The second substantial ground advanced by the Council in this case, was that if they were to seal the plans, the area, the frontage and depth of the allotments would fall below the minimum required under clause 804 (b), and this was prohibited by clause 803 of the Uniform Building Regulations which provides:

> When a building has been constructed on any site, the width of frontage, depth and area of such site shall not thereafter be reduced to less than the minimum width of frontage, depth and area respectively prescribed by these regulations, or by a by-law of the municipality for a building of the same class or occupancy.

His Honour, having pointed out that nowhere in the Regulations is 'site' defined, and that 'building' is defined as including a part of a building, thought that the question turned not on in whom the title was vested but, in the language of clause 804 (b) whether the site appertained exclusively to the building in question. Here, notwithstanding that the title to the residual land would be vested in the service company, there was no doubt that the site would be 'exclusively appertaining to such building'.

The remaining contention of the Council was that within the meaning of section 569 (5) (a) of the Local Government Act 1958, the Council could not be satisfied that 'every allotment site which such land is to be subdivided, is capable of being used for a purpose permitted by' such regulations. His Honour thought this argument untenable. Even if he were prepared to hold that clause 804 (b) prohibited future reconstruction of, or alterations to, the allotment, this would not establish that they could not now be used for a purpose permitted by the regulations. He was not, however, purporting to decide that clause 804 (b) would so apply.

Thus Adam J. was able to hold that the plan of subdivision should have been sealed by the Council. The decision, although not remarkable, must have caused flat builders much relief.

J. G. LARKINS

COMMISSIONER FOR RAILWAYS (N.S.W.) v. YOUNG[1]

Evidence—Best evidence rule—Application of rule to inscribed chattels —Purpose of testimony

The deceased, Young, was killed when he attempted to board a train as it moved from the Town Hall Station in Sydney. His widow accordingly framed her action alleging negligence on the part of the employees of the Commissioner for Railways.

The defendant sought to argue that the injury was caused, not by the negligence of its servants, but rather by the intoxicated state of the deceased which caused him to slip as he entered the moving vehicle. To put this case on its feet, evidence was sought to be adduced that a sample of the deceased's blood had been taken by a Dr Sheldon and on testing by Mr McDonald, the senior analyst in the Department of Public Health,

[1] (1962) 35 A.L.J.R. 416. High Court of Australia; Dixon C.J., Kitto, Taylor, Menzies and Windeyer JJ.

it was found to contain a significant percentage of alcohol. Counsel for the defendant at the trial, therefore, brought forward Mr McDonald as his first witness. This witness was allowed to state that he had received and examined a sample of blood at the relevant date, but an objection to his identifying the sample by reference to his journal was upheld by the learned trial judge.[2]

Subsequently, Dr Sheldon was called to state that he had taken a sample from the deceased and that he had put it in a sealed bottle and had labelled it. Counsel then asked Dr Sheldon whether he had written anything on the label, and received an affirmative reply. The examination continued:

Counsel: What?
Dr Sheldon: I should say that . . . (objected to).
Counsel: You did write something?
Dr Sheldon: Yes.[3]

It is not clear whether or why the question or the answer was objected to.

Mr McDonald was then recalled and he gave evidence that he had received a bottle containing a sample of blood. The seal was intact and there was a label on it. He positively identified the writing on the label as that of Dr Sheldon, but was not allowed to continue. The reason given by Clancy J. was that there had been a break in the chain of identification.

The question raised by the case, assuming that the intoxication of the deceased was relevant to the issue of the defendant's negligence,[4] was whether the evidence of Mr McDonald as to the identity and nature of the contents could be admitted. Admission was objected to on two main grounds, first that it was immaterial,[5] and secondly that, if material, it was inadmissible as a result of the best evidence rule.

The argument as to materiality was put alternatively in two ways. First, that the method chosen by Counsel to prove identity was not sufficiently certain to enable him to proceed to the next step in his case; that is, the proof of alcohol content; and secondly, that, since Dr Sheldon's evidence was not sufficient to show what he had written on the bottle, it was open to the learned judge to infer that he was unable to prove this step.

The former was the argument which found favour with the majority of the Full Court of the Supreme Court of New South Wales.[6] Identity of the bottle in the hands of Dr Sheldon with that in the hands of Mr McDonald could be shown either by tracing the steps by which the article passed from one to the other,[7] or by positively identifying the two

[2] Clancy J.

[3] (1962) 35 A.L.J.R. 416, 420 *per* Taylor J. quoting from the transcript.

[4] The relevance of the deceased's state of intoxication or sobriety was assumed or stated by all the learned judges of the Full Court and by all the learned judges of the High Court except Kitto J., who said that the sole question presented by the evidence was 'whether the train moved off while the deceased was attempting to board it or whether he attempted to board it when it was already in motion'. (1962) 35 A.L.J.R. 416, 420.

