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MAKING SENSE OF DOCUMENTARY EVIDENCE (*Part II*)

[*Continued from* [1993] SJLS 504 – 537]

Part II of the article completes the discussion of the scope of section 93. It goes on to demonstrate the difficulties in the inter-relations of real evidence and documentary evidence.

V. Proof of a Document

IN Part I, section 93 is shown to depend on reduction of a matter by the parties or a party to the form of a document whether this occurs by consent or by statutory imperative. Over-zealous application of section 93 must be avoided. If the parties have only reduced part of their agreement to the form of a document, section 93 must not be wielded to capture the oral parts. If the parties have agreed that the truth of certain written answers shall be a promissory condition, section 93 must not be raised to bar a demonstration that the written answers were not quite the answers in fact given. If statute allows pre-trial statements reduced to the form of a document to be used as corroboration, section 93 must not be employed to undermine the giving of testimonial evidence.

There is another form of over-zealous application to be avoided. Reference to a document does not invariably mean a reference to its terms. If it did, whenever some fact about the document is a relevant fact, section 93 would compel the production of the document as proof. Section 93 only compels proof of the terms of a document within its reach, by the document; the terms only may not be contradicted by parol evidence.[1]

Sometimes the reference to a document really means a reference to its terms. In restitutionary actions based on payments made under unenforceable or void contracts, the existence of a contract and the effect of that contract,

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[1] See, *eg*, *Mayandee Chetty* v *Sultan Meracayar* (1872) Ky 352; *Bulsing Ltd* v *Joon Seng & Co* [1972] 2 MLJ 43; *Indian Overseas Bank* v *Goh Teng Hoon* [1988] 3 MLJ 372; *Pernas Trading Sdn Bhd* v *Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124; *Wong Wai Cheng* v *A-G of Singapore* [1979] 1 MLJ 59; *Eng Mee Yong* v *V Letchumanan* [1979] 2 MLJ 212; *YK Fung Securities Sdn Bhd* v *Ronald Yeoh Kheng Hian* [1989] 3 MLJ 490; *Chan Kin* v *Chareen Realty Development Sdn Bhd* [1989] 1 MLJ 62.

namely, its unenforceability or nullity, are the relevant facts. The terms of the contract are often also relevant facts because they are relevant to the determination of unenforceability or nullity. To allow oral evidence of the unenforceable or void written contract would contradict section 93. In most cases, no doubt the written contract which is void or unenforceable would have been produced in accordance with section 93 in a contract claim which fails. The court then simply proceeds to consider the restitutionary claim.[2]

But there are numerous instances in which although a document is referred to, the relevant fact to be proved has nothing to do with the terms of the document. In these instances, section 93 is in fact irrelevant.

One such instance may seem rather obvious. Yet the obvious is sometimes the most difficult to unravel. That oral evidence is admissible to show the existence of a written contract or disposition within section 93 seems obvious. Where the document in question purports to be a contract, it has rightly been said by Edmonds J that "[i]n order that the section may apply one must have a contract and then its operation *prima facie* only affects the terms."[3] There must be a completed contract in writing before it may be sole evidence of its terms. If what seems to be a complete and concluded agreement is really not so because other terms have yet to be agreed upon, oral evidence may be given of the efforts made to agree those terms, whether or not they result in a settlement of these other terms.[4]

Section 93 cannot therefore preclude oral evidence establishing that certain documents together constitute the contract or memorandum or other deposition, when the document contains some reference, express or implied, to the other.[5] Nor can it preclude oral evidence showing that an alleged contract was not in fact concluded. Where a deed of hiring has only been executed by one party, who alleges that the other party has accepted the terms of the deed so as to become bound by it, the deed must be proved.[6] But oral evidence may be given of the acceptance or rejection of the terms of the deed. This is perhaps what Edmonds J intended when he propounded that "section 92 [now section 93] can only apply where a contract was intended by at least one of two parties; and has no application where neither of two ostensible parties had any 'animus contrahendi'."[7] The proposition is liable to be misunderstood. To say that section 93 requires at least one party to intend a contract implies that where an offer has been reduced

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2 *Fook Lee Tin Mining Kongsi* v *Gurdev Singh* [1952] MLJ 55; *North Central Wagon Finance Co Ltd* v *Brailsford* [1962] 1 WLR 1288. See also *Vincent* v *Cole* (1828) 3 Car & P 481.

3 *NS Narainan Pillay* v *The Nederlandsche Handel Maatschappij* [1936] MLJ 227 at 249.

4 *Hussey* v *Horne-Payne* (1879) 4 App Cas 311.

5 *Timmins* v *Moreland Street Property Co Ltd* [1958] 1 Ch 110.

6 *R* v *Houghton-le-Spring* (1819) 2 B & Ald 374.

