THE BEST EVIDENCE RULE—A CRITICISM.—A preferential and exclusionary principle of evidence, commonly known as the *best evidence rule* is, in its simplest terms, that the highest degree of proof of which the nature of the case at bar is susceptible must be produced, any evidence which presupposes better evidence available will not be received.[1] This rule has its root far back in the history of judicial proof and has been commonly enunciated by the courts. It is a preferential principle because it prefers one kind of evidence to another and is exclusionary because it attempts to exclude evidence which does not come up to an

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demand was made for a retraction, the defendants purported to print one which evasively reiterated the charge, after giving the statement of the person to whom the charge referred. Hence punitive damages were probably recovered here on the theory of implied ratification of the original defamation. It is submitted that these were alternative grounds for imposing punitive damages on the corporation, either ground being sufficient in itself.) Neafie v. Publishing Co., *supra*, note 15. (There was nothing to show that the managing editor had previous knowledge of the publication. A retraction was printed upon request and punitive damages were not allowed. Here there was no previous authority and subsequent ratification was expressly negatived by the retraction.) See also: Haines v. Schultz, *supra*, note 53; McCormick, *supra*, note 15, p. 282.

In Peterson v. Middlesex Traction Co., 71 N.J.L. 296, 299, 59 Atl. 496 (1904), the court said: "In each of the former cases (including Haines v. Schultz, *supra*) it was held that because there was nothing to show that the master participated in the malicious and wanton act of the servant by either authorizing it before or approving it after it was done, punitive damages could not be assessed against him, while in the Kahn case, *supra*, the conduct of the managing editor was such an approval of the malicious and wanton act of the person responsible for the original publication as to justify the assessment of exemplary damages against the defendant."

From this quotation from the opinion of Paterson v. Middlesex Traction Co. the result may be reached that whether or not the doctrine of respondeat superior makes a corporation answerable for punitive damages may be determined by the actions of the manager of the business. The implication is that the manager for the purposes of this doctrine, stands in the position of acting for the corporation for the purpose of authorizing or ratifying the defamation.

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1. Hoffman v. Rodman, 39 N.J.L. 252 (Sup. Ct. 1876); Cumberland Mutual Fire Ins. Co. v. Geltenan, 48 N.J.L. 495, 7 Atl. 424 (E. & A. 1886); Corbo v. East Orange, 86 N.J.L. 563, 92 Atl. 345 (E. & A. 1914); Pluckino v. Piccolo, 114 N.J.L. 82, 175 Atl. 812 (Sup. Ct. 1934).

objective standard of probative value. Preferential and exclusionary rules have their justification in the dictates of experience, which show one type of evidence to be more trustworthy than another type and less apt to appeal to emotion, bias, and prejudice.[2] It is the purpose of this note to show that the best evidence rule lacks a substantial foundation both historically and logically, and should give way to more concrete rules achieving the same ends and more adaptable to a scientific system of judicial proof.

Historically,[3] the phrase "best evidence" first appeared in the cases in the latter part of the 17th century during the time of Holt, C. J.[4] In these first cases it was applied wholly to writings and was a convenient way of expressing the rule, already in existence, that when the contents of a writing were in issue, the writing itself must be introduced into evidence, unless its absence was satisfactorily explained.[5] But the phrase caught hold and was applied by the courts and the text writers to any attempt to introduce evidence which presupposed better evidence in existence.[6] It took on the aspect of a separate rule and not a mere expression of another existing rule, as was its original purpose. The seeds of the rule were sown at a time when rules of evidence, as such, were incapable of prominence because juries were allowed to find verdicts on their own knowledge and had a power unlimited by principles of evi-

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2. Preferential rules are based on the dictate of experience that, for certain probanda, one kind of evidence is always more trustworthy than other kinds, and it should therefore be produced before offering any other, if it is available. WIGMORE: A STUDENTS TEXTBOOK OF THE LAW OF EVIDENCE (1935) p. 29.

