

# RULES OF EVIDENCE IN PRELIMINARY CONTROVERSIES AS TO ADMISSIBILITY

JOHN MACARTHUR MAGUIRE AND CHARLES S. S. EPSTEIN

## I

"In *preliminary rulings* by a judge on the admissibility of evidence, the ordinary rules of evidence do not apply . . ." <sup>1</sup> Thus Professor Wigmore compactly states the proposition which we propose to examine. The English writer Best says, with respect to preliminary inquiries made and decided by the judge, "it seems the better opinion that, for the purpose of determining such collateral questions, the judge is not restricted to *legal evidence*".<sup>2</sup> Phipson's admirable treatise on evidence also advances the view that "the better opinion is that the judge is not confined to strictly legal evidence, but may rely, e.g. on affidavits . . ." <sup>3</sup> But Taylor, speaking of the possibility of using affidavits in such preliminary matters, says: "This course, however, though highly convenient, is of questionable legality, and the doubt on the subject has not been cleared up by the Rules".<sup>4</sup>

None of the quotations above should be taken to mean that *every* rule of evidence goes by the board in these preliminary judicial inquiries. The mere shift from ultimate to introductory questions and from jury to judge furnishes no cause for discarding such doctrines as the marital privileges and incompetencies, the privilege against self-incrimination, the privilege protecting state secrets, or the lawyer-client privilege. All these doctrines are supposed to guard interests which would suffer as greatly from forced public revelations to a judge as from like revelations to a jury.<sup>5</sup> But this shift does furnish good cause

---

<sup>1</sup> 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1385; see also 1 *ibid.* §§ 4, 12, 487, 497, 587; 2 *ibid.* § 861; 3 *ibid.* §§ 1808, 1820; and 5 *ibid.* §§ 2322, 2550. Both the quotation above and our text itself assume the conventional rule that preliminary questions of fact relating to the admissibility of evidence are to be decided by the judge rather than by the jury. This rule we have discussed in a companion article on *Preliminary Questions of Fact in Determining the Admissibility of Evidence* (1927) 40 HARV. L. REV. 392.

<sup>2</sup> BEST, EVIDENCE (12th ed. 1922) 70.

<sup>3</sup> PHIPSON, EVIDENCE (6th ed. 1921) 12.

<sup>4</sup> 1 TAYLOR, EVIDENCE (11th ed. 1920) 375—376.

<sup>5</sup> For an analysis of the history and policy of these privileges and in incompetencies see 4 WIGMORE, *op. cit. supra* note 1, §§ 2227, 2228 (marital privilege); 5 *ibid.* §§ 2332, 2333 (privileged communications between husband and wife); 1 *ibid.* §§ 600, 601 (marital incompetency); 4 *ibid.* §§ 2250,

for taking unconventional short cuts through the hearsay rule and other doctrines intended wholly or principally to guard against erroneous findings of fact in the very trial.<sup>6</sup> Since preliminary matters should be dealt with expeditiously, as to them a court may well run some risk of inaccuracy to gain speed. And the risk is very slight, for a judge's experienced shrewdness enables him to discount evidence which gullible jurymen might greatly overvalue.<sup>7</sup> It is in this latter field of evidential restrictions that we must search for material to test the more or less positive statements of Wigmore, Best, Phipson, and Taylor.

A further introductory warning is necessary. In a multitude of proceedings leading up to, following, or somehow supplementing actual trials on the merits, evidence inadmissible at such trials is employed to establish material facts. It is a commonplace to support motions with affidavits, suggestions, or even bare assertions of counsel. Such summary, often informal, pro-

---

2251 (privilege against self-incrimination); 5 *ibid.* § 2378 (privilege respecting state secrets); and 5 *ibid.* §§ 2290, 2291 (lawyer-client privilege). The present authors are no more favorably impressed than is Professor Wigmore by many of the reasons given for these restrictive rules. But so far as we continue the rules we ought to live up to their spirit. It must be admitted that in the early days before the doctrines of evidence had been lucidly explained there were decisions departing from the principle suggested by the text. See, for example, *Rex v. Wright*, 1 Sessions Cas. 243 (K. B. 1734), where on a motion for an information an affidavit by the prosecutor's wife was allowed to be read for the defendant; the court "leaving the Point undetermined whether she could be a Witness upon the Trial". But by way of contrast we have the almost contemporaneous case of *Walker v. Kerney*, 7 Mod. 413 (K. B. 1741), where the court declined to accept defendant's affidavit in a preliminary matter after it was shown that defendant had been convicted of forgery and had stood in the pillory. Disqualification visited upon a would-be witness because of infamy involved a punitive element, added to the notion that as an infamous person he was unworthy of belief.