[5] The terminology is that of Professor Montrose, 'Basic Concepts of the Law of Evidence' (1954) 70 *Law Quarterly Review* 527, who distinguishes materiality, relevancy and admissibility.

[6] [1961] N.S.W.R. 745 *per* Brereton J. at 748, and *per* Ferguson J. at 755.

[7] This is the normal method adopted wherever possible by prosecutors in matters of this nature.

objects as one and the same by a description of their distinguishing characteristics. It was this latter method that was adopted by the defendant in the instant case, and which, according to two of the learned judges of the New South Wales appellate court,[8] may not be sufficiently certain to permit further evidence to be admitted, evidence whose materiality depended on the establishing of the identity of the samples.

This point was expressly rejected by Menzies and Windeyer JJ. who agreed that the identification by description method was not as certain as the other, and that it led to a conclusion of probable identity only. But the learned judges stated that this probability would be sufficient to discharge the burden on the defendant, and would entitle the matter to be put to the jury for them to draw their own conclusions:

> The question was simply: was it the same sample of blood? That would be for the jury to say, if there were any evidence before them. It was not something that had to be proved beyond reasonable doubt, nor was it necessary that every possibility that it was not the same blood should have been eliminated.[9]

The second argument for rejection on the ground of materiality, the one which, coupled with the final decision of Kitto J., finally dismissed the defendant's appeal, was founded on the conduct of Counsel for the defendant in not pursuing the examination of Dr Sheldon as to the contents of the label. From the transcript quoted above, it is not clear why the line of questioning was not persisted in. The answer was rejected either because the question violated the best evidence rule, or because of its hesitant form, and in the latter event the question was not pressed merely for prudential reasons. Dixon C.J. alone considered that the former was the sole reason for the rejection; the remaining judges[10] noted the ambiguity, and two of them, Windeyer and Taylor JJ., gave the latter reason full consideration.

In the absence of full evidence as to the contents of the label by Dr Sheldon, it is clear that Mr McDonald's testimony was immaterial, and therefore inadmissible:

> In the present case it may not have become clear beyond dispute that the appellant was unable to prove through Dr Sheldon what it was that he had written on the label. But a fruitless attempt was made, without objection to any question, to establish what it was. There the matter was left and in my view it was open to the learned trial judge to conclude that proof of this vital link was beyond the appellant.[11]

This leaves the most important consideration raised by the case, namely the argument based on inadmissibility, since evidence of the contents of the label, a document, could not, it was submitted, be admitted unless it was primary evidence, that is by production of the label itself.

The rule of evidence, said to be the *one* general rule of evidence,[12] that

[8] Brereton and Ferguson JJ.
[9] (1962) 35 A.L.J.R. 416, 425 *per* Windeyer J.
[10] Except Kitto J.
[11] (1962) 35 A.L.J.R. 416, 421 *per* Taylor J.
[12] *Omichund v. Barker* (1744) 1 Atk. 21, 49 *per* Lord Hardwicke.

'a man must have the utmost evidence the nature of the fact is capable of'[13] springs from two sources, from the old pleading doctrine of profert, and from the common law principle that the written word itself is more reliable than man's memory of it.[14] This general rule which in its hey-day was applied by some judges to every form of proof,[15] assumed its present form in 1820, when Abbott C.J., delivering the opinion of the judges to questions proposed by the House of Lords in legislative proceedings, stated that

> . . . they found their opinion upon what, in their judgment, is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence.[16]

And none of the learned judges of the Full Court nor the High Court was prepared to dissent from this principle.

A peculiar problem, however, is raised by the application of this principle to the instant fact situation. The rule does not apply to chattels: failure to produce a chattel in question affects merely the weight that may be attached to a party's case.[17] A court is then faced with the task of distinguishing a document from a chattel—a task which experience has shown to be a difficult one.[18] The difficulty arises from the fact that words inscribed on any material can be used in the same ways as words inscribed on paper, and further, the problem is exacerbated by the fact that meaning can be likewise conveyed by symbols other than words.[19]

To resolve this difficulty Dixon C.J. placed documents on one side, chattels uninscribed on the other, and then considered the best evidence rule in relation to inscribed chattels.[20]

After an examination of the cases which considered this intermediate category, His Honour concluded that the application of the best evidence rule was confined to 'documents the written contents of which amount to what may be called an instrument or writing which, because of the significance of what it expresses, has some legal or evidentiary operation

[13] *Gilbert on Evidence* (2nd ed. 1760) 4.

[14] For a full treatment of the history of the best evidence rule see *Wigmore on Evidence* (3rd ed. 1940) iv, 307 ff. and Thayer, *Cases on Evidence* (2nd ed. 1900) 778 ff.