3. For a complete history of the rule see THAYER: PRELIMINARY TREATISE ON EVIDENCE (1898) p. 489.

4. Thayer calls this an early period for anything like a rule of evidence, properly so called.

5. Thayer says that the first instance of the use of the phrase "best evidence" was in the year 1699 in Ford v. Hopkins where, in allowing a goldsmith's note as evidence against a stranger to the fact, Holt, C. J., says that only the best proof that the nature of the thing well afford is required.

6. In Chief Baron Gilbert's famous treatise on Evidence, written in the 18th century, it is said, "The first, therefore, and most signal rule in relation to evidence is this, that a man must have the utmost evidence the nature of the case is capable of." Quoted in Thayer, *supra*, note 3.

dence.[7] In the century that followed, when the seeds were taking root, definite rules had been forming and were being applied. Judicial control over evidence had been greatly extended, and the practice of granting new trials because of the jury's disregard of the evidence of the case was proof that evidential rules were coming into an equipose with the individual power of the jury. Rules sprouted and hardened into independent growth, and with them came the "best evidence" rule, which started as a mere phrase describing an already existing rule.[8] The phrase had outlived its usefulness and had taken a place in the system of judicial proof far beyond its original intent. In spite of this, however, it continued in its application and was enunciated by the text writers as a definite, independent rule governing the production of evidence.[9]

Today, the best evidence rule is applied almost wholly to writings.[10] Thus, where A sues B in contract the best evidence of the contract is the writing itself.[11] It applies to writings of a public character as well

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7. When the Norman judges organized the jury to assist them in their investigations, the jurors were at first left to their own discretion in the use of evidence. They might use their own impressions, obtained in the vicinage, and they might even go about among the neighbors asking for information out of court. Wigmore, *supra*, note 3, p. 4.

8. Even in the days when the jury was allowed to find facts on their own knowledge, there were rules about the production of documents. *Ibidem.*

9. Thayer lists the following text writers as accepting the rule: PEAKE in 1801, PHILLIPS in 1814, STARKIE in 1824, GREENLEAF in 1842, TAYLOR in 1848, and BEST in 1849.

10. MCKELVEY ON EVIDENCE, 1898 ed., p. 342. Hartman v. Dobar, 80 N.J.L. 250, 76 Atl. 347 (Sup. Ct. 1910), wherein Minturn, J., held that the rule applied only to writings and those writing which were directly in issue.

See also MCGRATH ON NEW JERSEY TRIAL EVIDENCE, p. 259.

11. Durbrow v. Hackensack Meadows Co., 77 N.J.L. 89, 71 Atl. 59 (Sup. Ct. 1908), wherein Trenchard, J., speaking for the Court said, "The plaintiff next offered to prove, by the witness, the terms and provisions of a contract. . . This testimony was properly excluded for two reasons: (1) The writing, if it existed, and had been duly executed, was presumed to have been in the hands of . . . the defendants. The plaintiff by the rule of law was required to make his proof of the contract by the highest evidence which, under the circumstances of the case, the law presumed to be or ought to be in his power."

This same rule applies to (a) *deeds*, Rollins v. Atl. City R.R., 73 N.J.L. 64, 62 Atl. 929 (Sup. Ct. 1906); Rundale v. Bellwood, 90 N.J.Eq. 262, 107 Atl.

as to private documents.[12] If the fact to be proved is one which the law requires to be in writing, the record itself is the best evidence.[13]

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35 (Ch. 1918), where it was necessary to prove ownership of the premises in one of the defendants and one of the complainant's solicitors testified that he had searched the records and found title in the alleged owner. *Held*, not the best evidence. (b) *Receipts*, Chambers v. Hunt, 22 N.J.L. 552 (E. & A. 1849). (c) A *memorandum* required by the Statute of Frauds, Bent v. Smith, 22 N.J.Eq. 560 (Ch. 1871). (d) *letters*, Linden Silk Co. v. Patterson Throwing Co., 197 Atl. 57 (E. & A. 1938), holding a photograph not the best evidence of a letter. (e) *Accounts and books of account*, Park v. Miller, 27 N.J.L. 338 (Sup. Ct. 1859). (f) All other writings which the law requires to be in writing, which the parties themselves have put into writing, and those whose existence is denied and which are material to the case, 1 GREENLEAF ON EVIDENCE, sec. 85.