<sup>6</sup> As suggested in the text, the hearsay rule is on analytical grounds the best example of this class of evidential doctrines. It has indeed been said that the sole or principal reason for the hearsay rule is a distrust of jurymen's good judgment. *Berkeley Peerage Case*, 4 Camp. N. P. 401, 415 (H. L. 1811), *per Mansfield*, C. J.; *cf. Wright v. Doe d. Tatham*, 5 Cl. & Fin. 670, 692, 701, 719, 726, 748, 769 (H. L. 1838). See also *infra* note 54. The case of *Rex v. Bell, Andrews*, 64 (K. B. 1737), has some bearing. There a motion was made for bail upon the affidavits of the applicants themselves. The court overruled an objection that this was allowing the parties to purge themselves of felony, saying "that they (the court) might make use of any means for receiving light in the case, in order to guide their discretion; And to be sure the court will not place an undue credit on the affidavits of the parties themselves". But the historical basis for the hearsay rule is somewhat different from that suggested by Chief Justice Mansfield in the passage referred to above. THAYER, *PRELIMINARY TREATISE ON EVIDENCE* (1898) 498-501, 518 *et seq.*; 3 WIGMORE, *op. cit. supra* note 1, §§ 1364 *et circa*.

<sup>7</sup> See first three references in note 6.

bative methods have been long accepted and are illustrated as frequently in seventeenth and eighteenth century English cases as in modern practice. With these matters we are not concerned. Our interest centres upon proof of those facts which must be established as immediate conditions precedent to admission or exclusion of evidence offered during trials.

## II

The earlier English decisions give our historical background. Consequently we begin by sketching them and for convenience trace their development in England before crossing the Atlantic to consider the American authorities. *Bredon (or Breddon) v. Gill*,<sup>8</sup> a carefully considered litigation arising in 1697, strikes a good keynote although its actual result has no bearing upon our problem. Bredon sought a prohibition<sup>9</sup> from King's Bench, suggesting the following facts: Gill had exhibited an information against him before the commissioners of excise. These commissioners adjudged Bredon guilty. He appealed to the commissioners for appeals under a statutory provision requiring them "to summon the party accused, and upon his appearance or contempt to proceed to the examination of the matter of Fact and upon prooffe made thereof either by the voluntary confession of the party, or by the oath of one or more credible Witnesses (which oath they or any two or more of them have hereby power to administer) to give Judgment or Sentence."<sup>10</sup> Gill offered in evidence before the commissioners for appeals the minutes of testimony taken before the commissioners of excise, although

<sup>8</sup> The case is reported with variations of detail in Comb. 414, 1 Ld. Raymond, 219, 3 *ibid.* 179, 5 Mod. 269, 2 Salk. 555. We take this occasion to speak frankly of both the quality and quantity of our English material. Few of the seventeenth and eighteenth century reporters are regarded as highly reliable. However, we must use what there is at hand. The number of relevant reported cases is dishearteningly small. Even examination of more than fifty reporters, volume by volume, and almost page by page, has disclosed only a few early decisions. We suspect that the nature of the problem was not very clear to contemporary lawyers or judges and that possible manifestations of it were often glossed over.

<sup>9</sup> Incidentally this case affords an excellent illustration of the distinction drawn by the last paragraph in section I of our text. A motion for a prohibition might be supported by affidavit as distinguished from *viva voce* evidence. This was absolutely beyond question. The principal point of doubt was in discriminating between those motions for this type of relief which necessitated no evidential showing at all and those in connection with which affidavits were required. *Godfrey v. Lewellin*, Rep. t. Holt, 593, 2 Salk. 549 (K. B. 1700); *Savill v. Kirby*, 10 Mod. 385 (K. B. 1717); *Anon.*, 2 Barn. 285 (K. B. 1733); *Surby v. York*, Andrews, 7 (K. B. 1737); *Dawson v. Wilkinson*, *ibid.* 11; *Buggin v. Bennett*, 4 Burr. 2035 (K. B. 1765).