7 *NS Narainan Pillay* v *The Nederlandsche Handel Maatschappij* [1936] MLJ 227 at 249.

to writing by one party who intends by it to enter into contractual relations, that offer will be the sole evidence of its terms. That with respect states the law too highly and inaccurately; for it suggests that no oral evidence may be given of the extent to which the terms have been accepted or rejected. But if the proposition means that the writing must at least be intended by one party to give rise to contractual relations *if accepted*, then the proposition would be useful. It would also be accurate in calling for oral evidence of acceptance.

There is another reason why oral evidence is admissible to prove that an offer was accepted or rejected or that something apparently in writing never became the contract between the parties or only partially so. Without recourse to oral evidence, circularity becomes dangerously possible in quite common circumstances. Take the foregoing example where one party purportedly makes an offer in writing. If the intention must be gathered solely from the writing, whenever there is some writing that is alleged to constitute the contract, that is tantamount to concluding the offeror's writing against and to the possible prejudice of the intended offeree. The proof of a contract would presuppose that the offer was the contract; which is a circularity. Take another example where an oral agreement was made but it appears that the terms were also either reduced to or recorded in writing.[8] The writing will need to be scrutinized to ascertain whether in fact it is a record or a constitution of a fresh contract (including a re-constitution in which the prior oral agreement is merged). Should the court assume putatively that the writing was intended to constitute the contract, confirming or dispelling this only by a scrutiny of the writing? But the writing alone cannot be conclusive of the intention. To treat it as conclusive would presuppose that the writing was the contract. It would ignore the possibility that if the writing was merely a record, it would not be the sole evidence and in those cases where a memorandum was not required, no party would be constrained to prove the writing. As a general principle then, oral evidence must be admissible to ascertain the true intention of the parties whether the writing was to be the contract or a mere record.

No doubt, where both parties have put their signature to a document which purports to be a contract, the matter is often different. (Even then, care must be taken to ensure that the parties have not signed merely to record their contract.) The acceptance would be in writing. Even if the true intention is not to enter into contractual relations, the other party is entitled to rely on what seems to be an acceptance or the signifying of it. A contract has been concluded in writing and oral evidence can no longer be admitted

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[8] As unsuccessfully alleged in *Hutton* v *Watling* [1948] 1 Ch 398. See also *Roe* v *Naylor* (1918) 87 LJ KB 958. And see *Tyagaraja Mudaliar* v *Vedathanni* [1936] MLJ 62; *Lau Wai Mun William* v *Holland Grove Enterprise Pte Ltd* [1991] 2 MLJ 425; *Kam Mah Theatre Sdn Bhd* v *Tan Lay Soon* [1994] 1 MLJ 108.

to controvert the acceptance. This is apprehended to be the true explanation of *Foo Tock Lin* v *Piong Kew*.[9] There was first an oral agreement for the sale of a house followed by a written agreement for the same sale. The written agreement contained a provision as to guarantee which the oral agreement did not. Nothing on the face of it indicated that it was not a true agreement, intended to supersede the earlier oral agreement. The court could therefore have disposed of the case quite simply on the basis that the second agreement was intended to supersede the first. This was not only the purport of the writing. It was also the true effect of the oral evidence as to the parties' common intention, whatever the peculiar intention of any one party might be. The Court of Appeal of the Federation of Malaya held that: "With regard to the second point that there was no true agreement because there was no *consensus ad idem*, no common intention to be bound by the written agreement, the answer clearly is that parole evidence to that effect was not admissible."[10] That seems to be a rejection of the admissibility of oral evidence to show the true effect of a written agreement unless regard is had to the material facts and to the whole tenor of the judgment. The material facts show that the written agreement had been accepted by signing. The tenor of the judgment shows that the court had determined that a written contract was concluded.

In some cases, reliance has been placed on presumptions in order to escape the risk of circularity. Suppose a statement made for the purposes of an information which is taken down in writing. "If the alleged statement on oath was not contained in the information, but was orally made on the same occasion, still it was necessary that the information should have been produced, to show that the statement was not in the information, before oral evidence of the statement could be received: *Leach* v *Simpson*[11]."[12] The reason is a general presumption that everything material has been taken down.[13]

These are not the only instances in which the existence of a written contract or disposition can be proved by oral evidence. The existence of a partnership may be proved by oral evidence of subsequent conduct, without introducing the partnership deed.[14] This must in any case follow if the existence and condition of a document are by definition not matters of documentary evidence, an argument which the definition provision, section 3, will bear. So, if section 93 had been less explicit and more ambiguous, the definition provision would have supplied a similar restriction. The existence of a