12. Stout v. Edison Cement Co., 82 N.J.L. 133, 81 Atl. 737 (Sup. Ct. 1911), *aff'd*, in 83 N.J.L. 639 (E. & A. 1911), wherein Voorhees, J., said, "An exception which in practice is by far the commonest in its employment, is the exception admitting statements made by officials in pursuance of official duty . . . avoiding the inconvenience of summoning public officers from their post to prove the documents and records in litigation. But it will be seen that the exception does not do away with the necessity of producing in Court the report or the copy of the document as published."

The following documents have been held to be within this rule:

An agent's authority to issue a license. Emery v. King, 64 N.J.L. 529, 45 Atl. 915 (Sup. Ct. 1900).

A record of administration of an estate. Hay v. Bruere, 6 N.J.L. 212 (Sup. Ct. 1822).

A record of appropriation by a Board of Freeholders. Freeholders of Passaic Co. v. Downie, 54 N.J.L. 223, 23 Atl. 954 (Sup. Ct. 1892).

The minutes of a meeting of a Board of Freeholders. Peck v. Freeholders of Essex Co., 20 N.J.L. 457, *reversed* for other reasons in 21 N.J.L. 656 (E. & A. 1847).

A record of a surveyor appointed to lay out a road. Hoffman v. Rodman, 39 N.J.L. 252 (Sup. Ct. 1877).

The records of a township meeting. *In re* Prickett, 20 N.J.L. 134 (Sup. Ct. 1843).

The certificates, notices, and other papers of an election board. O'Donnel v. Dushman, 39 N.J.L. 677 (Sup. Ct. 1877).

But the rule is different where it is sought to prove that a person is a public officer. Stout v. Hopping, 6 N.J.L. 125 (Sup. Ct. 1822), where it was held that one may prove himself a constable by proving his own acts and general reputation. See also Conover v. Solomon, 20 N.J.L. 295 (Sup. Ct. 1844).

13. Tice v. Reeves, 30 N.J.L. 314 (Sup. Ct. 1863). Fox v. Lambson, 8

The rule does not apply to writings collateral to the issue. Where the contents are immaterial and the question is one of mere identity, the production of the writing is not required, but its existence may be proved by parol.[14] Thus, where A sues B for damages for personal injuries and claims as a part of his damages the loss of a contract,, proof of the contract may be by parol, though the contract itself is in writing.[15]

Many jurisdictions hold that the best evidence rule does not apply to parol admissions *in pais* and against interest and that such admissions are competent as primary evidence against the party making them, although they involve what must necessarily be contained in a written instrument.[16] But the general rule is different in New Jersey and it has been held that before such an admission can be introduced, the non-production of the writing must be accounted for.[17] It has, however, been held, in an action on an insurance policy, that where the admission of a party insured was contained in a written proof of loss made under oath and set forth the policies existing, the document was admissible to show the existence of the policies without producing them.[18] This evidence was considered not as an ordinary admission, but as an

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N.J.L. 275 (Sup. Ct. 1826). O'Donnel v. Dushman, *supra*, note 11. Wilson v. Stevens, 105 N.J.Eq. 381, 148 Atl. 392 (Ch. 1929).

See also, 20 CENT. DIG., title "Evidence," sections 508, 511, 512, 546.

14. Gilbert v. Duncan, 29 N.J.L. 133, *reversed* on other grounds in 29 N.J.L. 521 (E. & A. 1861). In Breslin v. Donnelly, 81 N.J.L. 691, 80 Atl. 474 (E. & A. 1911), Minturn, J., said, "The ground upon which the rulings were made by the trial court was the fundamental rule that the deed between the parties contained the best evidence of the transaction. This, of course, as to the direct transactions between the parties, is undoubtedly the law. But upon a collateral inquiry, such as that involved in the present question, the production of the documents involved is not necessary, since they are only incidentally involved in the main inquiry and are not in issue in the case."