<sup>10</sup> 12 Car. II, c. 23 (1660), 5 St. Realm, 257. The report of the case in Mod. purports to quote the act. But as a matter of fact the reporter gives no more than a substantially accurate paraphrase.

the witnesses were still alive and available, and the commissioners for appeals ruled this evidence admissible. Bredon claimed that the ruling was unlawful. The opinion in King's Bench contains a significant remark: "Curia. The common law does not require, that witnesses shall be examined *viva voce*, except where the trial is by *jury*."<sup>11</sup> Another reporter puts it: "*Holt* Ch.J. How doth the Common Law require, where the Trials are not by Jury, that the Depositions should not be taken in Writing."<sup>12</sup> A third version: ". . . and the law does not make *viva voce* evidence necessary, unless before a jury."<sup>13</sup>

Now this might mean any of several things. At its mildest, that appeals should be heard on the record compiled below. But the quoted act upon its face shows this appellate proceeding not to be of that restricted type. And indeed the ultimate decision was that the prohibition should issue because of Parliament's manifest intent to provide a hearing *de novo* before the commissioners for appeals, with fresh examination of witnesses.<sup>14</sup> Or the remark might imply that in proceedings before a tribunal not including a jury, the personal attendance of witnesses may be dispensed with. Or, taken still more strongly, the remark might have led to decisions that in proceedings of this type the whole hearsay rule, and by reasonable extension other associated rules, may be broken down as thoroughly as the tribunal desires. Either of the last two implications would of course justify a corresponding relaxation of evidential rules in preliminary hearings before a judge on questions of admissibility.

The strongest implication certainly was not fully accepted. Within about fifty years we find Lord Hardwicke stating fre-

---

<sup>11</sup> 5 Mod. at 277. We find the converse many years later in a case holding that an agreement to try by affidavits implies an agreement to try without a jury. *Brooke v. Wigg*, 8 Ch. D. 510 (1878).

<sup>12</sup> Comb. at 415.

<sup>13</sup> 2 Salk. 555. The report of the case in *Ld. Raymond* contains no corresponding passage.

<sup>14</sup> 5 Mod. at 278, 2 Salk. *ubi supra*, and 1 *Ld. Raymond*, at 222. *Comberbach* does not show the final disposition of the case, his report stopping at the half-way mark. In this connection see *Apthorp v. Eyres*, *Quincy* (Mass.), 229, 231 (1766), where the Colonial Chief Justice says: "Certainly Courts are not tied up to such strict Rule in Admission of Evidence, as when it is to go to Juries". During the proceedings in Parliament with respect to the attainder of Sir John Fenwick, 13 *How. St. Tr.* 537, 585 (1696), Sir John Hawles, Solicitor General, made an argument which at first reading suggests the language quoted in the text above. As a matter of fact, however, the speaker was simply trying to persuade the House that it might hear objectionable evidence before deciding finally whether to admit or reject it. *Reg. v. Ryle*, 9 M. & W. 227, 239, 244 (Ex. 1841), contains language which is of some interest in this connection, but the immediate case under consideration was of a different type. See *infra* note 47. Cf. *Higgins v. Watson*, *infra* note 86, and *Bagley v. Eaton*, *infra* note 73.

quently that rules of evidence are the same in equity as at law and drawing no distinction whatever because of the absence of a jury from one court and its presence in the other.<sup>15</sup> This may be well enough as to privileges of witnesses. But the great Chancellor was not ruling on claims of privilege. He was passing upon questions of hearsay,<sup>16</sup> incompetency for interest,<sup>17</sup> and admissibility of secondary evidence of the authenticity or contents of documents.<sup>18</sup> As to some at least of these questions one may well feel that the routine adoption of legal rules was a mistake. The nail has been driven and clinched, however, and the influence of Hardwicke's attitude endures to this day. Some American cases referred to hereafter hint at a departure from the English rule. But the hint breaks down when really put to the test.

