Volume 35 | Issue 3 Article 9

April 1929

Best Evidence Rule--When Applied

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STUDENT NOTES AND RECENT CASES

BEST EVIDENCE RULE—WHEN APPLIED.—The earliest statement of the Best Evidence Rule seems to have appeared about 1700 when Holt, C. J., speaking for the court in *Ford* v. *Hopkins*, said: "The best proof the nature of the thing will afford is only required." This phrase was adopted by the courts and continued to hold great place throughout the eighteenth century. Wiles, J., resorted to the rule in 1744 in the famous case of *Omychund* v. *Barker* and Lord Hardwicke, sitting as Chancellor said, "The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow.[1] This rule in substantially this form was used by most of the text book writers in the nineteenth century and has been used by our own Supreme Court of Appeals.[2] Professor Thayer in commenting on this statement of the rule says, "This old principle has outlived its usefulness. * * * It is accompanied now with so many explanations and qualifications as to indicate the need of some simpler and truer statement, which would exclude any mention of this as a working rule in our system. * * * Regarded as a general rule, the trouble with it is that it is not true to the facts and does not hold out in its application, and in so far as it does apply it is unnecessary and uninstructive."[3]

Whatever may have been the early conception of the Best Evidence Rule, its application, by the better view, is, broadly speaking, now limited to cases where the contents of a written document are directly in issue.[4] "The rule applies only to the *terms of the document* and not to any *other facts about* the document." In other words the rule applies to exclude testimony designed to establish the terms of the document and requires the document's production instead, but does not apply to exclude the testimony which concerns the document without aiming to establish its terms."[5]

The West Virginia Court has followed this view in *Dixon-Pocahontas Fuel Company* v. *Myers Grain Company*.[6] In that case the Fuel Company, the Grain Company and a bank of Columbus, Ohio, all claimed funds in the hands of the Bank of

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1 THAYER, PRELIMINARY TREATISE ON EVIDENCE, 489 ff.
2 Chicago Art Co. *v.* Thacker, 65 W. Va. 143, 63 S. E. 770 (1909).
3 THAYER, *supra*, n. 1.
4 WIGMORE, EVIDENCE, §1242; 10 R. C. L. 904; Sirrine *v.* Briggs, 31 Mich. 443 (1875).
5 WIGMORE, *supra*, n. 1.
6 71 W. Va. 715, 77 S. E. 362 (1913).

Mt. Hope at Mt. Hope, West Virginia. Title to the funds were evidenced by a sight draft drawn by the Grain Company, discounted by the Columbus bank and collected by the bank of Mt. Hope. To prove its claim the Columbus bank did not produce the original draft nor account for its non-production but did offer in evidence copies of the draft. The copies were objected to because they were not the best evidence. The court held the copies were admissible and the Best Evidence Rule did not apply because "it was not a question of proving the contents of a paper."[7] This case restricts the application of the Best Evidence Rule to cases where the contents of a written document are in issue and is in accord with the best authority.

But in the recent case of *Thompson, Administrator* v. *Turkey Gap Coal & Coke Company*[8] the court seems to make a rather doubtful application of the Best Evidence Rule. In that case one Bartee, alleged to be under the age of sixteen years, was injured while employed by the Turkey Gap Coal & Coke Company. In an action by Bartee's administrator for damages resulting from the injuries, the pivotal question was the deceased's age. The evidence offered was the family Bible into which the date of deceased's birth had been copied by his mother about six years prior to the accident. This record was copied from an entry in another book made by the mother at the time of deceased's birth. The original record was not shown to be unavailable. The court held that the record offered was not admissible because it violated the Best Evidence Rule; that the evidence offered was secondary and that the original record was the best evidence.

This decision seems to be based upon the earlier conception of the Best Evidence Rule. By the test set out above and generally supported by modern authorities this rule applies only when the contents of a written document are in issue. In the principal case the issue is not the contents of a writing but the age of the deceased. There is a clear distinction between proving the age of the deceased which is evidenced by a writing and proving the contents of the writing itself. The terms of the writing form no part of the issue and the essential fact to be proved is not the contents of the writing but a fact extrinsic to the writing. It is submitted that the case does not offer a satisfactory situation for the application of the Best Evidence Rule.[9]

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[7] See also as tending in the same direction State *v.* Davis, 74 W. Va. 657, 82 S. E. 525 (1914).

[8] 104 W. Va. 134, 139 S. E. 642 (1927).

[9] In substantial accord with the principal case see Chicago Art Co. *v.* Thacker, *supra*, n. 2.

Whether the actual conclusion reached in the principal case can be justified by an application of the Hearsay Rule is a question not within the purview of this note.

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MURDER—DISTINCTION BETWEEN FIRST AND SECOND DEGREE—INCONSISTENCY IN SOME WEST VIRGINIA CASES.—Chapter 144, Section 1 of BARNES' WEST VIRGINIA CODE of 1923, says "Murder by poison, lying in wait, imprisonment, starving, or any willful, deliberate, and premeditated killing, * * * [and homicides in the commission of, or attempt to commit certain enumerated felonies, (see also chapter 148, sec. 13)] * * * is murder of the first degree. All other murder is of the second degree". This act is based on the Virginia Code of 1860, and the original statute was enacted much earlier than that. As these two degrees of murder are statutory and unknown to the common law, the first inquiry must be as to what constitutes murder at common law; and having found the answer, the next logical step is to exclude therefrom all that which the legislature has declared to be first degree murder, which leaves, because of the "all other" clause, a residue of second degree.

For the purposes of this note no attempt at an all inclusive classification of common law murder need be given, as it is sufficient to state that a killing accompanied by malice aforethought,—malice prepense,—is essential. This proposition is elementary and needs no authority to support it. Malice aforethought is either express or implied, and it is in regard to the implied malice that the difficulty arises. It is the former in cases where the accused has made threats or otherwise expressly shown malice, and the latter in cases where the surrounding circumstances are such that the killing can only be accounted for on the supposition of design or intent. Courts applying the rules of common law in cases involving no degrees of murder have laid down that when a homicide occurs in the commission of any felony, or in the resistence of a lawful arrest, the offense is murder even though the killing was unintentional, for there the malice prepense is implied by law. *Regina* v. *Horsey,* 3 Fost. & F. 287 (1862); *State* v. *Smith,* 32 Me. 369, 54 Am. Dec. 578; *Boyd* v. *State,* 17 Ga. 194 (1855); *Dilger* v. *Commonwealth,* 88 Ky. 550, 11 S. W. 651. It has also been held that malice aforethought may be implied when the act which causes the death is done "delib-