15. Hartman v. Dubar, *supra*, note 10. See also: N. J. Zinc & Iron Co v. Lehigh Zinc & Iron Co., 59 N.J.L. 189, 35 Atl. 915 (E. & A. 1896); Sharp v. Hamilton, 12 N.J.L. 109 (Sup. Ct. 1830); Hoisting Machinery Co. v. Goeller Iron Works, 84 N.J.L. 504, 87 Atl. 331 (Sup. Ct. 1913).

16. 17 Cyc. 510.

17. Cumberland v. Giltinan, 48 N.J.L. 495, 7 Atl. 424 (E. & A. 1866).

18. *Ibidem*

admission so formal and so accredited as to amount to an admission of law intended to dispense with primary evidence. But in the case of judgments, decrees and other court records, even an admission under oath on the witness stand is not sufficient to dispense with production of the original; the rule being that even the admission of the fact by a party does not supersede direct proof of matter of record by which it is sought to affect him, for the record on being produced may be found irregular and void, and the party might be mistaken.[19]

The best evidence rule leads naturally to a division of evidence into *primary* and *secondary*. Primary evidence is the best or higher evidence, that which in legal contemplation affords the greatest certainty of the fact in question. All evidence falling short of this in its degree is termed secondary. The distinction is one of law and not of fact; referring only to the *quality* and not to the *strength* of the proof.[20]

Primary evidence is always admitted, but secondary evidence can only be introduced when the circumstances are such as to make it the best evidence available.

One of the main grounds for the admission of secondary evidence is when the original and primary evidence has been lost or destroyed.[21] This principle is widespread in its application and applies to all writings which would have fallen within the best evidence rule had the original document been available.[22] But secondary evidence is not admitted as a matter of course when proof of the destruction of an instrument is offered, the motive and cause of the destruction being a controlling factor. Thus, he who voluntarily, without mistake or accident, destroys

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19. Livesey v. Benson, 82 N.J.L. 333, 82 Atl. 509 (Sup. Ct. 1912). See also McGRATH, supra, note 10.

20. 1 GREENLEAF ON EVIDENCE 99, 12th ed.

21. Seward v. Vandergrift, 3 N.J.L. 922 (Sup. Ct. 1812); Johnson v. Arnwine, 42 N.J.L. 451, 36 Am. Rep. 527 (Sup. Ct. 1880). In the Seward case, Depue, J., said, "The theory on which evidence of a secondary grade is admissible is, that the production of the primary evidence is out of the party's power. The loss or destruction of a paper is the occasion on which the rule is most frequently invoked."

22. See Wilson v. Stevens, 105 N.J.Eq. 381, 148 Atl. 392 (Ch. 1929); *In re* Prickett, *supra*, note 11; Belknap v. Tillotson, 82 N.J.Eq. 271, 88 Atl. 841 (Ch. 1913).

primary evidence, and thereby deprives himself of its production and use, cannot later avail himself of secondary evidence.[23] But it will not be presumed that a party has voluntarily destroyed an instrument which he was interested in preserving, where there is no other evidence on this point other than the absence of the original. In such a case, the inference is that the instrument is lost.[24] The court will not, upon mere conjecture, impute a dishonest motive. It follows that when the party against whom the fact is to be proved has destroyed the instrument, secondary evidence of the fact can be introduced.