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9 [1963] MLJ 67.
10 *Ibid*, at 68.
11 5 M & W 309 at 312.
12 *R* v *Coll* (1889) 24 LR Ir 522 at 550.
13 *Ibid*, at 569.
14 *Anderson* v *Clay* (1816) 1 Stark 405.

contract must of course be proved by oral and original evidence, not secondary evidence. A contracting party may prove by oral and original evidence that he made a written contract. But a non-contracting party must prove the existence of a contract if at all by secondary evidence, namely, through having had sight of the written contract. That evidence will not do.[15]

As with all distinctions, complication in extreme cases is inevitable. All can agree that existence is one thing; duration of a written contract is another, for duration is a term of the contract. But the distinction is not always clear. Take a case where oral evidence of payments of rent is adduced as proof of the naked fact of a written tenancy, though not of the quantum of the agreed rent. Is the oral evidence admissible, being evidence of the existence of a tenancy? Or is it inadmissible as being evidence of the duration or term of a written tenancy? The opinion of Bayley J in one case was that:

> although there may be a written instrument between a landlord and tenant, defining the terms of the tenancy, the fact of the tenancy may be proved by parol, without proving the terms of it.[16]

In *Strother* v *Barr*,[17] two judges were for and two were against that opinion. Best CJ who was against that opinion said:

> The lease also states the landlord's and tenants' names and describes the premises, and the term. If the lease must be produced to prove the rent, it must, for the same reasons, be produced to prove these other facts.[18]

To him, the issue was one of duration of the term of tenancy and that had to be proved by producing the written tenancy. This may well be right, for a tenancy is usually of no value except as an on-going relationship; so that the legal significance resides in its duration, and only rarely in its existence.

Similar difficulties have been encountered in prosecutions under the Prevention of Corruption Act. In *Goh Leng Sai* v *R*,[19] the appellant was convicted of giving a bribe to an agent of the Sewerage Department as

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[15] *Ng Kong Yue* v *R* [1962] MLJ 67 at 71. This might have been a possible objection in *Goh Leng Sai* v *R* [1959] MLJ 121; it was unlikely that the Chief Engineer, Planning & Design, Sewerage Department as opposed to the Chief Engineer (Construction) was a contracting party. This might also be the thrust of the objections of Best CJ in *Strother* v *Barr* (1828) 5 Bing 137.

[16] See *R* v *Inhabitants of Holy Trinity, in the Town of Kingston-upon-Hull* (1827) 7 B & C 611. Doubted in *Strother* v *Barr* (1828) 5 Bing 137; *Ng Kong Yue* v *R* [1962] MLJ 67.

[17] (1828) 5 Bing 137.

[18] *Ibid*, at 153.

[19] [1959] MLJ 121.

inducement or reward in connection with a contract to construct minor sewers. Oral evidence of the Chief Engineer, Planning & Design, Sewerage Department, was held to have been rightly given as to a contract which the appellant had obtained with the Sewerage Department. The reason was that the existence of the contract which alone was material might be proved by oral evidence. But in *Ng Kong Yue* v *R*[20] where the material facts were similar, oral evidence of the existence of a contract between the War Department and Sin Sin Furniture was held to have been wrongly given. Although the reasoning of Chua J might throw doubts on whether even the existence of a contract can be proved by oral evidence, his true ground appears at p 71: "the duration of a contract can only be proved by the written instrument itself." To him, something more than the existence of the contract had to be proved for purposes of the Act. The nature of the charge necessitated proof of duration of the contract (the contract must be subsisting); and that could not be done without referring to the terms of the contract where the duration had been stipulated in writing.

These two cases are plainly irreconcilable. Although Chua J took into account (but in the earlier case, Ambrose J ignored) certain provisions in the Act which enhanced the penalties and raised a presumption in such cases as the case before the court, these provisions cannot affect the operation of section 93. There is perhaps a technical difference between the cases. In the earlier case, the relevant facts involved payment of a gratification to an agent of the Government who was not directly supervising the performance of the payor's contract with the Government. The case was that the payment was made to induce the agent to show favour when he became the supervisor. In the later case, the payment was for the purposes of gaining indulgence in the actual supervision of the performance of the subsisting contract. But can it be that whether the existence or the duration is at issue depends on whether the agent has yet to show favour or is presently showing favour? With respect, the later decision blurs the distinction between existence and duration. If the charge had required proof of a sustained course of conduct during the contractual performance, the prosecution had had to prove the duration of the contract. The charge merely involved showing an inducement in connection with a contract.

The distinction between existence and identity is perhaps the most subtle and the most in danger of being overlooked. Some have thought erroneously – that identity, like existence, might be outside the reach of section 93. This is misleading and overlooks the fact that the law may require that the identity of a document be proved by the document. In that case, proof of identity implies proof of the terms. So in *Lawrence* v *Clark*,[21] in an action

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[20] [1962] MLJ 67.

