Washington Law Review

Volume 6 | Number 1

2-1-1931

Degrees of Secondary Evidence

Story Birdseye

DEGREES OF SECONDARY EVIDENCE

Introduction

One of the most ancient of all legal doctrines is the "best evidence rule," although originally it had a much broader meaning than at present. According to the early view, it meant that only the best evidence which could be produced was admissible, it was applicable to all classes of evidence and not confined to documents. In its modern application, however, the best evidence rule amounts only to the requirement that the contents of a written instrument must be proved by the introduction of the writing itself, unless its absence is satisfactorily accounted for. The reason for this law of evidence is obvious—the original is the primary evidence of its own contents and precludes the inaccuracies that might appear in copies or parol testimony, it serves as a protection against fraud and mistake.

This interesting development of such an important rule has resulted in great confusion as to what the term "best evidence" signifies. Whereas it was originally interpreted quite literally, it has now come to have an altogether different meaning—one not in harmony with the connotation of its title. By substituting the word "primary" for the word "best," a more accurate descriptive term is had, and it is in this sense that the expression "best evidence" is used in this article.

The loss or destruction of a writing, if satisfactorily shown, opens the door for the admission of what is known as secondary evidence of its contents. This type of proof is that which is not the original but tends to prove the contents of the latter.[1] Such evidence is allowed because it is impossible to produce the original and if its contents are to be proved at all it must be by resorting to other proof thereof, which is necessarily of an inferior grade.

But when one has proven circumstances justifying the introduction of secondary evidence, must he produce the very best obtainable or will any proof be sufficient? For instance, must he produce a written copy of the original if it exists, or may he, notwithstand-

[1] *In Youroveta Home and Foreign Trade Company* (1924) 297 Fed. 723.

ing the existence of such a copy, give parol testimony of the contents of the document? To require the production of the copy is to say that there are degrees of secondary evidence, while to adopt the other position is to assert that no such degrees exist—that any kind of secondary evidence is equally admissible. The latter is known as "the English rule," while the contrary doctrine is designated as "the American rule." It must be borne in mind, however, that these terms have very little significance, as there are decisions supporting each rule to be found in both the English and American reports.

The English Rule

The court, in the leading English case of *Doe d. Gilbert v. Ross* (1840)[2], clearly states the rule credited to that country, saying

> "We think there are no degres of secondary evidence. The rule is, that if you cannot produce the original, you can 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 should be adverse to the party withholding it. But the law makes no distinction between one class of secondary evidence and another."

This rule, as applied in the United States, is the best illustrated by the Massachusetts case of *Goodrich v. Weston* (1869),[3] in which the court spoke as follows

> "When the source of original evidence is exhausted, and resort is properly had to secondary evidence, the contents of private writings may be proved, like any other fact by indirect evidence. The admissibility of evidence offered for this purpose must depend upon its legitimate tendency to prove the facts sought to be proved, and not upon the comparative weight or value of one or another form of proof. The jury will judge of its weight and may give due consideration to the fact that a more satisfactory one exists and is withheld, or not produced, when it might readily have been obtained. But there are no degrees of legal distinction in this class of evidence."

As illustrations of this view it has been held that, to prove a marriage settlement, a shorthand writer's notes of a former trial at

---

[2] 7 Mees & W 102, 10 L. J. Ex. 201.
[3] 102 Mass. 362, 3 Am. Rep. 469.

which the settlement was proved admissible, even though a copy is in court[4] that if the testimony of a deceased witness is to be proved, any person who heard the testimony may be called, although the latter was accurately taken down by a stenographer[5], that a party may give parol evidence of the contents of a lost letter, though it is shown that he has a copy in his possession[6], that parol evidence of the contents of an insurance policy is admissible, even though a copy is obtainable[7] that a copy of a copy may be introduced, though the latter was in the possession of the same person[8], that parol testimony of the contents of a bond may be given notwithstanding the fact that a copy is known to exist[9], and that a power of attorney may be proved by verbal testimony, although the party introducing the evidence could have produced a copy[10]

This rule has the support of such writers as Starkie,[11] Phillips,[12] Browne,[13] Chamberlayne,[14] Stephen,[15] Best,[16] McKelvie,[17] Taylor,[18] and Greenleaf [19] who advance the argument that a contrary holding (that there are degrees of secondary evidence) confounds all distinction between the weight of evidence and its legal admissibility Their theory is that the best evidence rule is founded upon the nature of the evidence offered and not upon its strength or weakness—that primary evidence should be required if available, and if not, that secondary proof should be accepted, its weight to be determined by the judge or jury Hence they say that all so-called "degrees" of secondary evidence are equally admissible, but that their weight may vary according to the circumstances surrounding their introduction and their tendency to prove the facts involved. Thus, if a party introduces parol evidence of the contents of a deed when he is shown to have a copy in his possession, this is a fact to be considered by the court in determining the weight of the evidence offered.