Destruction and loss is not the only ground upon which secondary evidence is admissible, but where the primary evidence is in the possession or under the control of the adverse party, secondary evidence may be brought in.[25] And, similarly, where the instrument is in the possession of a third person who refuses to produce it or who is outside the jurisdiction of the court, the secondary evidence is admissible, without further proof of inability to procure the original.[26]

But the mere fact that an instrument is lost or destroyed, is not produced after notice, or is in the hands of a third person outside the jurisdiction, is not sufficient to admit secondary evidence if the existence of the original document is denied. There must be proof of the former existence, proper execution, and the genuiness of the document.[27] In other words, a proper foundation must be laid by the party seeking to introduce secondary evidence and this foundation of existence, execution, and validity must be proved by clear, cogent evidence,[28] the burden being borne by the party claiming under the lost document.[29]

The general rule as to the burden of proof of grounds for admission of secondary evidence is that the one seeking to establish the ground

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23. Wyckoff v. Wyckoff, 16 N.J.Eq. 401 (Ch. 1863).

24. *Ibidem.*

25. Truax v. Truax, 2 N.J.L. 166 (Sup. Ct. 1807); Benoliel v. Homac, 87 N.J.L. 375, 94 Atl. 605 (Sup. Ct. 1915).

26. Hersh v. Leatherbee Lumber Co., 69 N.J.L. 509, 55 Atl. 645 (Sup. Ct. 1903).

27. Durbrow v. Hackensack, 77 N.J.L. 89, 71 Atl. 59 (Sup. Ct. 1908).

28. Maddock v. Connoly, 82 N.J.Eq. 533, 90 Atl. 1027, *affirmed* in 82 N.J.Eq. 645 (E. & A. 1913).

29. Borsteiman v. Brokan, 81 N.J.Eq. 401, 87 Atl. 145 (Ch. 1913).

for admission must prove the fact by sufficient and satisfactory evidence.[30] The sufficiency of the evidence rests in the discretion of the court and is governed by settled rules that apply to evidence offered for other purposes.[31] The discretion of the court as to sufficiency of the evidence generally will not be disturbed on appeal, except in a case of abuse of discretion amounting to error of law.[32]

As to the *quantum* of proof necessary to establish the loss or destruction of an original instrument, it is difficult to fix a hard and fast rule, but it is accepted that the one seeking to establish the admissibility of secondary evidence is required to make a diligent and bona fide search for the original document.[33] If any suspicion hangs over the instrument or there are circumstances tending to excite a suspicion that it is designedly withheld, the most rigid inquiry will be made into the reasons for its non-production; but where there is no such suspicion, all that is required is reasonable diligence in the effort to find it.[34] The degree of diligence necessary depends on the circumstances of the particular case—the character and importance of the paper, the purposes for which it is to be used and the place where a paper of that kind may naturally be likely to be found.[35] [36]

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30. Large v. Van Doren, 14 N.J.Eq. 208 (Ch. 1862).
31. Clark v. Hornbeck, 14 N.J.Eq. 208 (Ch. 1862).
32. Longstreet v. Kock, 64 N.J.L. 112, 44 Atl. 934 (Sup. Ct. 1899).
33. Roll v. Everett, 73 N.J.Eq. 697, 71 Atl. 263 (Ch. 1907).
34. Johnson v. Arnwine, *supra*, note 21.
35. *Ibidem.*
36. On the weight and sufficiency of evidence in general:

(a) *Negotiable Instruments and Receipts*, see Sterling v. Potts, 5 N.J.L. 773 (Sup. Ct. 1820).

(b) *Judicial Papers*, see Fox v. Lambron, 8 N.J.L. 275 (Sup. Ct. 1826).

(c) *Books of Account*, see Suydam's Adm'rs v. Combs, 15 N.J.L. 133 (Sup. Ct. 1835).

(d) *Bonds*, see Kingwood v. Bethlehem Twnp., 13 N.J.L. 221 (Sup. Ct. 1863).

(e) *Contracts and Assignments*, see Insurance Co. v. Woodruff, 26 N.J.L. 241 (Sup. Ct. 1857); Smith v. Axtell, 1 N.J.Eq. 494 (Ch. 1832); Koehler v. Schilling, 70 N.J.L. 585, 57 Atl. 154 (Sup. Ct. 1904); Smith v. Ins. Co., 3 N.J.Misc. 994, 130 Atl. 371 (Sup. Ct. 1925).

