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EVIDENCE — DEGREES OF SECONDARY EVIDENCE — PROBLEMS IN APPLICATION OF THE SO-CALLED "AMERICAN" RULE — Since 1710[1] the courts of the Anglo-American juridical system have been seeking a solution to the problem of the existence of degrees of secondary evidence. Those courts which have determined that there are degrees have been confronted with the second problem concerning the circumstances under which the secondary evidence rule will actually preclude the admission of the evidence offered. In the majority of decisions the courts have relied on precedent, or on statements of text writers, stripped of their context, and have failed to seek the solution in terms of the purposes for which rules of evidence have been devised. The result of this mechanical method has been complete confusion, not only when jurisdictional results are compared, but also when one attempts to align the decisions of a single jurisdiction.[2] An attempt will be made herein to analyze the decisions which have directly dealt with the problem, in terms both of the results reached and the reasons, if any, suggested by the courts; and then to determine, in so far as it is possible, which solution seems preferable in the light of the ends which the rules of evidence seek to serve.

The historical approach to the question divides jurisdictions into those adhering to the American rule and those holding to the English rule.[3] Such an approach, however, over-simplifies the problem by presupposing that there are but two distinguishable rules, and is grossly inaccurate in so far as it infers any geographical water-tight division.[4] Consequently, the writer proposes to discard this division, and to use, instead, an analytical approach. Thus, those courts which have concluded that, once the absence of the original is excused, all evidence not otherwise objectionable is admissible, and its insufficiency a matter of weight to be determined by the jury, will be grouped together as proponents of the "weight of evidence" rule.[5] In contradistinction are those courts which hold that, even after the original is accounted for, there are problems of admissibility which must be de-

[1] Sir Edward Seymour's Case, 10 Mod. 8, 88 Eng. Rep. 600 (1710).

[2] In New York and in Michigan the courts have reversed themselves, and subsequently have reversed themselves again without reference to their prior decisions Compare Van Dyne v. Thayre, 19 Wend. (N. Y.) 162 (1838), with Healy v. Gilman 1 Bosw. (14 N. Y. Super.) 235 (1857); Phillips v. United States Benevolent Society, 125 Mich. 186, 84 N. W. 57 (1900), with People v. Christian, 144 Mich. 247, 107 N. W. 919 (1906).

[3] 22 C. J. 1068 (1920); 20 AM. JUR. 365 (1939); 2 JONES, COMMENTARIES ON EVIDENCE, 2d ed., §§ 859-861 (1926); 2 WIGMORE, EVIDENCE, 2d ed., § 1268 (1925); 1 GREENLEAF, EVIDENCE, 16th ed., 563 (1899); 25 AM. & ENG. ENCYC. LAW, 2d ed., 162 (1903).

[4] See comparison of holdings and of jurisdictions, post.

[5] This is what is generally called "the English rule."

cided in terms of whether or not the evidence offered is the best available; this view will be referred to as the "admissibility" rule.[6]

I.

Preliminary to a more searching analysis of the rules, it would seem that a more or less cursory view of the divisions between and within jurisdictions would be of some benefit. From such an investigation one may discern which of the above suggested rules is supported by the numerical majority of the cases and courts; which view is supported by the better recognized courts; and what, if any, correlation is discernible between the date of the decision and the holding.

Clearly the majority of cases and of jurisdictions support the admissibility rule. Out of 182 cases and 37 jurisdictions dealing directly with the problem, 132 cases, and the most recent decisions in 28 jurisdictions, favor this rule. Eight jurisdictions appear to be actually committed to the admissibility rule,[7] while five states have shown tendencies, through two or three cases, in the same direction.[8] On the other hand, only five jurisdictions appear to be actually committed to the weight of evidence rule.[9] Ten jurisdictions have considered the problem only once, and of these only two have decided in favor of the weight of evidence rule.[10] Four jurisdictions, which have considered the problem only two or three times, have shown a marked tendency to vacillate,[11] as have five other jurisdictions which have considered the problem more often.[12]

[6] This group of more or less homogeneous rules is what is generally referred to as "the American rule."

[7] The federal courts, with fourteen decisions between 1804 and 1899; Alabama, with nine cases between 1847 and 1909; Arkansas, with five cases between 1840 and 1905; Georgia, by statute—Ga. Code Ann. (1935), § 38-213; Illinois, with eight cases between 1841 and 1908; Iowa, with five cases between 1859 and 1912; Missouri, with twelve cases between 1829 and 1932, although there was one case contra in 1906; and Pennsylvania, with five cases between 1821 and 1885.

