 383 (1952), an eight man court was evenly divided on the question of overruling it completely. See also the dissenting opinion of Mallery, J., in Small v. Bartyzel, 27 Wn.2d 176, 177 P.2d 391 (1947).