[21] (1845) 14 M & W 250.

on a bill of exchange, oral evidence for the purposes of identifying a bill of exchange was rejected. In *Boosey* v *Davidson*,[22] the identity of a music score was required to be proved by comparison with another alleged to have been sold previous to registration of copyright. The statute 5 & 6 Vict c 45, section 11 provided that registration was *prima facie* evidence of copyright. Section 16 of the same statute cast a burden upon a defendant wishing to prove prior publication to give notice stating when and by whom that was done. Moreover, the statute, 8 Anne c 19, required writing for an assignment[23] and it was consistent with that to insist that a defence of prior publication be proved strictly.[24]

Like existence, possession may be proved *de hors* a written contract as against a third party. As against a third party to the contract of tenancy, possession is a fact independent of the writing. It follows that a tenant in possession pursuant to an oral contract of tenancy may sue a third party for trespass, despite the lack of writing. But as against his landlord, a suit by the tenant must fail. He cannot enforce his contract against his landlord, lacking a memorandum signed by the landlord. As he "must at some stage of the pleadings set up a title derived from the defendant,"[25] he will be unable to rely solely on possession.

Another important instance in which section 93 is irrelevant occurs where the relevant facts to be proved are facts collateral to the contract or grant of property or subject matter required by law to be reduced to writing. This idea has been called the doctrine of collateral purpose, and there is no harm in using that terminology provided of course we are clear that it is consonant with the construction of section 93.[26] In *Jacob* v *Lindsay*,[27] a clerk who did not make the entries in a book of accounts brought that book to the defendant and read the accounts to him. The accounts as read aloud were acknowledged by the defendant. When the clerk was called in a trial of debt to testify to this acknowledgement, the defendant objected. But Lord Kenyon CJ was very clear that the objection was bad since there was no question of giving parol evidence of the contents of a book but of giving oral evidence of the defendant's admission of debt subsequent to the writing which was an event independent of the writing. In another case, oral evidence was allowed to establish that the signature of a will was indeed at its foot.[28] In another case, although depositions of witnesses were required to be proved by the writing itself, yet since the witness had repeated his evidence to

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22 (1847) 13 QB 257.

23 *Latour* v *Bland* (1818) 2 Stark 381.

24 *Cf Lucas* v *Williams & Sons* [1892] 2 QB 113.

25 *Delaney* v *TP Smith Ltd* [1946] 1 KB 393 at 397.

26 See *Mohamed Lajan* v *Daud* [1963] MLJ 209 at 211.

27 (1801) 1 East 460.

28 *Re Wotton* (1874) LR 3 P&D 159.

the clerk, it was held that the clerk could give evidence of what he had said.[29]

Perhaps the most controversial cases occur where section 93 is avoided. Where the existence of a contract or possession of some proprietary interest is proved by oral evidence, or where some collateral fact is proved by oral evidence, section 93 is irrelevant; not avoided. Section 93 may be avoided when some irregularity vitiates the writing which the law requires.[30] In those circumstances, the common law holds that oral evidence of the transaction may be admitted.[31] So although a law provided that answers in a magisterial inquiry should be taken down in writing and signed by the magistrate, yet where the writing had not been signed, oral evidence was received as to what the witness said before the magistrate.[32] If through neglect of duty, what the law requires is in fact not done, oral evidence may be given. If in taking a deposition, the magistrate omits to take down a statement of the prisoner, evidence may be given of it. "What a prisoner says is evidence against himself, whether the officer was right or wrong in not returning the statement, or furnishing a copy of it to the prisoner."[33] This appears to be why parol evidence may be given to add to a deposition.[34]

This avoidance of the best evidence rule is of course impossible where the irregularity destroys the very transaction in issue. Where an oral contract is required to be supported by a memorandum, any 'irregularity' in the memorandum, as where it is not signed by the person against whom the contract will be enforced, renders the contract unenforceable.

The avoidance of the best evidence rule in this manner which appears to be the law in Singapore[35] is defensible.[36] All that section 93 requires is that whenever there is writing, it must be produced. It does not specify what is to happen when there is in fact no writing or when that writing is vitiated (as a result of breach of duty). There may be a breach of duty; but the curbing of that breach is no function of the law as to admissibility of evidence. The cynic's cry is: to what purpose does section 93 specify that only the writing will be acceptable evidence, if oral evidence will be admissible anyway, if there is in fact no writing? This is arguing incorrectly that the law as to admissibility must provide a check on dereliction of duty. So if, as in *PP* v *Tan Huang Hiang*,[37] a 'section 122(5)' statement has not

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[29] *R* v *Christopher* (1850) 2 Car & K 994.