Despite these decisions as to the rules of evidence respecting ultimate controversies of fact in Chancery, we find on preliminary questions of admissibility in that court a practice which accords to some extent with the stronger interpretations of the remark quoted from *Bredon v. Gill*. A succession of cases running from about 1722 through 1754 involved situations requiring parties to prove certain preliminary facts—usually death or inaccessibility of witnesses—to justify the use of depositions. All these cases as a matter of course permit the preliminary proof to be by affidavit.<sup>19</sup> Indeed under proper facts the Chan-

---

<sup>15</sup> *Henley v. Philips*, 2 Atk. 48 (Ch. 1740); *Glynn v. Bank of England*, 2 Ves. Sr. 38, 41 (Ch. 1750); and *Askew v. The Poulterers Company*, 2 Ves. Sr. 89, 91 (Ch. 1750). See also *Scott v. Fenwick*, 3 Gwillim Tithe Cases, 1250, 1255 (1783), a case on the equity side of the Exchequer. Compare *Lefebure v. Worden*, 2 Ves. Sr. 54 (Ch. 1750); *Brown v. Yerro-way*, Dick. 353 (Ch. 1762); *Cotton v. Luttrell*, 1 Atk. 451, 452 (Ch. 1738); *Man v. Ward*, 2 *ibid.* 228 (Ch. 1741); *Mabank v. Metcalf*, 3 *ibid.* 95 (Ch. 1744); *Barret v. Gore*, 3 *ibid.* 401 (Ch. 1746); *Fotherby v. Pate*, 3 *ibid.* 603 (Ch. 1747); *Dixon v. Parker*, 2 Ves. Sr. 219, 222 *et seq.* (Ch. 1750); *Armiter v. Swanton*, 1 *Ambler* (ed. 1828), 393 (Ch. 1761); and our article referred to in note 1 *supra*, at 414, n. 73.

<sup>16</sup> *Glynn v. Bank of England*, *supra* note 15.

<sup>17</sup> *Manning v. Lechmere*, 1 Atk. 453 (Ch. 1737).

<sup>18</sup> *Henley v. Philips*, *supra* note 15; *Askew v. The Poulterers Company*, *supra* note 15; and *Clavering v. Clavering*, 2 Ves. Sr. 232 (Ch. 1751). The adoption by equity of these principles respecting documentary evidence is defensible. Any court may wisely enforce such preferential rules.

<sup>19</sup> *Debroy v. ———* (Ch. 1722), included in the report of *Copeland v. Stanton*, 1 P. Wms. 414, 415 (Ch. 1718); *Cox v. George*, *Select Cas. t. King*, 11 (Ch. 1725); *Ward v. Sykes*, *Ridgeway Cas. t. Hardwicke*, 193 (Ch. 1744); *Smales v. Chayter*, Dick. 99 (Ch. 1745); *Gason v. Wordsworth*, 2 Ves. Sr. 325, 336, 337, *Ambler*, 108 (Ch. 1751); and *Anon.*, 2 Ves. Sr. 497, *Ambler*, 237 (Ch. 1754). Later cases indicate the continuance of this same practice. *Morrison v. Arnold*, 19 Ves. Jr. 670, 672 (Ch. 1817); and *Biddulph v. Lord Camoys*, 19 Beavan, 467 (Ch. 1854), at a later stage 20 *ibid.* 402 (Ch. 1855). See also the indication of ecclesiastical practice in *Weguelin v. Weguelin*, 2 Curteis, 263 (1839).

cellors several times directed that depositions be admitted as evidence in trials at law, accepting affidavits to prove the existence of these proper facts.<sup>20</sup> Such equity decisions, of course, furnish no reliable basis for determining how a common law judge was likely to decide parallel problems. Affidavits would seem normal to a Chancellor who almost invariably took his proofs by deposition.<sup>21</sup> Instead of elaborating this theme, therefore, we move over at once to the law courts.