[8] Maryland and New Jersey, by two decisions; Vermont, Virginia and Wisconsin, by three decisions.

[9] England, with nine cases between 1834 and 1858 and one case in 1807, although between 1710 and 1825 there were nine cases contra; Massachusetts, with eight cases between 1841 and 1936; Minnesota, with four cases between 1872 and 1907; Texas, with sixteen cases between 1851 and 1931; and Tennessee, with four cases between 1865 and 1906, although there was one case contra in 1896.

[10] Connecticut and Nebraska have held to the weight rule; Alaska, Kansas, Kentucky, Montana, North Dakota, Ohio, Philippine Islands, and West Virginia, contra.

[11] Maine and Mississippi holding to the weight theory in their most recent determination; Indiana and Louisiana contra.

[12] California, South Carolina and Michigan holding to the admissibility rule in their most recent decision (Michigan, however, by a four-four decision); New York and North Carolina concluding with the weight rule (New York's last decision, how-

In the eighteen jurisdictions which have passed on the question in the twentieth century, eight have, in at least one decision, favored the weight view.[13] However, three of these decisions were in states already committed to, or which had already tended toward, that view[14] and in three other jurisdictions the weight rule was subsequently departed from.[15]

In summary, both numerically and with regard to the time of the decisions, the tendency of the courts is toward the admissibility rule. However, it must not be overlooked that two of the most respected jurisdictions, England and Massachusetts, are committed to the weight rule, and two others, Michigan and New York, have wavered from one view to the other.

2.

The doctrine that the admissibility of secondary evidence is merely a question of weight, to be determined by the jury, has been much favored by the text writers[16] and appears to be in accord with what is considered "the modern interpretation of the best evidence rule."[17] The rule was probably never more lucidly stated than by Lord Abinger, C.B., in *Doe v. Ross*,[18] wherein he held that:

> "there are no degrees of secondary evidence. ...if you cannot produce the original, you may give parol evidence of its contents. If indeed the party giving such parol evidence appears to have better secondary evidence in his power, which he does not produce, that is a fact to go to the jury, from which they might sometimes presume that the evidence kept back would be adverse to the party withholding it. But the law makes no distinction between one class of secondary evidence and another."

No little disparity may be noted in the reasons the courts have suggested for adherence to this rule in preference to one of the admissibility rules, where any reason has been given at all. The English courts have

ever, was preceded by four decisions holding to the admissibility rule, to which decisions the court did not refer in its last decision).

[13] Massachusetts, Michigan, Minnesota, Missouri, New York, North Carolina, South Carolina and Texas.

[14] Massachusetts, Minnesota and Texas.

[15] Michigan, Missouri and South Carolina.

[16] 2 PHILLIPS, EVIDENCE, 10th Eng. ed., 568 (1859); 1 GREENLEAF, EVIDENCE, 16th Am. ed., 563 (1899); for further citations see Birdseye, "Degrees of Secondary Evidence," 6 WASH. L. REV. 21 (1931).

[17] Birdseye, "Degrees of Secondary Evidence," 6 WASH. L. REV. 21 (1931). The writer suggests in that article that the modern interpretation of the best evidence rule is that it is intended merely to insure the utilization of primary evidence, if it is available.

[18] 7 M. & W. 102, 151 Eng. Rep. 696 at 698 (1840).

held that, as all secondary evidence is, by definition, inferior in weight and importance to primary evidence, it is all equally admissible;[19] that the best evidence rule is only intended to exclude evidence which presumes better evidence, and that secondary evidence, by its very nature, never presumes that better evidence exists, hence, the reason for the rule failing, the rule should not apply;[20] and that the difficulty of requiring the proponent always to account for all better secondary evidence would be too great.[21] A New York decision, in refusing to apply the admissibility rule, based its decision on the fact that a copy is merely another form of parol evidence and hence equally admissible.[22] In a Michigan decision it was held that, the object of the best evidence rule being to preclude inaccuracies, and no evidence being inherently more inaccurate than any other, except that all secondary evidence was less accurate than the original, there was no reason to apply the exclusion rule except to favor the original.[23] A Maine decision defined the best evidence rule as a rule excluding only evidence of a substitutionary nature when the original was available, and, by this definition, prevented the rule from applying as between different categories of secondary evidence.[24] The South Carolina court decided that, as the only purpose of secondary evidence was to show the contents of the original, all evidence should be equally admissible to serve this end.[25] Only one decision appears to have attempted to analyze the question in terms of the objects that evidentiary rules, as such, are intended to serve.[26] In that case it was suggested by Lipscomb, J., that:

> "the rule sanctioned by Greenleaf [the weight rule] is more philosophical, and harmonizes better with the progress of the more enlightened jurisprudence of the age on the subject of the admissibility of evidence; that is, to curtail and limit the objections to the competency, and let the evidence in, to go to the jury to judge of its weight or credibility."[27]

Most of these reasons, of course, assume the conclusion by determining the result through defining the best evidence rule so as to

[19] Doe v. Wainwright, 5 Ad. & E. 520, 111 Eng. Rep. 1262 (1836).

[20] Parke, B., in Doe d. Gilbert v. Ross, 7 M. & W. 102, 151 Eng. Rep. 696 (1840); accord Osborne v. Ballew, 7 Ire. Law (29 N. C.) 415 (1847).

[21] Alderson, B., in Doe d. Gilbert v. Ross, 7 M. & W. 102, 151 Eng. Rep. 696 (1840).

[22] Rosenbaum v. Podolsky, 97 Misc. 614, 162 N. Y. S. 227 (1916).

[23] Elliott v. Van Buren, 33 Mich. 49 (1875).

[24] State v. McDonald, 65 Me. 466 (1876). The statement made, though seeming to be a reason, may actually be merely the result of a strict application of the best evidence rule.

[25] Beaty & Co. v. Southern Ry., 80 S. C. 527, 61 S. E. 1006 (1908).

[26] Lewis v. San Antonio, 7 Tex. 288 (1851).

[27] Ibid., at 315-316.

exclude the possibility of applying it to this problem. However, the practical difficulties facing the application of the admissibility rule to secondary evidence and the desirability of letting such questions go to the jury, when combined with the simplicity of the treatment afforded by the weight view, should weigh heavily in favor of the latter view.

Under the weight rule, parol evidence has been held admissible despite the existence of a counterpart,[28] a copy,[29] a memorandum,[30] contemporaneous notes,[31] a copy with a subscribing witness,[32] a letter press copy,[33] a copy of telegram given to the transmitter,[34] books similar to the original,[35] or a certified copy.[36] Shorthand notes have been held admissible though an attested copy was in existence;[37] copies of letter press copies have been held admissible without explaining the absence of the letter press copies;[38] certified copies have not been barred by the existence of the book of register;[39] an office copy did not preclude the admission of a book into which portions of the instrument had been copied, when supplemented by parol evidence;[40] and a private copy was held admissible despite the existence of a registrar's copy,[41] or the original receipt.[42]

Clearly, once it has been determined to apply the weight rule, its application presents no problems. If the absence of the original is accounted for, any evidence not inadmissible because of some other rule of evidence may be offered; if there is better evidence within the con-

[28] Hall v. Ball, 3 Man. & G. 242, 133 Eng. Rep. 1133 (1841).

[29] Brown v. Woodman, 6 Car. & P. 206, 172 Eng. Rep. 1209 (1834); Fitzgerald v. Williams, 24 Ga. 343 (1858).

[30] Kensington v. Inglis, 8 East. 273, 103 Eng. Rep. 346 (1807); Boggs v. Lakeport Agr. Park Assn., 111 Cal. 354, 43 P. 1106 (1896).

[31] Jeans v. Wheedon, 2 M. & Rob. 486, 174 Eng. Rep. 357 (1843); State v. McDonald, 65 Me. 466 (1876).

[32] Eslow v. Mitchell, 26 Mich. 500 (1873).

[33] People v. Christian, 144 Mich. 247, 107 N. W. 919 (1906).

[34] Magie v. Herman, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660 (1892).

[35] Rawlings v. Y. M. C. A., 48 Neb. 216, 66 N. W. 1124 (1896).

[36] McNeely v. Pearson, (Tenn. 1896) 42 S. W. 165; Simpson v. Edens, 14 Tex. Civ. App. 235 (1896).

[37] Doe d. Gilbert v. Ross, 7 M. & W. 102, 151 Eng. Rep. 696 (1840).