[30] Such as undated notes of evidence: *Mohamed Hanifah* v *PP* [1956] MLJ 83.

[31] *R* v *Reed* (1829) M & M 403.

[32] *Jeans* v *Wheedon* (1843) 2 M & Rob 486.

[33] *R* v *Wilkinson* (1838) 8 Car & P 662 at 664.

[34] *R* v *Harris* (1832) 1 Mood 338.

[35] Since section 93 is regarded as the embodiment of the best evidence rule.

[36] *Cf* Criminal Procedure Code (Cap 68, 1985 Rev Ed) s 124(6).

[37] [1990] 2 MLJ 24.

been reduced to writing whether justifiably (because of urgency) or not, section 93 is avoided and oral evidence may be given of the oral statement of the accused. There was indeed no necessity in that case to reduce the duty to record such a statement to a mere morality. The true reason for admissibility of the oral evidence of the statement of the accused lies in these cases on the effect of an irregularity in which the oral evidence which is admissible is not admissible as secondary evidence but as original evidence of what the accused said.

VI. Inter-Relations of Documentary and Real Evidence

The greatest shortcoming of the Act's provisions as to documentary evidence appears when we are confronted with that class of documents which is of increasing importance comprising recordings of transactions in issue. These must be classified as documentary evidence. Two classes of recordings are identifiable: namely, recordings of personal conduct (say withdrawal at the cash terminal) and recordings of personal involuntary conduct (say the recording of alcohol in the blood). Whether the recording contains personal voluntary conduct or involuntary conduct, the effect of section 3 is to denominate the recording a document and its contents offered for inspection documentary evidence.

The difficulties in such a characterization stem from the best evidence rule as embodied in sections 61 and 66. Section 66 says that documents in the hands of the party proving them (in effect) must be proved by primary evidence except in the cases hereinafter mentioned. The best evidence rule embodied in part in section 66 demands that primary documentary evidence must be produced whenever it is sought to prove relevant facts by documentary evidence, whether as a result of choice or because of compulsion by section 93.[38]

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[38] As Stephen says in *Introduction to the Indian Evidence Act* (1872) at 10, "if the court requires the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceeding." This also argues the impossibility of knowing whether the documentary evidence is compulsory or voluntary from the mere application of s 66. In *Watson* (1817) 2 Stark 115, in a trial for high treason, it was sought to tender as evidence a placard announcing a public meeting in a certain place and papers found in the lodgings of a co-conspirator. The placard was not among those that were taken away and used but was one of those remaining at the printers who had executed an order to print 500 copies. Its admission was upheld, the court overruling the objection that the placard being secondary evidence could not be produced without there having been notice to produce the original. What is interesting is the way the court considered any possible hearsay objection and overcame it by emphasizing that the admission was for the purposes of proving knowledge and therefore did not contravene the hearsay rule. For those purposes, the placard

This creates some difficulties which would be avoided quite easily by characterizing the recording as real evidence. Suppose an intoximeter shows on the screen a particular measurement of the alcohol in a breath specimen as well as produces a printout of that measurement. Which is the original document? – the screen reading or the printout? Or are both original documents? Suppose the results are contained in a database and a printout is obtained: which is the original document? If the database is the primary document, the printout must be a copy. Or is the printout as well the primary document? The characterization of such evidence as documentary evidence gets us into the difficulties of what primary evidence is. The characterization of such evidence as real evidence avoids the difficulties. We may admit that the printout is documentary evidence but as it is also real evidence, we may simply ignore the evidentiary nature of the screen reading or the database (since that is not being produced for inspection). We need not be concerned to ask whether the real evidence is a copy of an original, a question which is moot if the printout is properly real evidence.

A second aspect of the best evidence rule also creates problems for recordings. In lieu of primary evidence, secondary evidence which is defined in section 65[39] may be produced only if certain conditions are satisfied.[40] These conditions are enumerated in section 67:

> (a) when the original is shown or appears to be in the possession or power
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> (1) of the person against whom the document is sought to be proved;
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> (2) of any person out of reach of or not subject to the process of the court;
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> (3) of any person legally bound to produce it, and when, after the notice mentioned in section 68, such person does not produce it;

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was indeed an original copy because every one of the 500 copies printed was original. But it would have been different, as Bayley J put it, had the placard been offered in evidence in order to show the contents of the original manuscript; for then the placard would be secondary evidence and a proper foundation must be laid for its introduction. See also *Millard* (1813) R & R 245; *Cooke* (1838) 8 Car & P 586; *Sturge* v *Buchanan* (1839) 10 A & E 598; *Brewster* v *Sewell* (1820) 3 B & Ald 297.