Here we find more than one line of cases developing. Most of the lines can be briefly dismissed. First, suppose a witness is claimed to be incompetent by reason of interest. May the challenged witness himself testify on *voir dire*? The answer is generally affirmative.<sup>22</sup> But this witness is not *proved* incompetent. His competency is only in doubt and since the burden of preliminary proof is on the objecting party<sup>23</sup> we may more reasonably listen to the witness than refuse to hear him. Besides, it is arguable that even if interest fatally infects a witness's credibility as to the merits, it need not infect his credibility as to the existence of the interest itself. While this rings hollow to the ear of common sense, such hairsplitting distinctions are no strangers to the law of evidence. The distinction becomes impossible, though, when the same problem as to *voir dire* examination arises with respect to a witness challenged as incapable of taking the oath.<sup>24</sup> Yet here too the English courts employed his preliminary testimony. Perhaps this was because the most obvious alternative means for proving lack of belief in divine

<sup>20</sup> The best case of a considerable number is *Corbett v. Corbett*, 1 V. & B. 335 (Ch. 1813); some other cases are referred to by the note in *Ambler*, 108. By way of analogy *Laragoity v. Attorney General*, 2 Price, 172, 176, 180, 185 (1816), is worth citing; it arose on the equity side of the Exchequer. See also s.c. 3 *ibid.* 221 (1816).

<sup>21</sup> *Graves v. Budget*, 1 Atk. 444, 445 (Ch. 1737), and *Bank v. Farques*, *Ambler*, 145, *Dick*, 167 (Ch. 1752), indicate the extremely restricted scope given *viva voce* evidence in the contemporary Chancery practice.

<sup>22</sup> Sometimes the answer is given by implication only. *Fotheringham v. Greenwood*, 1 Str. 129 (K. B. 1718); *Rex v. Bray*, Cas. t. *Hardwicke*, 358, 359 (K. B. 1736); *Lord Lovat's Case*, 18 How. St. Tr. 529, 579-586, 596-597 (H. L. 1746); *Downing v. Townsend*, *Ambler* 592, 593 (Ch. 1753); and *Bent v. Baker*, 3 T. R. 27, 32 (K. B. 1789). See also the related cases in (1927) 40 HARV. L. REV. at 409, n. 58, and 416, n. 76.

<sup>23</sup> This seems to be the general rule as to burden of proof in connection with the existence of incompetencies and privileges. See (1927) 40 HARV. L. REV. at 409, n. 58, and 427, n. 99.

<sup>24</sup> In order to be examined on the *voir dire* the witness was required to take the following oath: "You shall true answer make to all such questions as shall be demanded of you; and you shall speak the truth, the whole truth, and nothing but the truth. So help you God". *Lord Lovat's Case*, *supra* note 22, at 583. See *Rex v. White*, 1 Leach (4th ed. 1815) 430 (*Old Bailey*, 1786), and *Maden v. Catanach*, 7 H. & N. 360, 364-366 (Ex. 1861); also 3 WIGMORE, *op. cit. supra* note 1, § 1820.

rewards and punishments consisted of the witness's extrajudicial declarations about his religious principles.<sup>25</sup> The courts had early accepted utterances as evidence of the speaker's existing beliefs.<sup>26</sup> But it would have been ludicrous to prefer bare hearsay on this point to a statement in court by the same man when subject to questioning by the judge and probably to cross-examination by objecting counsel.<sup>27</sup>

The reader will observe that the last sentences of the preceding paragraph, while still touching the point of proving facts to establish competency or incompetency, have moved us into the question of employing hearsay for that purpose. On this question we encounter a tantalizing case in 1732.<sup>28</sup> Plaintiff's object was to prove a marriage. He offered one Mrs. Mottram, said to have been an eye witness of the ceremony. Whereupon opposing counsel objected to her being sworn, since he could produce "one Mrs. Davis, who would swear, that she heard Mrs. Mottram say, that in case the Marriage could be proved the Plaintiff's Mother would take care that she should never want during her Life."<sup>29</sup> A lively discussion arises, in which the court are as active as counsel. Cases are cited and described to indicate a difference of opinion between King's Bench and Exchequer on one side, and the House of Lords on the other. Finally Lord Raymond swings his colleagues into line by arguing "that it might be a Thing of dangerous Consequence upon such an Exception totally to exclude a Person from being an Evidence. He said an honest Witness might have a Well-wishing to one

<sup>25</sup> *Smith v. Coffin*, 18 Me. 157, 159-162 (1841).