---

[4] *Supra* note 2.
[5] *Jeans v. Wheedon* (1843), 2 Moody & R. 486.
[6] *People v. Christian* (1906), 144 Mich. 247, 107 N. W 919.
[7] *Protection Life Ins. Co. v. Dill* (1878), 91 Ill. 174.
[8] *Cameron v. Peck* (1871), 37 Conn. 555.
[9] *Carpenter v. Dame* (1858), 10 Ind. 125.
[10] *Eslow v. Mitchell* (1873) 26 Mich. 500.
[11] Starkie on Evidence (9th Am. Ed.), p. 498.
[12] 2 Philips on Evidence (10th Eng. Ed.), p. 568.
[13] Browne, Short Studies in Evidence, p. 145.
[14] 1 Chamberlayne on Evidence, p. 610.
[15] Stephen's Digest of the Law of Evidence (2nd Am. Ed.), p. 191.
[16] 2 Best on Evidence (1st Am. Ed.), p. 820.
[17] McKelvie Hornbook on Evidence (2nd Ed.), p. 433.
[18] Taylor on Evidence.
[19] 1 Greenleaf (15th Am. Ed.) p. 129.

It is insisted that the American rule often tends to the subversion of justice and always is productive of inconvenience. For example, if proof of the existence of an abstract of a deed will exclude oral evidence of its contents, this proof may be withheld by the adverse party until the moment of the trial, and the other side be defeated, or the cause greatly delayed thereby To eliminate this danger the supporters of the English doctrine urge that a party should be allowed to put in such proof as he can or desires to produce, its weight to be determined by its nature and the circumstances surrounding its introduction. Thus, if one is surprised at the time of trial by being informed of the existence of better secondary evidence, he is not unduly penalized, while if he suppresses such evidence himself, he must suffer the effect of the presumption which his actions raise.

The American Rule

The American rule is well illustrated by the leading case of *Harvey v Thorpe* (1856),[20] in which the court says

> "Although the facts may warrant the admission of secondary evidence, the best kind of that character of evidence which appears to be in the power of the party to produce must be offered."

The United States Supreme Court has stated the rule as follows

> "Proof of the contents of a lost paper ought to be the best the party has in his power to produce, and, at all events, such as to leave no reasonable doubt as to the substantive parts of the paper."

Some of the states, however, while asserting that there are degrees of secondary evidence, are more liberal in their application of the rule, holding that when the nature of the case does not of itself disclose the existence of better secondary evidence, a party will not be required to produce the latter unless it can be shown that he knew of its existence.[22] This is a compromise rule developed to meet the argument raised by the supporters of the English doctrine and it must be admitted that it at least overcomes some of the practical objections to the strict interpretation of the American theory, at least it prevents embarrassing situations and delays

[20] 28 Ala. 250, 65 Am. Dec. 344.
[21] *Renner v. Bank of Columbia* (1824) 9 Wheat. 581, 6 L. Ed. 166.
[22] 1 Greenleaf on Evidence (15th Ed.) p. 130.

caused by surprise. However, it cannot be denied that it is a departure from the reasoning underlying the American rule—that the "next best evidence" obtainable must be produced. This interpretation of the law will be referred to in this article as the liberal application of the American rule.

The following decisions, among others, illustrate the theory that there are degrees of secondary evidence, where it is proved that a copy of a will can be produced, parol evidence of its contents is inadmissible[23], an offer to prove the contents of a letter by parol was held to be properly rejected where it appeared from the proofs that the plaintiffs had in their possession a *facsimile* of the original letter which they failed to produce[24], where a copy of a note can be produced, parol evidence is improper[25], parol evidence of the contents of a deed is admissible when a copy is available[26], and oral testimony cannot be resorted to to prove the contents of an insurance policy when a copy can be obtained.[27]

It cannot be denied that the American rule savors strongly of the "next best evidence doctrine" — the theory underlying the original "best evidence rule." Wigmore seems to favor it in a modified form,[28] while Jones argues vigorously for its adoption.[29] However, it should be noted that Jones is one of the few modern writers who still clings to the old interpretation of the best evidence law.