39 This definition embodies the common law. Secondary evidence may be oral or documentary. There are no degrees of secondary evidence: Martin B in *Boyle* v *Wiseman* (1855) 11 Ex 360; *Brown* v *Woodman* (1834) 6 Car & P 206; *Jeans* v *Wheedon* (1843) 2 M & Rob 486; *Wayte* (1983) 76 Cr App R 110 at 116.

40 For a recent application, see *Loh Shak Mow* v *PP* [1987] 1 MLJ 362.

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 76;

(f) when the original is a document of which a certified copy is permitted by this Act or by any other law in force for the time being in Singapore to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

Where the document is in the possession or power of the opposite side, a further precondition is prescribed in section 68. Notice must be given by the party proposing to give secondary evidence. If the law prescribes no such notice, that notice must be such as is reasonable in the circumstances. The purpose of the rule of notice is the narrower one of giving the option to the opponent to produce the original. Therefore the law must not put up too high a barrier before the party proposing to adduce secondary evidence. So the provisos to section 68 define the circumstances in which notice will be reasonable as follows:

(a) when the document to be proved is itself a notice;

(b) when from the nature of the case the adverse party must know that he will be required to produce it;

(c) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(d) when the third party or his agent has the original in court;

(e) when the adverse party or his agent has admitted the loss of the document;

(f) when the person in possession of the document is out of reach of or not subject to the process of the court.

The best evidence rule is not in favour these days. When providing for the admissibility of certain documentary hearsay in civil cases in the Civil Evidence Act 1968, the English legislature made it clear that they were not going to be bothered by all the rules about primary evidence. So it was provided that proof could take the form of the original or (whether or not that document is still in existence) by the production of an authenticated copy, authenticated in such manner as the court may approve, and regardless of laying a proper foundation;[41] and of course there are numerous other instances. Certain remarks of the Divisonal Court in *Governor of Pentonville Prison, ex p Osman*[42] well express the general criticisms of the best evidence rule:

> [T]his court would be more than happy to say goodbye to the best evidence rule. We accept that it served an important purpose in the days of parchment and quill pens. But since the invention of carbon paper and, still more, the photocopier and the telefacsimile machine, that purpose has largely gone. Where there is an allegation of forgery the Court will obviously attach little, if any, weight to anything other than the original; so also if the copy produced in court is illegible. But to maintain a general exclusionary rule for these limited purposes is, in our view, hardly justifiable.[43]

Application of the best evidence rule to a tape recording of relevant facts or facts in issue leads to these unnecessary and undesirable consequences: (1) the original will have to be produced; (2) a copy can be produced only if the original is lost or in the power of a third party out of reach of or

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41 See also Police and Criminal Evidence Act 1984.

42 (1990) 90 Cr App R 281.

43 At 381. How differently Lord Tenterden CJ put it in *Vincent* v *Cole* (1828) M & W 257: "I have always acted most strictly on the rule, that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments; they are so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule." Judges then expressed a suspicion that the best evidence if produced might falsify the case: see, *eg*, *Strother* v *Barr* (1828) 5 Bing 131.

not subject to the process of court; (3) a transcript is secondary evidence and inadmissible if the original recording is tendered. The first and second consequences represent unnecessary obstacles to the use of tape recordings and inadequately capture the power and accuracy of reproduction. The third consequence is too generous where secondary evidence is admissible. The hearsay element is overlooked especially when the transcript is not the work of an expert transcriber. In those circumstances, the transcript looks more like a hearsay of the transcriber than secondary evidence.[44] But the third consequence is too strict where the recording is tendered. It deprives the court of an aid to understanding.

That a copy of a tape recording which the technology allows to be perfect should be subject to the best evidence rule and be denominated secondary evidence is an unnecessary obstacle not only because it is anachronistic. On one view there are also many shortcomings in those cases where the original cannot be produced and yet there is no situation within section 67 which provides for reception of secondary evidence. This may happen where the original has deteriorated somewhat because of poor storage but the copy is still good. Whilst it may have deteriorated somewhat we may not be able to say within section 67(c) that it has been destroyed.

Another problem is illustrated by the facts of *Kajala* v *Noble*.[45] The British Broadcasting Corporation (BBC) had filmed a good part of the riots in Bristol and the accused was charged with unlawful assembly. The prosecution wanted the BBC film but the BBC's policy was not to release the original. So the prosecution got from them an edited version of the riots from which the accused could be identified. We are unable to say that the original is out of reach of the process of the court. There may be good reasons why the possessor is unwilling to produce the original when only a part of a whole film is relevant so that the film must be edited. There is no easy application of section 67 here. Even if we could admit the edited version as secondary evidence under section 67, we must show that it is indeed secondary evidence within section 65. But it is not obviously so because a secondary copy is like the original, not a re-arranged version.