<sup>26</sup> *Hathaway's Case*, 14 How. St. Tr. 639, 653, 654 (Surrey Assizes, 1702). The principle of this case may explain the usage in connection with dying declarations. At least one fairly early case seems to admit such a declaration without any showing or indication that the declarant knew he was dying. In fact the indications were that he had some expectation of recovery. *Earl of Pembroke's Case*, 6 How. St. Tr. 1309, 1325 (H. L. 1678). Less than fifty years later the auditor of a dying declaration prefaced his testimony thereto with the statement that the declarant spoke of himself as a dying man. *Rex v. Reason and Tranter*, 1 Str. 499, 16 How. St. Tr. 1, 24-38 (K. B. 1722). Within the next seventy years it apparently became a commonplace to use the declarant's statements as evidence of his realization of impending death. *Woodcock's Case*, 1 Leach (4th ed. 1815) 500 (Old Bailey, 1789).

<sup>27</sup> But as an analogy consider the old doctrine that the affidavit of a party might be accepted to establish the loss of an original writing, the contents of which he proposed to prove by secondary evidence. This is discussed at p. 1120, *infra*. The extent to which such affidavits were employed in England seems quite doubtful. See the reference given in 1 GREENLEAF, EVIDENCE (16th ed. 1899) § 349, n. 3, in App. II at 867, and 2 TAYLOR, EVIDENCE (1st ed. 1848) 382, n. (t).

<sup>28</sup> *Lomax v. Honeby*, 2 Barn. 178 (K. B. 1732). Compare *Commonwealth v. Waite*, *infra* note 88.

<sup>29</sup> *Ibid.* at 178.

side of a Cause, and in the Zeal of his Heart might say, it would be better for him, if the Cause went on the Side he wished it would. Yet perhaps, if this Person was to be examined upon his Oath, it would be found, that he would not be one Six-pence the better for the Event of it."<sup>30</sup> That is, the judges do not necessarily hold the hearsay inadmissible, but do deny its adequacy. They fear misquotation or misinterpretation. However, as a preliminary, Mrs. Davis is called; "but when she came to be examined, she said nothing that was material."<sup>31</sup> Here surely is the great grandfather of our modern story in which the lawyer asks his witness: "What did Jones say next?"; a great wrangle ensues, assertions are made, authorities quoted; and, at length, when the question is allowed, the witness answers: "I couldn't hear what he said."

Finally we come to a long and interesting line of decisions analogous to the chancery cases already spoken of with respect to the admissibility of depositions. In 1613<sup>32</sup> and again in 1664<sup>33</sup> the law courts indicate that the death or absence of deponents may be proved by affidavit. But in 1624 there is talk of proving a witness's inaccessibility by "oath";<sup>34</sup> and in 1666, when preparing for the trial of Lord Morley, the judges unanimously resolve that if certain witnesses are "dead or unable to Travel; and Oath made thereof . . . the examinations of such Witnesses [before the coroner] . . . might be read, the Coroner first making Oath" that the examinations are the unaltered originals.<sup>35</sup> This is ambiguous. Does "Oath" connote *viva voce*

<sup>30</sup> *Ibid.* at 179.

<sup>31</sup> *Ibid.* at 179. One previous case referred to by the court appears to be *Whithall v. Sir George Saunders, W. Kelynge*, 62 (K. B. 1732). As here reported it does not suggest the subtle point discussed by the text. But this may be the fault of the reporter. The solution of the principal case might depend partly upon whether the *actual existence* of interest or the witness's *belief in its existence* was the disqualifying factor. At least one nearly contemporaneous opinion says that "if a witness thinks himself interested in the question, though in strictness of law he is not, yet he ought not to be sworn". *Fotheringham v. Greenwood*, *supra* note 22, at 129. A scrutiny of the facts in this controversy indicates that no such broad principle need be enunciated to sustain the result. With the principal case compare *Needham v. Smith*, 2 Vern. 463 (Ch. 1704), where the witness's declaration of his interest had been made in an answer to a bill exhibited against him.

<sup>32</sup> *Sir Francis Fortescue and Coake's Case*, Godb. 193 (C. P. 1613). Commentators have cited this case as involving the affidavit of a party. There is nothing in the bare text of the report to necessitate such interpretation.

<sup>33</sup> *Sir Martyn Nowels Case*, 1 Keb. 685 (K. B. 1664).

<sup>34</sup> *Anon.*, Godb. 326-327 (K. B. 1624). Here the court unmistakably contemplated accepting the oath of a party.