The arguments advanced in support of the theory that there are degrees of secondary evidence are all consistent with the ancient theory that one must produce the best evidence of which the case, in its nature, is susceptible. It is claimed that it follows as a necessary corollary from this proposition that if certain species of secondary evidence be manifestly better and more likely to contain a true account of what was in the original than others, a party ought not to be allowed to resort to the latter until his incapacity to produce the former be demonstrated. A copy, the correctness of which is sworn to by a witness who has compared it with the original, is far more to be relied on, it is urged, than the mere memory of that witness as to the contents of the latter, both on

---

[23] *The Illinois Land & Loan Co. v. Bonner* (1874), 75 Ill. 315.
[24] *Stevenson v. Hoy* (1862), 43 Pa. 191.
[25] *United States v. Britton* (1822) 24 Fed. Case. No. 14,650, 2 Mason 464.
[26] *Supra* note 20.
[27] *Cummings v. Penn. Fire Ins. Co.* (1911), 153 Ia. 579, 134. N. W 79, 37 L. R. A. (n.s.) 1169, Ann. Case 1913E 235.
[28] 2 Wigmore on Evidence (2nd Ed.), p. 903.
[29] 2 Jones on Evidence (2nd Ed.), p. 1563.

account of the comparative imperfection of all verbal testimony, when compared with written, and also that, in such a case, the utmost which any witness under ordinary circumstances can be expected to remember of the contents of a writing in which he is not interested is its leading features, he is not likely to recall conditions, limitations, or particular words used in it, which might, however, have a most material effect in altering or qualifying its meaning.

Strange as it may seem, although practically all the text writers prefer the English rule, a majority of the courts of the United States, which have passed on the question, have adopted the American theory An examination of the cases in which the problem is considered reveals the fact that this question, although an important one, has received but little consideration. Very frequently courts have adopted the statement of some text writer as to what the law is without even considering the relative merits of the two doctrines, and often even without bothering to apply the doctrine of *stare decisis,* all of which has resulted in a hopeless conflict in the holdings of the various courts on this problem. It is to be noted that quite a few of the American courts have adopted the so called English rule, and it should be borne in mind that the geographical names of the two doctrines have no correlation with the jurisdictions in which they are applied.

All the states which have passed on the question are enumerated herein according to the rule which they have adopted. No effort has been made to exhaust the authorities for some of the states and if there are more than three or four decisions in any one jurisdiction in which the question is definitely settled, only the latest, best considered, and most representative ones are cited.

States Following the English Rule

The English rule, that there are no degrees of secondary evidence, has been adopted by the following states

The Supreme Court of California first held that oral evidence of the contents of letters was inadmissible when press copies were available.[30] However, in a later case they concluded that, in the absence of the minute book of a board of directors, "any competent secondary evidence" was admissible to show what the act of the board was, oral evidence was accepted when rough minutes were available.[31]

[30] *Ford v. Cunningham* (1890), 87 Cal. 209, 25 Pac. 403.

[31] *Boggs v. Lakeport Agricultural Park Assn.* (1896), 111 Cal. 354, 43 Pac. 1106.

In a MAINE case it was held that where the record of a partition had been destroyed by fire, the partition was provable by oral evidence, without requiring the demandant to show that an "authenticated copy," authorized by statute, was not in existence.[32]

MASSACHUSETTS has consistently followed the English doctrine, their first case having held that a copy of a copy is equally as admissible as the latter itself.[33] *Goodrich v. Weston* (1869),[34] is probably the leading case in the United States supporting this doctrine. In it the decisions and authorities are reviewed and the conclusion reached is the result of a very scholarly treatment of the question. The principle has been followed in subsequent decisions.[35]

This question has received more attention in MICHIGAN than in any other state. It was held that if a copy could be obtained, parol evidence was inadmissible.[36] Fifteen years later the court switched to the English rule,[37] but in the next case [38] the American theory was applied. This same doctrine was also followed a few years later, though two judges dissented.[39a] Notwithstanding these two consecutive rulings, five judges of the Supreme Court, in *People v. Christian* (1906),[39] boldly stated that "there are no degrees of secondary evidence." That the state is hopelessly confused on the question is shown by the recent case of *Baroda State Bank v. Peck* (1926),[40] where the decision of the lower court upholding the American rule was affirmed by necessity, four judges concluded that Michigan was committed to the English doctrine, while the others insisted that a copy should be required in preference to parol evidence.