A third difficulty is disclosed by the facts of *Taylor* v *Chief Constable of Cheshire*.[46] The accused was video-taped in the act of committing theft. Various people played over the video-tape and identified him. But before the trial the tape was accidentally erased and no copy was available. So the prosecution called the eyewitnesses to the video-tape to give evidence of identity. How should we resolve this problem? If the tape recording is the original document which has been destroyed, that is a ground for

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[44] *Cf Ma Mi* v *Kallander* AIR 1927 PC 15.
[45] (1982) 75 Cr App R 149.
[46] (1987) 84 Cr App R 191.

introduction of secondary evidence. The oral evidence (the secondary evidence) will be oral accounts of the contents of a document given by some person who has himself seen it, within the meaning of section 65(e). So there is that simple answer. But if the recording is now of poor quality, its non-production cannot be excused. We are left with an inferior recording, when the evidence of the eye-witnesses is superior. If these eye-witnesses are called to identify the accused from the video-tape, they will almost certainly not be identifying him from the tape but from the impression he had created in their minds at the earlier time when they watched the now inferior recording.

In England, the overwhelming trend is to characterize such recordings as being real evidence. This must mean that the English courts are willing to treat the contents as real evidence; so that the tape recorder or recording becomes simply the mechanical or electronic means of bringing the real evidence before the trier of fact. If so, the fact that the recording is a copy is as insignificant as the fact that it is played over on a different instrument from that used in recording. A copy should still be real evidence if it accurately brings the facts before the court for its inspection. This will accommodate the fact that copies can be accurately reproduced. It will also correctly avoid the hearsay rule which is potentially involved whenever there is a statement of relevant facts.

The trend is traceable to *The Statue of Liberty*[47] in which an action was brought after a collision between two ships and the plaintiffs sought to adduce in evidence a film of the approaches of both ships which had been recorded by the radar apparatus on the shore. The court held that:

> The evidence in question in the present case has nothing to do with the hearsay rule.... It is in the nature of real evidence ... [being] ... the evidence afforded by the production of physical objects for inspection or other examination by the court.[48]

In *Maqsud Ali*,[49] while the two accused persons were in custody as suspects, their conversations in which they confessed to guilt were recorded on tape. The court decided that the tape recordings were admissible as real evidence. This case is also interesting in the way transcripts of the conversations which were in Punjabi were allowed to go with the jury into the jury-room as aids to understanding.

The more recent case of *Taylor* v *Chief Constable of Cheshire*[50] is also

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[47] [1968] 1 WLR 739.
[48] *Ibid*, at 740.
[49] [1966] 1 QB 688.
[50] (1987) 84 Cr App R 191.

in line with a recording of a transaction being real evidence if produced in court for its inspection. On that occasion, a video recording of a theft was by mistake erased but before the unfortunate accident occurred, various persons had viewed it and could identify in court the accused as the thief. The court on a case stated confirmed that such evidence of identification was admissible. The "evidence of what they say they saw on the recording is not different in point of principle from evidence of witnesses who claim to have seen the event by direct vision."[51] This judgment implies that the evidence of identification (made at a later time) was not secondary evidence of the contents of a document. It was direct evidence derived from the recording.

Very different, admittedly, is the decision in *Butera* v *DPP*.[52] In this case, the admissibility of a tape recording of conversations in Punjabi, Thai, Malay and English was not controversial since those conversations were alleged to be acts of furtherance of a conspiracy to traffic in heroin. The sole ground of appeal was whether the written translations of the conversations should have been allowed in as a documentary exhibit.

The majority judgment of Mason CJ, Brennan, and Deane JJ adopts Wigmore's explanation of the tape recording as adding "to our knowledge other data not discernible by the unaided senses". It is scientific evidence. Having assigned to such evidence a unique classification, the majority proceed to engraft a kind of best evidence rule on it, saying that in those cases where the tape is not available, secondary evidence of its contents may be given by a witness who heard the tape played out of court. Copy tapes may be played in court to produce the admissible evidence provided its provenance is satisfactorily proved. The transcripts are merely aids to understanding.

Dawson J regards the tape recording as furnishing documentary evidence when tendered for its contents. He agrees that the best evidence rule is restricted to written documents and this leaves him free to specify special rules for the tape recording. Production and playing of the tape recording is the best proof. A transcript is secondary evidence and not merely an aide memoire.

Gaudron J takes yet another approach. Avoiding any attempt to describe or characterize the nature of the evidence, she divides intelligible from unintelligible recordings. If a recording is intelligible and is in evidence, although it may not be entirely appropriate to apply the best evidence rule to something other than a written document, it should be held that extraneous evidence such as a transcript is inadmissible. Where, however, a recording

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[51] *Ibid*, at 198.
[52] (1987) 164 CLR 180.

is unintelligible and inaudible, transcripts may be admitted as aids to comprehension.