(f) *Conveyances*, see Roll v. Rea, 50 N.J.L. 264, 12 Atl. 905, *affirmed* in 57 N.J.L. 647, 32 Atl. 214 (E. & A. 1895).

Another preliminary step in establishing the admissibility of secondary evidence is that the party seeking to introduce the evidence must first give notice to produce to the party holding the original or to his attorney.[37] The sufficiency of such notice is a preliminary question of fact for the trial court.[38] A subponea *duces tecum* is the best accepted way of giving notice; this may be served on a third person or on a party to the action.[39]

Whether the law recognizes any degrees in the various kinds of secondary evidence is a question not yet settled.[40] The affirmative argument is an equitable extension of the principle which postpones all secondary evidence until the absence of the primary is accounted for; and it is said that the same reason which requires the production of a writing, if within the power of the party, also requires that, if a writing is lost, its contents shall be proved by a copy, if in existence, rather than by the memory of a witness who has read it. On the negative side it is said that this extension of the rule confounds all distinction between the weight of evidence and its legal admissibility; that the rule is founded upon the nature of the evidence offered, and not upon its strength or weakness; and that to carry to the length of establishing degrees in secondary evidence as fixed rules of law would often tend to the subversion of justice and always be productive of inconvenience.[41] In New Jersey various kinds of secondary evidence have been received[42] but in none of the cases examined in which secondary evidence was admissible did it appear that a higher form of evidence was being withheld. The American tendency seems to be that if from the nature of the case a

37. Ford v. Munson, 4 N.J.L. 103 (Sup. Ct. 1818). See also Durbrow v. Hackensack, *supra*, note 27.

38. McGRATH, *supra*, p. 263.

39. Murray v. Elston, 23 N.J.Eq. 212 (Ch. 1872).

40. 1 GREENLEAF, *supra*, p. 99.

41. For a discussion of degrees of secondary evidence see WIGMORE, *supra*, p. 229.

42. See McGRATH, *supra*. See also Veghte v. Raritan, etc., 19 N.J.Eq. 142 (Ch. 1868); Kingwood v. Bethlehem, 13 N.J.L. 221 (Sup. Ct. 1832); Watson v. Kelty, 16 N.J.L. 517 (Sup. Ct. 1838); Browning v. Flanagan, 22 N.J.L. 567 (E. & A. 1849).

higher degree of secondary evidence exists, the party will be required to produce it.[43]

As was stated at the outset the purpose of this note is to point out that the so-called "best evidence" rule lacks both a historical and logical foundation. It has already been pointed out that the phrase has outlived its usefulness and cannot be justified from a historical point of view.[44] That its logical basis is open to criticism is deducible from the above consideration of basic principles.

That the general law of evidence is unnecessarily complicated and in need of logical simplification is not to be denied. Dean Wigmore, recognizing that in its present state the law of evidence is complex, heterogenous and arbitrary, argues that this situation is due in a large measure to our ignorance of the principles which underlie judicial proof. His approach is that there *are* these general principles, that it *is* possible to discover them, and that to do *so* is of the greatest utility.[45] This is

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43. McGRATH, *supra*, p. 266.

44. "The official theory is that each new decision follows syllogistically from existing precedents. But as precedents survive, like the clavicle in the cat, long after the use they once served is at an end, and the reason for them has been forgotten, the result of following them must often be failure and confusion from the merely logical point of view. It is easy for the scholar to show that reasons have been misapprehended and precedents misapplied." HOLMES in *Collected Legal Papers*, p. 302. And again: "It is revolting to have no better reason for a rule of law than that is so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists through blind imitation of the past." HOLMES, SPEECHES, p. 98; COLLECTED LEGAL PAPERS, p. 291.

45. See 33 COL. L. REV. 770. WIGMORE, *supra*, p. 5: "It is important to remember that all of the *fundamental* rules have some *reason* underneath. They are not arbitrary. Their aim is to get at the truth by calm and careful reasoning. 'The letter of the Law, once said old Sergeant Plowden, is the body of the Law, but the sense and reason of it is the soul.' Therefore to understand the reason of the rules is to be halfway towards mastery of the rules deduced from those reasons."