[15] In 1802 Lord Ellenborough went so far as to call in the doctrine of best evidence to support his ruling that where an eye witness was not called, circumstantial proof will not be admitted to show facts which could have been 'better' proved. *Williams v. East India Company* (1802) 3 East 192.

[16] *The Queen's Case* (1820) 2 Br. & B. 284.

[17] (1962) 35 A.L.J.R. 416, 419 *per* Dixon C.J. This principle is to be preferred to that of Lord Kenyon in *Chenie v. Watson* (1797) Peake Add. Cas. 123 and of the Scottish text *Glassford on Evidence* (1820) 266, who would have applied the best evidence rule in all its pristine extensiveness. See too *Hocking v. Ahlquist Bros. Ltd* [1944] K.B. 120.

[18] Glanville Williams, 'What is a Document?' (1948) 11 *Modern Law Review* 150. This article is concerned with a definition in the context of forgery, but it illustrates the basic difficulty seen by *Wigmore, op. cit.* 321.

[19] Thus one can find cases as irreconcilable in principle as *Lewis v. Hartley* (1835) 7 Car. & P. 405, and *The Queen v. Fell* (1879) 2 S.C.R. (N.S.) N.S.W. 109, where animals were sought to be described by natural markings and brands respectively. In this area of inscribed chattels, the cases do not appear to show any consistency at all. *Wigmore, loc. cit.* and cases cited therein.

[20] (1962) 35 A.L.J.R. 416, 419-420.

or effect material to the case';[21] that is to say, the rule has *no* application in matters concerning inscribed chattels, which, for this purpose at least, are subject to the ordinary rule for chattels set out above.

Although no reason was given for such a conclusion, it would appear that it can be rationalized on the ground that the best evidence rule owes its origins to a society a large proportion of whose members were illiterate. Nowadays, there is scarcely any doubt that witnesses will normally recall the substance of writing sufficiently accurately for most purposes, so the rule should be extended no further than is absolutely necessary. In the case of instruments, however, whose contents are often long and technical, it may still be unwise to rely on mere recollection, especially in matters where this recollection may be vital to the issue.[22]

The reason for exempting inscribed chattels from such a requirement would seem to be that in most cases an accurate recollection is not required; in the difficult case of *Regina v. Hunt*,[23] nothing turned on the exact wording of the seditious banners, while in the doubted case of *Cowan v. Abrahams*,[24] where the plaintiff admitted that any variance between the instrument so set out in the declaration and the true one would non-suit him, Lord Kenyon would not admit parol evidence of the contents of the bill of exchange. In a modern context, however, it is perhaps not difficult to imagine an action in which the precise wording of an inscription on a chattel could be important,[25] and it is interesting to conjecture what the learned Chief Justice would rule as to admissibility in an action on a contract the contested details of which were roughly pencilled on a cut-off piece of timber as some builders are wont to do.[26]

Accordingly, it is submitted that a preferable approach is that employed by Windeyer and Menzies JJ., inasmuch as it avoids the difficult distinction between instruments and other writings.

These judgments are couched in terms of writings generally, whatever be their nature, content or the material on which they are inscribed.[27] Once an object can be given meaning by virtue of an inscription, the question that must be asked is what is the purpose for which it is

[21] *Ibid.*

[22] Thus in libel cases the precise wording will be all important to show innuendo; *Boyle v. Wiseman* (1855) 11 Ex. 360, but not to show publication: *Rex v. Johnson* (1805) 7 East 65, 66. *Aliter* where it is sought to be shown that the instrument merely existed or was wrongfully retained: *e.g. Bucher v. Jarratt* (1802) 3 B. & P. 143 *per* Rooke J.; *Whitehead v. Scott* (1830) 1 M. & Rob. 2. (*Cowan v. Abrahams* (1793) 1 Esp. 50, seems wrongly decided inasmuch as it denies this principle.) And see *per* Windeyer J. (1962) 35 A.L.J.R. 416, 423. *Aliter* also where it is sought to be shown that a certain fact is *not* contained in the instrument: *The Queen v. Shield* (1866) 5 S.C.R. (N.S.W.) 213, and perhaps *Slatterie v. Pooley* (1840) 6 M. & W. 664, and *Williams v. Russell* (1933) 149 L.T. 190. See generally Nokes, *An Introduction to Evidence* (2nd ed. 1956) 417 and cases cited therein.

[23] (1820) 3 B. & Ald. 566.

[24] (1793) 1 Esp. 50.

[25] One can imagine an action in contract to enforce the negotiable cow of Albert Haddock: *Board of Inland Revenue v. Haddock* reported by A. P. Herbert, *Uncommon Law* (1955) 201, and even more readily, a *Boyle v. Wiseman* (*supra* note 22) situation but where the libel is published on a chattel.