While the awkwardness of applying the best evidence rule has led the English courts to characterize such tape recordings as real evidence, those who insist that they are documentary evidence (they must mean solely and not also real evidence), remove the best evidence rule from documentary evidence which is not strictly writing.[53] The characterization of certain documentary evidence as real evidence is an example of the malleability of the common law. In Singapore, the malleability of the common law is unavailable in the face of section 3. The removal of the best evidence rule from documentary evidence which is not strictly writing is another example of the malleability of the common law. But how is this to be done when the best evidence rule has been crystallized in the way that it has been done in section 66?

That then is the problem. Whatever local case law there is appears to be oblivious to these difficulties. In *Ng Yan Pee* v *PP*,[54] the original tape recording was played at the trial without any objections being taken. The judge called a Malay interpreter as a court witness but would not allow him to be cross-examined as to the contents of the tape. He accepted the interpreter's evidence that he could not make out what was on the tape. The Court of Appeal (Thomson CJ, Ford and Neal JJ) appear to have thought that the approach of the trial judge was wrong and gave leave to the defence to examine the tape again with their own experts. There was a resumed hearing in which the defence called the same Malay interpreter; the tape was played again in the presence of the defence's experts; and the Malay interpreter produced a transcript with an English translation. This transcript the court studied. As they could find nothing of great help they were satisfied that the trial judge had not erred in dismissing the tape recording as unhelpful evidence.

What is interesting is that the court not only afforded the defence an opportunity to hear the tape again with their experts but the same Malay interpreter was called upon to produce a transcript which was studied by the court. If the court studied the transcript when they also heard the recording, the transcript must have been thought by them to be a mere aid to comprehension of the evidence.

In another case, *PP* v *Gurbachan Singh*,[55] a police informer testified that he received money from a certain Hashim to be paid over to the accused as inducement to the accused who was an OCPD (Officer-in-Charge of

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[53] See also Lord Denning MR in *Garton* v *Hunter* [1969] 2 QB 37 at 44; *Kajala* v *Noble* (1982) 75 Cr App R 149.

[54] (1959) 3 MC 249.

[55] [1964] MLJ 141, affirmed in [1966] 2 MLJ 125.

a Police District) to allow certain lorries carrying fresh fish to cross the Thai-Malaysian border after 6 pm. To show that Hashim had come to Lee's shop with the money, evidence of eyewitnesses was tendered as well as evidence of a cine-recording and tape-recording. The tape-recording was held to be admissible in evidence. But there was no discussion whether it was real evidence.

In another case, *Re Francis T Seow*,[56] a court of three judges condemned as deprecatory the attempt to tape-record conversations with a third party (to obtain admissions from him) without informing the third party. But it seems that there was no objection in principle to the admissibility of the recordings.

To resolve the difficulties which will arise when copies of tape-recordings or edited versions are tendered, one of two solutions is at hand; either re-define documentary evidence non-exclusively and allow that the contents of a document may be real evidence or re-define the best evidence rule as having no application to the contents of a document which is not strictly in writing. If the contents of a document may be real evidence, then in those cases where they are real evidence, the fact that they are also documentary will be immaterial in attracting the best evidence rule. If, however, they must be characterized as documentary evidence, avoiding the best evidence rule by amending section 66 will ensure that copies which are exact reproductions can be adduced without the restrictions otherwise imposed by that rule on the production of copies.

VII. Evaluation and Conclusion

Some six provisions set out the basic framework for reception of documentary evidence, namely, sections 3, 61, 66, 67, 68 and 93. The inter-relations of sections 61 and 93 are still something of a perplexity. The perplexity vanishes if section 93 is regarded as the only true constraint on the principle of free proof and section 61 is regarded as a complement to and not as making section 93 superfluous. Section 93 also needs to be applied with more circumspection in order to avoid certain indefensible results.

The age of section 3 has more than begun to show. Like a suit of old apparel, it will no longer fit the body. It subjects a whole realm of modern recording and scientific evidence inappropriately to the strictures of the best evidence rule. Reform is not difficult. The legislature could amend section 66 to read as follows:

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[56] [1973] 1 MLJ 199.

> Documents in the hands of the party proving them must be proved by primary evidence except in the case of documents which are not strictly written documents and except in the cases hereinafter mentioned. Explanation: A tape recording of a contract is a written document.

To secure the English position, which is best of all, the legislature could amend section 3 to read as follows:

> A document is any matter expressed or described upon any substance ... evidence includes – (a) ... (b) all documents produced for the inspection of the court: such documents are called documentary evidence; and (c) real evidence, namely, evidence of a practically immutable relevant fact or fact in issue offered for inspection of the trier of fact. Explanation: Real evidence may include the contents of a document.

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