In MINNESOTA there are but two decisions, these being squarely in conflict. In the first case the court adopted the English rule, saying:

> "One kind of secondary evidence may be more satisfactory evidence than another, but it is no more admissible than any other secondary evidence."

---

[32] *Nason v. Jordan* (1873), 62 Me. 480.
[33] *Stetson v. Gulliver* (1848), 2 Cush. 494.
[34] *Supra* note 3.
[35] *Commonwealth v. Smith* (1890), 151 Mass. 491, 24 N. E. 677.
[36] *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49 (1858).
[37] *Supra* note 10.
[38] *Dillon v. Howe* (1893), 98 Mich. 168, 57 N. W 102.
[39a] *Philips v. United States Benevolent Society* (1900), 125 Mich. 186, 84 N. W 57.
[39] *Supra* note 6.
[40] 235 Mich. 542, 209 N. W 827.
[41] *Smith v. Hurd* (1892) 50 Minn. 503, 52 N. W 922, 36 A. S. R. 660.

A few years later the same court switched to the other extreme and followed the strict American doctrine by stating the law to be that[42]

> "In case of loss or destruction (of an instrument) only the highest grade of secondary evidence obtainable will answer the requirements of the law This is the only safe rule."

NEBRASKA has committed itself to the theory that there are no degrees of secondary evidence.[43]

In the first NEW YORK case[44] the Supreme Court adopted the American rule. The most thoroughly reasoned decision in that jurisdiction is *Reddington v. Gilman* (1857),[45] in which the Superior Court, after an extensive review of the authorities, likewise held that there are degrees of secondary evidence and applied the liberal rule. The only other decision is a recent holding of the Supreme Court in which no decisions or authorities are cited, but the court states that he is "not aware of any rule of law that makes a distinction of grade in secondary evidence."[46] While this adoption of the English rule is the most recent decision in the state on the question, it may well be criticized for its utter lack of research and reasoning.

NORTH CAROLINA, in the first case in which the question arose, adopted the American rule without discussion,[47] and apparently followed it a few years later, holding that if a copy is obtainable, oral evidence of the contents of a written document is inadmissible.[48] However, this decision is based on a quotation from *Starkie on Evidence*,[49] and that learned writer, in his next sentence (which is not quoted), says that, "there are no degrees of secondary evidence." This court later definitely adopted the English rule, saying[50]

> "There are no degrees (of secondary evidence) When a party is entitled to give such evidence, he may give any species of it at his pleasure."

SOUTH CAROLINA has followed its sister state in holding that

---

[42] *Windom v. Brown* (1896) 65 Minn. 394, 67 N. W 1028.
[43] *Rawlings v. Y M. C. A.* (1896), 48 Neb. 216, 66 N. W 1124.
[44] *Niskayuna v. Albany* (1824), 2 Cow. 537.
[45] 14 N. Y. Super. Ct. Rep. 235.
[46] *Rosenbaum v. Podolsky* (1916) 97 Misc. Rep. 614, 162 N. Y. Supp. 227.
[47] *Dumas v. Powell* (1831) 14 N. C. 103.
[48] *Kello v. Maget* (1835) 18 N. C. 413.
[49] Ninth American Edition, p. 496.
[50] *Osborne v. Ballew* (1847) 29 N. C. 415.

"there is no division of degrees of proof in case of the loss of an instrument."[51]

There are many decisions in TEXAS that deal with this problem and all have consistently followed the English rule.[52]

STATES FOLLOWING THE AMERICAN RULE

The American rule, or the theory that there are degrees of secondary evidence, is supported by a majority of the jurisdiction, as follows

The UNITED STATES SUPREME COURT, in the leading case of *Renner v. Bank of Columbia* (1824),[53] adopted this doctrine, saying that "proof of the contents of a lost paper ought to be the best the party has in its power to produce." In a subsequent application of the rule they said that the reason for it was "to promote the ends of justice and guard against fraud, surprise, and imposition."[54] In other decisions of this court,[55] as well as in the determinations of the lower federal courts,[56] this same strict interpretation of the law has been applied.

The ALABAMA case of *Curry & Haynee v. Robinson* (1847)[57] well illustrates the application of the liberal interpretation of the American rule. In that decision the court interpreted the law to be

> "that if from the nature of the case itself, it is manifest that a more satisfactory kind of secondary evidence exists, the party will be required to produce it, but when the nature of the case does not of itself disclose the existence of such better evidence, the objector must not only show that there is such better evidence but must also prove that its existence was known to the party offering the inferior sort."