[38] Goodrich v. Weston, 102 Mass. 362, 3 Am. Rep. 469 (1869); Robertson v. Lynch, 18 Johns. (N. Y.) 451 (1821).

[39] Stetson v. Gulliver, 2 Cush. (56 Mass.) 494 (1848).

[40] Commonwealth v. Smith, 151 Mass. 491; 24 N. E. 677 (1890).

[41] Osborne v. Ballew, 7 Ire. Law (29 N. C.) 415 (1847).

[42] Patterson & Co. v. Gulf, C. & S. F. Ry., (Tex. Civ. App. 1910) 126 S. W. 336. Copy of receipt admitted, though original was known to exist. It was not barred by parol evidence rule because it was only a receipt and it was held at page 337 "as there are no degrees of secondary evidence, it would seem that the copy . . . was admissible."

trol of the proponent, the jury may consider that fact in determining the weight to be given the evidence.

3.

The admissibility rules are not so easily disposed of. Throughout the discussion it must be kept in mind there are not one but a number of rules, differing in their determination of the circumstances under which evidence may be held inadmissible because of the unexplained absence of preferred evidence. At one extreme is a mere blanket application of the best evidence rule to any secondary evidence offered, requiring the proponent to account for the absence of all higher degrees of better evidence before the evidence offered will be admitted.[43] At the other extreme is the rule, followed by the federal courts, that no evidence will be received which, "from the nature of the thing," presupposes greater evidence behind it, in the party's possession; all other evidence, not otherwise inadmissible, being acceptable.[44] In between these rules may be found any number of holdings which follow the general outline of the federal rule with added circumstances under which the evidence will be refused. For example, one group of courts applies the rule when the existence of better evidence is divulged either by the nature of the thing, or by the objecting party, if the objecting party further shows that the preferred evidence might have been produced.[45] Again, it has been suggested that the rule will be applied if the existence of the better evidence is shown in the nature of the case, in the offer itself, or in the circumstances surrounding the offer.[46] While in the normal case it is immaterial to the result which of these rules is followed, it may often happen that evidence admitted under one rule will be held inadmissible under another. However, as a matter of convenience, all those rules which do not require the proponent to account for the better evidence in every case will, for the purposes of this discussion, be grouped together under the more or less flexible title of

[43] Kello v. Maget, 1 Dev. & B. (18 N. C.) 414 (1835); Redd v. State, 65 Ark. 475, 47 S. W. 119 (1898); Mercier v. Harnan, 39 La. Ann. 94, 1 So. 410 (1887); Lazzaro v. Maugham, 10 Misc. 230, 30 N. Y. S. 1066 (1894); Hobbs v. Beard, 43 S. C. 370, 21 S. E. 305 (1894).

[44] Tayloe v. Riggs, 1 Pet. (26 U. S.) 591 (1828); United States v. Britton, 21 Mason 464, 24 Fed. Cas. No. 14,650 (1822). The phrase "from the nature of the thing" often is found in other decisions in the Latin form "in natura res." E.g., Jaques v. Horton, 76 Ala. 238 (1884).

[45] Jaques v. Horton, 76 Ala. 238 (1884); Doe ex dem. Vaughn v. Biggers, 6 Ga. 188 (1849); Robinson v. Singerly Pulp and Paper Co., 110 Md. 382, 72 A. 828 (1909).

[46] Healy v. Gilman, 1 Bosw. (14 N. Y. Super.) 235 (1857).

"the liberal rule."[47] Actually the liberal rules do have a common basis; that is, the feeling which motivated Thompson, J., in *Renner v. Bank of Columbia*:[48]

> "Every case of this kind must depend, in a great measure, upon its own circumstances. This rule of evidence must be so applied as to promote the ends of justice, and guard against fraud or imposition."

