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.

the place of incorporation.[2] This doctrine logically arose under the primitive conditions of the Middle Ages, when the bulk of an individual's property was generally carried with him on his journeys.[3] However, with changing economic conditions, the theory gradually developed that when an owner allowed his property to become so incorporated in a local business as to acquire a business situs, the state of that business situs had the power to tax. The court originating the doctrine justified it on the ground that the laws of the state in which a non-resident does business protect the wealth used in that business.[4] This reasoning was later supplanted by another; viz, that foreign wealth being in competition with domestic wealth should be subject to the same burden of taxation.[5] The first decision by the United States Supreme Court recognizing a business situs for taxing purposes,[6] was quickly applied by the several states to both tangibles and intangibles thus brought within their jurisdiction.[7]

An obvious result of the development of this new doctrine was the possibility of taxation by two states of the same property at the same time. Regarding tangibles, the Supreme Court has held that double taxation resulting from two states having the power to tax is violative of the Fourteenth Amendment of the Federal Constitution, in that it deprives the owner of his property without due process of law.[8] Such a holding necessitated the further decision as to which of the states able to tax could continue to do so; and with the cases of *Delaware, Lackawanna & Western R. R. Co. v. Pennsylvania*[9] and *Union Transit Co. v.*

2. Ohio R. Co. v. Wheeler, 1 Black 286, 17 L. Ed. 130 (1861); Note 69 L.R.A. 433.

3. Pullman's Palace Co. v. Pennsylvania, 141 U.S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613 (1890).

4. Colton v. Hill, 21 Vt. 152 (1849).

5. 2 COOLEY, TAXATION 465; 76 A.L.R. 806.

6. New Orleans v. Stemple, 175 U.S. 309, 20 Sup. Ct. 876, 35 L. Ed. 613 (1899).

7. 76 A.L.R. 806.

8. Delaware, Lackawanna & Western R.R. Co. v. Pennsylvania, 198 U.S. 341, 49 L. Ed. 1077 (1905); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 50 L. Ed. 150 (1905); Pullman Co. v. Kansas, 216 U.S. 56, 54 L. Ed. 379 (1910); Ludwig v. Western Union Telegraph Co., 216 U.S. 146 (1910).

9. 198 U S. 341, 49 L. Ed. 1077 (1905).

Kentucky,[10] it was established that the state in which the tangible was actually present could tax in preference to that of the owner's domicile.

Because of an inability to clearly recognize that fundamentally there should be no distinction between jurisdiction to tax tangibles and jurisdiction to tax intangibles the principle established in the above cases was never extended to intangibles. After the case of *Louisville and Jefferson Ferry Co. v. Kentucky*[11] holding that Kentucky could not tax ferry franchises granted to a Kentucky corporation by Indiana, the Supreme Court in a line of cases refused to apply the due process clause of the Fourteenth Amendment to intangibles.[12] Finally, applying it in a series of decisions not involving a business situs,[13] the court expressly reserved the question of jurisdiction to tax as between the state of domicile and the state of the business situs.[14]

This question was still open when, in *Newark Fire Ins. Co. v. State Board of Tax Appeals*,[15] the New Jersey court was called upon to decide whether New Jersey could tax the intangibles of a New Jersey corporation that had acquired a business situs in New York. Holding that, although the modern sentiment against double taxation expressed in the latest opinions of the United States Supreme Court raised a doubt whether the domiciliary state could tax when the business situs theory

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10. 199 U.S. 194, 50 L. Ed. 150 (1905).

11. 188 U.S. 385, 47 L. Ed. 513 (1903).

12. Hawley v. Malden, 232 U.S. 1, 58 L. Ed. 477 (1914); Fidelity & Columbia Trust Co. v. Louisville, 245 U.S. 54, 62 L. Ed. 145 (1917); Cream of Wheat Co. v. Grand Forks County N. D., 253 U.S. 325, 64 L. Ed. 931 (1920); Blodgett v. Silberman, 277 U.S. 1, 72 L. Ed. 749 (1928).

13. Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 50 Sup. Ct. 98, 74 L. Ed. 371 (1930); Baldwin v. Missouri, 28 U.S. 586, 50 Sup. Ct. 436, 74 L. Ed. 1056 (1930); Safe Deposit and Trust Co. v. Virginia, 281 U.S. 97, 50 Sup. Ct. 59, 74 L. Ed. 180 (1930); First National Bank of Boston v. Maine, 284 U.S. 312, 52 Sup. Ct. 174, 76 L. Ed. 313, 77 A.L.R. 140 (1932).

14. Farmers Loan and Trust Co. v. Minnesota, 280 U.S. 204, 213; First National Bank of Boston v. Maine, 284 U.S. 312, 331.

15. 118 N.J.L. 525, 193 Atl. 912 (1937) followed in {Univ. Indem. Ins. Co. / Univ. Insurance Co.} v. State Board of Tax Appeals, 118 N.J.L. 538, 193 Atl. 915 (1937); N. J. Insurance Co. v. State Board of Tax Appeals, 119 N.J.L. 245, 195 Atl. 719 (1937)

applied, it was bound by the *Cream of Wheat Case*,[16] the New Jersey court applied the ancient maxim *mobilia sequuntur personae*.

If the United States Supreme court should reaffirm this view when the situation is again properly presented to it, it would create an unjustified legal difference between two classes of personal property. It is submitted that jurisdiction to tax both tangibles and intangibles should be subject to the same rules. Neither should be subject to double taxation and, as in the case of tangibles, intangibles should be taxed where they are actually present. By their very nature intangibles are generally incapable of having a physical location since certificates and other *indicia* of ownership are merely evidence of wealth and not the wealth itself. However, in two instances, goodwill[17] and business situs, the intangible is deemed to have become so localized that it can be said to be physically present. In these cases that *locus* alone should be allowed to tax. If the intangible has not been "localized" it should be held to be present at the owner's domicile, and only the domiciliary state should tax.

LANDLORD AND TENANT — DUTY OF LANDLORD TO MITIGATE DAMAGES ON VACATION OF PREMISES BY TENANT BEFORE EXPIRATION DATE.—An interesting point in Landlord and Tenant law is raised by the recent case of *Carey v. Hejke*.[1] In holding that, when

16. 253 U.S. 325, 64 L. Ed. 931 (1920).

17. Adams Express Co. v. Ohio, 165 U.S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683 (1915).

1. 119 N.J.L. 594 (Sup. Ct. 1938). Plaintiff leased an apartment to defendant for a period of two months, by a written lease at a stipulated amount per month. The lease contained a clause that it should be considered as renewed from year to year at the end of the second month, unless either party gave a written notice of one month of intention to terminate on any yearly expiration date. No such written notice was ever given and defendant continued to occupy the apartment and pay the stipulated rent, until four months before the yearly expiration date, when he vacated and turned the keys over to the superintendent. The landlord entered into the apartment and redecorated it for the purpose of renting it and several months before the expiration date permitted another tenant to move in. In suit to recover rent for period when the apartment was unoccupied *held* when a tenant under lease vacates the premises prior to the proper termination thereof, the landlord has the *right* to re-enter and