<sup>35</sup> *J. Kelyng*, 53, 55 (1666). The text above refers to only one of three resolutions material to our topic. These resolutions are reprinted in Lord

testimony as it did in *Bredon v. Gill*? Six years after *Lord Morley's Case*, "it being sworn by the *Exeter* waggoner" that a witness "fell so sick that he was unable to travel any farther, [the witness's] depositions in chancery . . . were admitted to be read."<sup>36</sup> This sounds like *viva voce* examination on the preliminary point. And in 1729 "Mr. Reeves then produc'd another Witness, who swore that the first was in Scotland. And upon that the Court allow'd the [first witness's] Deposition to be read."<sup>37</sup> Two subsequent cases antedating 1750 emphasize the necessity of satisfying a common law judge that the maker of a proffered deposition is dead, sick, beyond seas, or not amenable to process and do not negative the idea that this preliminary proof must be *viva voce*.<sup>38</sup>

Having thus indicated the tendency of decision, we skip forward to the early nineteenth century and find further opinions continuing the same tone.<sup>39</sup> Soon the judges' attitude becomes more positive. In 1836 Lord Abinger at *nisi prius* calls for proof that deponents are abroad. Counsel diffidently suggests that the depositions themselves say deponents are going abroad. The answer comes: "That is not sufficient; you must have other proof that they are abroad."<sup>40</sup> In 1841 the same judge refuses to admit a deposition on testimony that "a person, whom [witness] believed to be the deponent's wife" had told witness deponent was abroad; for "it was indispensable to prove, by proper evidence, that the [deponent] was out of England. Here, there

---

Morley's Case, 6 How. St. Tr. 769, 770-771 (H. L. 1666). At the trial depositions were admitted "upon proof made that the witnesses were dead, and oath by the coroner, that the depositions were unaltered . . ." *Ibid.* 776. Also: "*Thomas Harding* sworn, deposed" as to the unavailability of a witness whose deposition was offered and rejected. *Ibid.* 777. In *Harrison's Case*, 12 *ibid.* 833, 852, the same point arose. A deposition was admitted after "being proved by the Coroner". The context indicates that the coroner was personally present at the trial. Compare the cases arising under an act permitting the use of depositions in criminal prosecutions after certain proof "by the oath or affirmation of any credible witness". *Reg. v. Riley*, 3 Car. & K. 116 (1851), and *Rex v. Noakes*, [1917] 1 K. B. 581. See also the discussion in *Reg. v. Ryle*, *supra* note 14, at 227, 229-230, 245.

<sup>36</sup> *Lutterell v. Reynell*, 1 Mod. 282, 283-284 (K. B. 1672). This is a leading case.

<sup>37</sup> *Patterson v. St. Clair*, 1 Barn. 268 (K. B. 1729).

<sup>38</sup> *Fry v. Wood*, 1 Atk. 445 (Ch. 1737); *Ward v. Sykes*, *supra* note 19.

<sup>39</sup> *Fonsick v. Agar*, 6 Esp. 92 (C. P. 1806); *Falconer v. Hanson*, 1 Camp. N. P. 171, 172 (N. P. 1808); *Andrews v. Palmer*, 1 V. & B. 21, 22-23 (Ch. 1812), which discloses a practice appearing later with modification; *Attorney General v. Ray*, 2 Hare, 518 (Ch. 1843); and *Pond v. Dimes*, 3 Moore & S. 161 (C. P. 1833).

<sup>40</sup> *Proctor v. Lainson*, 7 Car. & P. 629, 631 (N. P. 1836). Compare *infra* note 103, where somewhat similar American cases are cited.

was nothing but hearsay to rely upon.”<sup>41</sup> Yet now, as we draw near the end of this historical review, we do scent the powder smoke and hear the noise of rebellion. Chief Baron Pollock fired the first shot at *nisi prius* in 1848 when he admitted a deposition on the strength of an affidavit as to the deponent’s unavailability. This was an obscure shot, to be sure, referred to in print only by Taylor’s text and one of his footnotes and there not approved.<sup>42</sup> It became, however, of considerable importance eighteen years later in *Duke of Beaufort v. Crawshay*.<sup>43</sup> Defendant here desired to use a deposition. He called a witness who testified strongly to the deponent’s old age, incapacity, and illness. The plaintiff objected to the adequacy of such evidence because the witness was a mere layman, not a physician. This objection was overruled. Defendant also offered an affidavit from the deponent’s medical adviser. Now the plaintiff objected on the ground of hearsay. The ruling as reported by the judge is curious: “The affidavit . . . to be on my notes, in case the Court think it admissible on such a point.”<sup>44</sup> The deposition was admitted and defendant had the verdict. A rule *nisi* on the ground that the deposition had been improperly admitted was discharged, four opinions being rendered. We summarize them in order. Erle, C. J., did not discuss the affidavit, stating that the other evidence adequately sustained the ruling.<sup>45</sup> Willes, J., said that he was “far from agreeing” with Taylor’s distrust of Chief Baron Pollock’s decision.<sup>46</sup> He cited *Regina v. Ryle*.<sup>47</sup> He