Four major trends are to be found in the reasoning of the courts which adopt one of the admissibility rules. The first, and most easily disposed of, is the group which accepts the rule blindly on the basis of weight of authority or precedent.[49] The second group adds little to the picture, merely considering their ruling a logical offshoot of the rule which precludes secondary evidence until the primary evidence is accounted for.[50] The third group has found that the same reasons which make necessary the preference for primary evidence, at least under some circumstances, result in a preference for one type of secondary evidence over another. Thus the propriety of refusing to admit "the uncertain memory of a witness," where the party offering this evidence had in his possession an examined copy, appealed to the Alabama court, in 1856,[51] while in 1884 it was the fact that positive proof of the existence of better evidence subjected the proponent to the same imputation of fraud that is raised by presumption where primary evidence is withheld.[52] Other courts have found that the application of one of the admissibility rules results in a greater probability of accuracy[53] and less likelihood of injustice.[54] Still other courts have felt that the failure to introduce the better evidence results in the presumption that the better evidence would be adverse to the proponent.[55] And at least one court has justified the rule simply because it insures the most durable and unchangeable evidence.[56] The fourth group, however, presents what is probably the most convincing argument of all; an argument which, even though statistics are not feasible, seems to be most

[47] The term "liberal rule" appears to be the invention of Story Birdseye in his article "Degrees of Secondary Evidence," 6 WASH. L. REV. 21 (1931).

[48] 9 Wheat. (22 U. S.) 581 at 596 (1824).

[49] Scrivner v. American Car & Foundry Co., 330 Mo. 408, 50 S. W. (2d) 1001 (1932).

[50] Omychund v. Barker, 1 Atk. 22, 26 Eng. Rep. 15 (1744).

[51] Harvey v. Thorpe, 28 Ala. 250, 65 Am. Dec. 344 (1856).

[52] Jaques v. Horton, 76 Ala. 238 (1884).

[53] Davies v. Pettit, 11 Ark. 349 (1850).

[54] Mariner v. Saunders, 10 Ill. 113 (1848).

[55] Galbraith v. Starks, 117 Ky. 915, 79 S. W. 1191, 25 Ky. L. Rep. 2090 (1904).

[56] Kello v. Maget, 1 Dev. & B. Law (18 N. C.) 414 (1835).

firmly founded on reality. This is the argument so ably stated by Clark, J., when giving the holding of the court in *Baroda State Bank v. Peck*:[57]

> "If the business man of today were asked, What is the best evidence of a lost original letter? his ready response would be: The copy. And it is. The conflict in our own and in other cases is due to a refinement of reasoning which refuses to recognize degrees of secondary evidence. The common-sense rule of the business world should be followed."

4.

Having determined that one of the admissibility rules is applicable, and having determined under what circumstances the rule is to be applied, still a third problem confronts the court: what are the degrees of secondary evidence? No simple division such as that which divides primary and secondary evidence is available. At the outset the courts are in complete accord that this is not merely a question of weight or probative value. That is, no court assumes that as between every possible combination of available evidence, one will always be preferable to another. Testimony of one witness is never excluded merely because another witness might know the facts better[58] or because another witness is more credible or reliable.[59] Rather, the courts divide secondary evidence into broad categories and hold that the admission of evidence in one class will be allowed, unless the offeror could produce evidence from a higher class. Within the class itself, differences are mere matters of weight to be determined by the jury.[60]

The earliest attempt to determine such a classification appears to have been that of Hardwicke, C.J., in *Villiers v. Villiers*,[61] wherein it was held that:

> "If an original deed is lost the counterpart may be read, and if there is no counterpart forth-coming, then a copy may be admitted, and if there should be no copy, there may be parol evidence of the deed."

In general this classification has been accepted by those courts adhering to the admissibility rules.[62] However, occasional deviations or additions are not uncommon. Thus in the federal courts it would seem

[57] 235 Mich. 542 at 549, 209 N. W. 827 (1926).
[58] Governor v. Roberts, 2 Hawks (9 N. C.) 26 (1822).
[59] State v. McDonald, 65 Me. 466 (1876).
[60] See cases cited in notes 58 and 59, supra.
[61] 2 Atk. 71, 26 Eng. Rep. 444 (1740).
[62] Ludlam's Case, Lofft. 362, 98 Eng. Rep. 695 (1763); Coman v. State, 4 Blackf. (Ind.) 241 (1836); Governor v. Roberts, 2 Hawks. (9 N. C.) 26 (1822).

that the copy must be an examined copy to be given this priority.[63] Other courts have subdivided copies so that a certified or examined copy is given priority over a letter press copy,[64] and a duly attested copy over a sworn copy.[65] Other courts have suggested more or less comprehensive classifications of their own. Thus, by statute, Georgia gives a duplicate priority over a copy, and an examined copy is preferred to parol evidence.[66] A few states have classified the evidence as: counterpart, compared copy, abstract and parol.[67] And, at least one jurisdiction holds that the order of admissibility is: subscribing witness, proof of handwriting, and other circumstances.[68] As a result of these cases it would seem that Greenleaf's[69] conclusion, that the rule merely prefers certified or examined copies of public records, and written copies of private instruments over parol, and that there is no preference for a certified copy over a sworn or examined copy, is either an oversimplification or an antiquated viewpoint, and in many states the statement is treated as either incomplete or totally untrue.