However, this decision seems to have been overlooked by the court in deciding the much quoted case of *Harvey v. Thorpe* (1856),[58] and the comparatively recent one of *Powers v. Hatter* (1907),[59] which hold that "the best kind of (secondary evidence) which

---

[51] *Beatly v. Southern Ry. Co.* (1908), 80 S. C. 527, 61 S. E. 1006.
[52] *Simpson Bank v. Smith* (1908), 52 Tex. Civ. App. 349, 114 S. W 445, *Barclay v. Deyerle* (1909), 53 Tex. Civ. App. 236, 116 S. W 123; *Rich Furniture Co. v. Smith* (1918), 202 S. W 99.
[53] *Supra* note 21.
[54] *Cornett v. Williams* (1873) 20 Wall. 226, 22 L. Ed. 254.
[55] *McPhaul v. Lapsley* (1874), 20 Wall. 264, 22 L. Ed. 344.
[56] *Supra* note 25.
[57] 11 Ala. 266.
[58] *Supra* note 20.
[59] 152 Ala. 636, 44 So. 859.

appears to be in the power of the party to produce must be offered." Both cases clearly apply the stricter American doctrine.

The Supreme Court of ARKANSAS, in a long and well reasoned decision,[60] adopted the more liberal interpretation of the American rule, and has applied it in all subsequent decisions. In two interesting cases they refused to allow the introduction of parol testimony of the contents of lost documents because the law required copies of such instruments to be made and filed and these presumably could have been produced.[61]

As previously mentioned, the CALIFORNIA decisions are in conflict on this question.[62]

GEORGIA has committed itself to the strict interpretation of the American rule,[63] saying that "there are degrees in secondary evidence, and that the best should always be produced."[64]

The Supreme Court of ILLINOIS has adopted the American theory in its strict sense,[65] stating that "where the highest evidence can not be had, then resort can be had to the next highest or secondary evidence.[66] But in the case of *Protection Life Inc. v. Dill* (1878),[67] parol testimony of the contents of an insurance policy was admitted, it appearing by the record that a copy was in court in custody of the adverse party However, the question of degrees of secondary evidence was not specifically passed on in the decision.

INDIANA started out by adopting the English rule in *Carpenter v. Dame* (1858),[68] the only authorities cited being English cases. This decision was apparently overlooked the next time the question arose for the court then unhesitatingly committed itself to the theory that

> "where a record is lost, its contents may be proved, like the contents of any other document, by the best available secondary evidence."[69]

This strict interpretation of the American rule was also applied in *Barnett v. Lucas* (1901),[70] and the state now seems to be definitely committed to that doctrine.

---

[60] *Davies v. Pettit* (1850), 11 Ark. 349.
[61] *Redd v. State* (1898) 65 Ark. 475, 47 S. W 119· *Kelley v. Laconia Levee Dist.* (1905) 74 Ark. 202, 85 S. W 249.
[62] *Supra,* page 11 herein.
[63] *Bowden v. Archer* (1895) 95 Ga. 243, 22 S. E. 254.
[65] *Supra* note 23.
[66] *Ellis v. Huff* (1862) 29 Ill. 449.
[67] *Supra* note 7.
[68] *Supra* note 9.
[69] *Jones v. Levi* (1880) 72 Ind. 586.
[70] 27 Ind. App. 441, 61 N. E. 683.

IOWA has consistently followed the American rule in its strict application from the very first.[71] The well considered decision of the court in *Cummings v. Pennsylvania Fire Ins Co.* (1911),[72] is one of the leading cases on the subject.

LOUISIANA adopted the same theory in *Mercier v. Harnan* (1887),[73] in which the court made the very broad and inaccurate statement that the American doctrine is.

> "an elementary principle of the laws of evidence, found in every work on evidence, and so completely consecrated by established jurisprudence as to dispense with any citation of authorities to support it."

As previously mentioned, the decision of both MICHIGAN[74] and MINNESOTA[75] are in conflict on this question, and it is impossible to say which theory will finally be adopted by either state.

MISSOURI has always applied the strict American rule and as early as 1829 we find the expression:[76]

> "To admit secondary evidence, it must, under the circumstances, not only appear to be the best, but it must be the best legal evidence."

This doctrine is still applied in the more recent decisions.[77]

MONTANA has adopted this same theory,[78] as had NEW JERSEY,[79] the latter having accepted it as early as 1832.