[26] Perhaps the solution could be found by describing the wood as a document, but in this event the problem initially faced rises again but in a different form, for this makes a mockery of the learned Chief Justice's definition of 'document'.

[27] (1962) 35 A.L.J.R. 416, 424 and 422 respectively.

tendered.[28] Where the writing is relied on for its meaning, then it must be treated as a document and produced; but where 'words or figures appearing on something or at some place are referred to merely as marks distinguishing that thing or place, secondary evidence of them may be given without any need to explain the absence of primary evidence'.[29] The correctness of this principle is revealed by considering as did Ferguson J. in the Full Court,[30] that the actual wording on the label was irrelevant to the question of whether the same words, hence label, hence bottle, hence contents were in the hands of Dr Sheldon and Mr McDonald at the relevant times.

Thus the principle that parol evidence is admissible to show the identity of two writings is clearly not an exception to the best evidence rule, but merely flows from a close examination of its true nature. It is not an exception in the way that the admission of the contents of collateral documents is an exception, in that the latter is a qualification of the strict rule in the interests of convenience to 'the ends of justice'. This true exception which admits a brief but not exhaustive summary of the contents of writings which are unlikely to be disputed, or are not the subject of any important issue in the case exists in some jurisdictions of the United States,[31] but is of doubtful validity in the English common law systems,[32] and was not in issue in the instant case.

Clear as the principles may be, the query of Pollock C.B. in *Lawrence v. Clark*[33] is still a nagging one. 'The difficulty is, how do you prove the identity but by the contents?'[34] In the Full Court, Owen J. raises the same objection,[35] while Brereton J. phrases it in a different way:

> If what was written was a text from Shakespeare, it might perhaps be thought unlikely that Dr Sheldon would write the same text on every sample, and if so, there would be some evidence of identity, but if it were shown that, in fact, he wrote the same text on every sample, the value of the evidence would be completely destroyed. It seems to me therefore, that we are concerned not merely with the marking on the label as a series of pothooks and ciphers, but with its text and meaning.[36]

The judgment of Menzies J.[37] in reply to this objection, contains the memorable *dictum* of Martin B. in *Boyle v. Wiseman*,[38] where the learned

[28] This, despite a *dictum* of Maule J.: 'The objection has nothing to do with the purpose for which the thing is given in evidence; that relates to the medium of proof.' *Regina v. Hinley* (1843) 1 Cox C. C. 12, 13.

[29] (1962) 35 A.L.J.R. 416, 425 *per* Windeyer J. A purist may wish to fault this exposition on the ground that such parol evidence of identity is in fact primary and not secondary evidence: *Boyle v. Wiseman* (1855) 11 Ex. 360, 368 *per* Martin B.; *Lucas v. Williams* [1892] 2 Q.B. 113.

[30] The dissenting opinion on this point, [1961] N.S.W.R. 745, 753.

[31] *Wigmore op. cit.* 481-485; McCormick, *Handbook of the Law of Evidence* (1954) 412, and see *Coonrod v. Madden* (1890) 126 Ind. 197.

[32] *Wigmore op. cit.* 482. Some authors, however, use the word 'collateral' for what might be more properly placed under the heading of 'writings adduced to prove other than content': See for example, *Taylor on Evidence* (12th ed. 1931) i, 282.

[33] (1846) 14 M. & W. 250. [34] *Ibid.* 253. [35] [1961] N.S.W.R. 745, 747.

[36] *Ibid.* 751. This accords with the opinion of *Wigmore op. cit.* 467: 'the ruling will depend upon whether in the case in hand greater emphasis and importance is to be given to the detailed marks of peculiarity or to the document as a whole regarded as an ordinary describable thing.'

[37] (1962) 35 A.L.J.R. 416, 423. [38] (1855) 11 Ex. 360, 367.

Baron states that the reading of the words is irrelevant; the terms of the content have not been proved by parol evidence of the meaning of the instrument. In the instant case, the fact that the label contained the deceased's name does not, of course, advance one step the argument that the sample was from *his* body. A similar distinction was drawn in the old case of *Cotton v. James*,[39] where Lord Tenterden admitted certain letters in bankruptcy proceedings on the ground that they proved not the truth of the facts contained (that, as in the instant case, would be hearsay), but rather that the defendant was apprised that these facts existed, that is, the letters showed his state of mind.

Nor is this distinction, albeit a nice one, inconsistent with the basis of the best evidence rule, for Mr McDonald would have deceived no one but himself if he recalled inaccurately the contents of the label, for then the identification would surely have failed, and with it the widow's claim.

D. M. BYRNE

[39] (1829) M. & M. 273.