In those states which apply one of the liberal rules, still another problem is presented in determining under what circumstances the existence of preferred evidence will be presumed. As a general rule, where better evidence would normally exist if a public officer had fulfilled his duties, its existence will be presumed.[70] The authorities are split as to whether or not there is a presumption that a merchant keeps a copy of his letters.[71] Outside of these two classes of cases, how-

[63] United States v. Britton, 22 Mason 464, 24 Fed. Cas. No. 14,650 (1822); Riggs v. Tayloe, 9 Wheat. (22 U. S.) 483 (1824); Stebbins v. Duncan, 108 U. S. 32, 2 S. Ct. 313 (1882).

[64] Jaques v. Horton, 76 Ala. 238 (1884); Ford v. Cunningham, 87 Cal. 209, 25 P. 403 (1890).

[65] Jones v. Levi, 72 Ind. 586 (1880).

[66] Ga. Code Ann. (1935), § 38-213.

[67] Healy v. Gilman, 1 Bosw. (14 N. Y. Super.) 235 (1857); Kello v. Maget, 1 Dev. & B. Law (18 N. C.) 414 (1835).

[68] Hobbs v. Beard, 43 S. C. 370, 21 S. E. 305 (1894).

[69] 1 GREENLEAF, EVIDENCE, 16th ed., § 563, at p. 700 (1899).

[70] Copy of enrollment, Stillingfleet v. Parker, 6 Mod. 248, 87 Eng. Rep. 995 (1705); protocol, McPhaul v. Lapsley, 20 Wall. (87 U. S.) 264 (1873); court records and reports, Blackman v. Dowling, 57 Ala. 78 (1876), Dunn v. State, 2 Ark. 229, 35 Am. Dec. 54 (1840), and Hilts v. Colvin, 14 Johns. (N. Y.) 182 (1817); recorder's office copy, Mercier v. Harnan, 39 La. Ann. 94, 1 So. 410 (1887), Johnson v. Ashland Lumber Co., 52 Wis., 458, 9 N. W. 464 (1881); receipt of territorial treasurer, Smith v. Pacific Alaska Airways, (C. C. A. 9th, 1937) 89 F. (2d) 253; copy, exemplified or otherwise, of statutes of another state, People v. Lambert, 5 Mich. 349 (1858).

[71] Dennis v. Barber, 6 Serg. & R. (Pa.) 420 (1821), holds there is such presumption; contra, Cleveland etc. Ry. v. Newlin, 74 Ill. App. 638 (1897).

ever, it would seem that the existence of preferred evidence will not be presumed unless it must necessarily be in existence.[72]

No useful purpose would be served by a complete analysis of the evidence held inadmissible under these rules: once it has been determined which of the admissibility doctrines the court will adhere to, what the degrees of evidence are in the jurisdiction, and what presumptions the court will recognize, the rule is virtually self-executing. However, the problem of when evidence will be admitted, after the court has determined that better evidence may exist, presents certain interesting aspects. In general, the treatment is the same as that used when the proponent seeks to introduce secondary, as opposed to primary, evidence. Whether or not the evidence is admissible is a preliminary question for the judge, not subject to review on appeal unless it appears that the trial judge abused his discretion.[73] It is essential that the proponent prove either that what appears to be a higher degree of secondary evidence is not in fact such[74] or that, for one reason or another, the better evidence is not within his power to produce.[75] At an early date it was held that, when the original was in the possession of the objecting party, the proponent could introduce any secondary evidence, even under the admissibility rule, on the theory that if the objecting party was wronged by the evidence introduced, he need only produce the original.[76] Later opinions, however, have departed from this holding and it now seems that only the production of the original is thereby excused, and the proponent must still produce the best evidence in his power.[77] Search[78] and notice to produce[79] are both as essential to overcome the necessity of producing the higher degree

[72] The leading case so limiting presumptions is Renner v. Bank of Columbia, 9 Wheat. (22 U. S.) 581 (1824), in which the court refused to presume the existence of a notarial copy of a promissory note.