WIGMORE in his TREATISE has undertaken a successful classification of the rule of evidence. He adds a significant statement that "to abolish the bulk of the rules would amount to little or nothing. You cannot by fiat legislate away the brain coils of one hundred thousand lawyers and judges; nor the traditions embedded in one hundred thousand recorded decisions and statutes. Anyone who

the logically accepted view, although there are theorists who have advanced the idea that any effort to construct a science of judicial proof will never be successful and cannot presently achieve results of any great value, and that what is needed most today is the simplification of the law of evidence and its adjustment to the untrained intelligence of jurors.[46] It is submitted and shall be assumed in the following discussion that there is a science of judicial proof, which can be analyzed and principles discovered, and that the present need is to classify these principles into a just and workable system founded in logic.

If, then, we admit there is a science of judicial proof compatible with logic, the two main axioms of admissibility upon which the system rests are: (1) That nothing is admissible unless it is relevant in the given case.[47] A proposition is relevant to another proposition when it is so related that according to the common course of events one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other,[48] when the one proposition implies the other;[49] (2) that whatever is relevant is admissible *unless* it is subject to one or another of the exclusionary or preferential rules or principles.[50] Here, the positive value of the

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knows our profession from within knows that it would be a vain dream to think of abolishing the rules of evidence, as a system, until all mature practitioners and judges now alive had passed into the grave. And in the meantime, since trials must go on, a new generation will have been bred into the same system." WIGMORE, TREATISE, p. 124.

46. See 33 COL. L. REV. 770.

47. WIGMORE states this maxim as none but facts having rational probative value are admissible.

48. STEPHENS, DIGEST OF EVIDENCE, Art. 1.

49. 34 COL. L. REV. 1463: "First, what is treated as proof in a trial must be logically correct, must satisfy the conditions imposed by the principles and rules of logic; second, that the ultimate probandum of every line of proof must be a material proposition. Third, that more than mere relevancy is required in the sense that the proposition whose admissibility is in question must prove a material proposition with a certain decree of probative force.

50. WIGMORE states the maxim as all facts having rational probative value are admissible unless some specific rule forbids.

Exclusionary rules serve two major ends: (1) To set up and maintain standards of probative force in judicial proof, and (2) To safeguard the trial,

material is weighed against its negative value—the advantage of having the evidence admitted is balanced against the disadvantage which may attend its use, such as the undue prejudice the adverse party may suffer, or his unfair surprise, or the confusion of issues, or the unnecessary prolongation of the trial.

Assuming that there is a "best evidence" rule, it would fall within this second maxim, as it requires what is regarded as the better or best of two or more proofs which can be made of the same *probandum*, better or best in the sense of greater probative force. The rule, as has been pointed out, is an exclusionary one, since it excludes some probativ materials in favor of others.

The best evidence" rule, then, would fit into these two basic maxims upon which any system or science of judicial proof must rest. It thus has some measure of justification in logic. Let us take for example, a case wherein A sues B in contract, B denying that he ever contracted with A. At the trial A offers in evidence a copy of the contract materially at issue. Testing the admissibility of the copy we find (1) that it is relevant and probative, that the existence and production of a copy renders probable the existence of an original, and that it should be admitted as bearing directly upon the point at issue, but the science of proof makes us examine further and we find that (2) although it is relevant, its admission is prohibited on the ground that experience has shown that a copy of the precise terms of a document is highly susceptible to errors, that it is open to doubts and disputes which the original excludes; that these doubts and disputes might unnecessarily prolong the trial, that a copy might unduly prejudice the adverse party—for a copy may lack many distinguishing features, such as handwriting, paper, etc., which may afford the opponent valuable means of learning ligitimate objections to the signifigance of the document. The copy is excluded and the original preferred for the above reasons. The "best evidence" rule would cover this situation and would justify its continued

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including the processes, both of proof and of persuasion, from fallacious inference and from improper estimation of the probabilities and the ultimate probanda. Insofar as the rules of evidence serve these ends, they should have a rational foundation in the principles of logic and the theory of probability. 34 COL. L. REV. 1462, *et seq.*

existence in a science of judicial proof, unless further reason can be found for its abandonment.