Although the best reasoned decisions in NEW YORK, as previously explained,[81] have followed either the strict or the liberal interpretation of the American rule, the latest case involving the question[82] adopted the English theory without question or argument.

While there is some authority in NORTH CAROLINA supporting the American doctrine,[83] a review of the authorities seems to justify

---

[71] *Horseman v. Todhunter* (1861), 12 Ia. 230; *Higgins v. Reed* (1859), 8 Ia. 298, 74 Am. Dec. 305.
[72] *Supra* note 27.
[73] 39 La. Ann. 94, 1 So. 410.
[74] *Supra*, page 12 herein.
[75] *Supra*, page 12 herein.
[76] *Philipson v. Bates* (1829), 2 Mo. 116, 22 Am. Dec. 305.
[77] *Martin v. Brand* (1904), 182 Mo. 116, 81 So. 443; *Zimmerman v. Bottom Produce Co.* (1917) 192 S. W 1038.
[78] *Belk v. Meagher* (1878), 3 Mont. 65 (affirmed 104 U. S. 279, 26 L. Ed. 735).
[79] *Rice v. Rice* (1892), 25 Atl. 321.
[80] *Smith v. Axtel* (1832), 1 N. J. Eq. 494.
[81] *Supra*, page 13 herein.
[82] *Supra* note 46.
[83] *Supra* notes 47 and 48.

its classification with those states which hold that there are no degrees of secondary evidence.[84]

The question has only been considered once in OHIO, at which time the strict American rule was followed.[85]

This view of the law has likewise been adopted by PENNSYLVANIA, having been consistently followed in all its decisions.[86]

TENNESSEE is another state which has aligned itself with those who support the strict interpretation of the American theory [87] In the first case involving the question to arise in that jurisdiction the court said[88] "The best secondary evidence the nature of the case will admit of" is required.

The first VERMONT decision followed the strict American rule,[89] but in a later case and the only other one involving the problem, the court adopted the liberal interpretation, though still holding that there were degrees of secondary evidence.[90]

Th only VIRGINIA decision in which the question is even mentioned does not definitely pass on the point, but seems to indicate that the court favors the American rule.[91]

WISCONSIN has also definitely committed itself to this theory, applying the rule in its liberal form.[92]

CONCLUSION

It is to be noticed that WASHINGTON is one of several states which has not yet passed on this question, and it is impossible to say which doctrine will eventually be adopted.

An analysis of the theory of each of the two rules shows that the so-called English theory is in harmony with the modern interpretation of the best evidence rule, while the doctrine credited to this country is obviously only an extension of the old original conception of that rule. It is interesting to note that, even in spite of this queer anomoly and the further fact that practically all the writers on evidence have favored the English rule, a majority of

---

[84] *Supra*, page 14 herein.
[85] *Diehl v. Stine* (1886) 1 O. Cir. Dec. 287, 10 Ct. Ct. Rep. 515.
[86] *Kerns v. Swope* (1883) 2 Watts. 75, *supra* note 24.
[87] *State v. True* (1906) 116 Tenn. 294, 95 S. W 1028; *Southern Ry. Co v. Seymour* (1904) 113 Tenn. 523, 83 S. W 675.
[88] *Galbraith v. McFarland* (1866) 3 Cald. 267, 91 Am. Dec. 281.
[89] *Mattocks v. Stearms* (1837) 9 Vt. 326.
[90] *Durkee v. Vermont Cent. R. Co.* (1856) 29 Vt. 127.
[91] *Pendleton v. Commonwealth* (1834) 4 Leigh. 694, 26 Am. Dec. 342.
[92] *Sexsmith v. Jones* (1861, 13 Wis. 565· *Johnson v. Ashland Lumber Co.* (1881) 52 Wis. 458, 9 N. W 464.

the states have adopted the American theory and insist that there are degrees of secondary evidence.

The explanation of this may be that in many of the jurisdictions the courts first passed on the question before the best evidence doctrine was reduced to its final form and so fell into the natural error of thinking that the best obtainable evidence was always required, irrespective of whether it was primary or secondary in nature. Some judges have also probably been mislead by the inaccurate term, "American rule."

While the function of this article is only to explain both sides of this question, and not to determine which is the most desirable or most satisfactory rule, we will say that it might well be contended that, if the problem were to arise today as an original proposition in these same courts, the decisions of those who follow the American doctrine might very well be otherwise—that the so-called English theory would probably be adopted as one more consistent with the modern interpretation of the best evidence rule.

STORY BIRDSEYE.*

*Of the Seattle Bar.