[73] Hobbs v. Beard, 43 S. C. 370, 21 S. E. 305 (1894).

[74] 25 AM. & ENG. ENCYC. LAW, 2d ed., 162 (1903); Harvey v. Thorpe, 28 Ala. 250; 65 Am. Dec. 344 (1856).

[75] Proof of death of subscribing witnesses has been held sufficient to allow proof by comparison of handwriting, where the former is preferred evidence. Ludlam's Case, Lofft. 362, 98 Eng. Rep. 695 (1763). Testimony of a subscribing witness has been held admissible where the proponent showed loss of his counterpart, and the objecting party did not bring his into court, after notice to produce. Riggs v. Tayloe, 9 Wheat. (22 U. S.) 483 (1824). Where a certified copy was preferred to a sworn copy, the latter was admitted after a showing that the original had been lost so as to prevent the making of a certified copy. New York Car Oil Co. v. Richmond, 6 Bosw. (19 N. Y. Super.) 213 (1860). Parol evidence of a court record was held admissible on a showing that all that was left of the record was the docket entry. Harvey v. Thomas, 10 Watts (Pa.) 63 (1840).

[76] Sir Edward Seymour's Case, 10 Mod. 8, 88 Eng. Rep. 600 (1710).

[77] Mattocks v. Stearns, 9 Vt. 326 (1837).

[78] Rhind v. Wilkinson, 2 Taunt. 238, 127 Eng. Rep. 1068 (1810).

[79] Tobin v. Roaring Creek & C. R. R., (C. C. Pa. 1898) 86 F. 1020.

of secondary evidence, once the conditions precedent to the application of the rule have been fulfilled, as they are in admitting secondary evidence in the first instance.

Reduced to their simplest terms, then, the admissibility rules hold that, when the absence of the original is accounted for, if the court determines that, under the circumstances, a better class of evidence would normally exist, the party offering the evidence must fulfill substantially the same requirements that would confront him if he were seeking to introduce secondary evidence of the contents of a written instrument.

5.

In considering which of the two broad doctrines, the weight theory or the admissibility theory, should be supported by the courts, it is essential that one keep in mind that neither doctrine carried out to its logical extreme will give a satisfactory result. Clearly one's sense of justice is not satisfied when parol evidence is admitted, while the party testifying is carrying an established copy in his pocket; nor by the rejection of answers to written interrogatories, on the ground that the interrogatory failed to establish the non-existence of letter-press or other copies, or explain their absence. Yet over-emphasis on the desirability of letting all evidence be admitted, and subjecting it to the jury's judgment as to its weight caused the former result,[80] and the latter was the ultimate result of an attempt to give effect to the business man's concept of what constitutes the best evidence.[81] Weighing in favor of the weight rule is its simplicity of application; in favor of the admissibility rule a feeling that the jury's judgment as to the weight to be afforded the evidence will not be accurate where the proponent has, under circumstances giving rise to at least a suspicion of fraud, withheld better evidence within his control.

Between these two extreme positions lies the field of the liberal admissibility rules. Here, in the majority of cases, the simple weight rule will be applied; however, where a taint of fraud is suspected, the court may require an explanation for the failure to produce the preferred evidence and, if such an explanation is not forthcoming, may reject the questionable evidence. Such a rule was applied by Slossen, J., in *Healy v. Gilman*,[82] when he said:

"I do not mean to contend that there are any arbitrary or in-

[80] Allowed in Fitzgerald v. Williams, 24 Ga. 343 (1858), under the weight rule.

[81] Interrogatory rejected on this ground in Lazzaro v. Maugham, 10 Misc. 230, 30 N. Y. S. 1066 (1894).

[82] 1 Bosw. (14 N. Y. Super.) 235, at 242 (1857).

> flexible degrees of secondary evidence, rendering it necessary for a party, who is driven to that description of proof, to show affirmatively, in every instance, that there is no higher degree within his power, than the one he offers; but I think it may be safely said, that where it appears in the very offer, or from the nature of the case itself, or from the circumstances attending the offer, that the party has better and more reliable evidence at hand, and equally within his power, he shall not be permitted to resort to the inferior degree first."

It is submitted that such a rule will best serve to protect a party from losing his case either because of unnecessary technicalities or because of the withholding of valuable evidence by the other party, and will allow the court to determine, with a minimum number of collateral issues, the true nature of the contents of a lost document.

William H. Klein