This reason can be found in an examination of other preferential rules of evidence, viz. the rule as to the *production of documents,* the *Hearsay Rule,* the rule of *preferential witnesses,* and certain *principles of substantive law.* These specific rules rest on their own foundation of principle and reason, each with its own precedent and history totally independent of the phrase "best evidence,"[51] and each accomplish the same end as the best evidence rule. These rules were not deducible from the principle implied in the phrase, but the phrase came to be used as descriptive of the rules already existing.[52]

A brief consideration of the above mentioned rules will bear out the submission that they produce the same result as the best evidence rule, more positively represent a concrete rule and are more conducive to a useful system of judicial proof than the loose and troublesome term "best evidence" which at its best seems unnecessary and uninstructive.

First, the rule that gives preference to documentary originals. Simply stated, it is that in proving a writing, production must be made, unless it is not feasible, of the original writing itself, whenever the purpose is to establish its terms.[53] Likewise, this rule has its justification in the concept that copies are open to doubt and dispute, and in reasonable and common fairness the original should be before the court. This rule has a history originating before the best evidence rule and, as the latter is now applied almost wholly to writings, the two are identical in the end achieved, with the former possessing a more concrete foundation. As applied to writings, there is nothing in the best evidence rule that can't adequately be taken care of by this rule of preference for documentary originals.

Secondly, the Hearsay Rule that no assertion offered as testimony can be received unless it is or has been open to cross-examination or an opportunity therefore.[54] Thus, testimony on the stand is "best" in the sense that it is not considered trustworthy until tested by cross-examina-

51. THAYER, *supra,* p. 489.
52. WIGMORE, 2nd ed., vol. 2, sec. 1174.
53. WIGMORE, STUDENTS EDITION, *supra,* p. 219.
54. *Ibidem,* p. 238.

tion. This is a familiar and well recognized rule of evidence, and today its connection with the best evidence rule has almost wholly disappeared from the reported cases.

Thirdly, there is a group of rules preferring one class of witnesses to another class. Thus, to take a familiar example, in proving a will, the testimony of one of the attesting witnesses is regarded as "best". This rule was frequently designated as the "best evidence" rule, and while modern instances are still found[55] it now stands alone as an individual rule of preferential evidence.

Fourthly, the phrase "best evidence," was employed in connection with certain established principles of substantive law. Perhaps, the best known of these is the *parol evidence rule,* which was often used in connection with the phrase "best evidence," but, as Dean Wigmore points out, this in truth is not a doctrine about preferred testimony but a doctrine of substantive law specifying what sort of transactions are to be treated as acts for the purpose of giving them legal effect.[56]

It is submitted that these rules of preferential evidence, being justifiable both historically and logically and being concrete and definite, should take the place of the best evidence rule in our system of judicial proof, and that the phrase about producing the best evidence that the nature of the case will admit should be discarded as more likely to confuse and hinder the development of a true science of evidence.[57]

TAXATION—JURISDICTION TO TAX INTANGIBLES—BUSINESS SITUS.—Well established at common law, the maxim *mobilia sequuntur personae* held the situs of all personal property for the purpose of taxation to be at the domicile of the owner,[1] or, in the case of a corporation, at

55. Pluckino v. Piccolo, 114 N.J.L. 82, 175 Atl. 812 (1934), where it was held that in an action to recover for wrongful death, where dependency was at issue, it was necessary that a witness who had direct knowledge of a material fact be produced, if available.

56. WIGMORE, 2nd ed., vol. 2, note 70, sec. 1174.

57. WIGMORE in his TREATISE conclude a discussion of the best evidence rule by saying the sooner the rule is wholly abandoned the better. *Ibidem.*

1. St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 78 U.S. 192 (1870); Note 62 A.S.R. 448.