<sup>41</sup> *Robinson v. Markis*, 2 Moo. & Rob. 375, 376 (N. P. 1841). The decision rendered here by Lord Abinger is significant when considered in connection with *Reg. v. Ryle*, *supra* note 14, and *infra* note 47. The current of authority is here confused by a line of cases concerning the production of attesting witnesses. Frequently these cases appear to admit hearsay evidence when in fact the actual decisions are merely that the offering party has proved sufficiently diligent search for the desired witnesses. *Crosby v. Percy*, 1 Camp. N. P. 303, 304 (N. P. 1808); *Ward v. Wells*, 1 Taunt. 461 (C. P. 1809); *Doe d. Johnson v. Johnson*, 2 Chit. 196 (K. B. 1818); *Kay v. Brookman*, 3 C. & P. 555 (N. P. 1828); *Wyatt v. Bateman*, 7 C. & P. 586 (N. P. 1836); *Willman v. Worrall*, 8 C. & P. 380 (N. P. 1838). But even here objection was raised to hearsay. *Doe d. Beard v. Powell*, 7 C. & P. 617 (N. P. 1836). Much the same problem and result are found in the so-called best evidence cases. *Rex v. Castleton*, 6 T. R. 236 (K. B. 1795); *Rex v. Morton*, 4 Mau. & Sel. 48 (K. B. 1815); *Rex v. Denio*, 7 B. & C. 620 (K. B. 1827); *Rex v. Rawden*, 2 Ad. & El. 156 (K. B. 1834); *Reg. v. Kenilworth*, 7 Q. B. 642 (1845); and *Reg. v. Braintree*, 1 El. & El. 51 (Q. B. 1858). See *infra* note 84.

<sup>42</sup> *Knight v. Campbell*, 1 TAYLOR, *op. cit. supra* note 4, § 517, n. (o).

<sup>43</sup> *Duke of Beaufort v. Crawshay*, L. R. 1 C. P. 699 (1866).

<sup>44</sup> *Ibid.* at 700.

<sup>45</sup> *Ibid.* at 705-708.

<sup>46</sup> *Ibid.* at 708.

<sup>47</sup> *Ibid.* at 708-709. *Reg. v. Ryle* is plainly distinguishable, having been an *ex parte* proceeding, not final in its result. 1 WIGMORE, *op. cit. supra* note

then went on to argue that the use of affidavits serves convenience and saves expense. If they are false, the falsity can easily be exposed. These last remarks by Willes have a ring of common sense. He is a real rebel. But his colleagues Byles and Montague Smith, JJ., smother the rebellion with cushions of polite indifference.<sup>48</sup> Both really followed the Chief Justice in saying that the evidence other than the affidavit fully justified the ruling.<sup>49</sup>

Under any circumstances so indefinite a case as *Duke of Beaufort v. Crawshay* would hardly have produced much impression. In fact, with it our line of authorities practically breaks off.<sup>50</sup> Why? We suspect because of the spirit infused into English legal practice by the new Rules following the Judicature Acts. Order XXXVII of the Rules of the Supreme Court, 1883, provides in Rule 18 that except as otherwise directed no deposition shall be given in evidence without consent "unless the court or judge is satisfied" that certain specified conditions exist which make the deponent unavailable in person. The whole wording of this rule is derived directly from the act of Parliament controlling *Duke of Beaufort v. Crawshay*. The doubt seems to remain just as that case left it. But Rule 1 of this same Order contains a general provision that "the court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court or judge think reasonable . . .; provided that, where it appears to the court or judge that the other party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit."<sup>51</sup> The inference from this to the probable present day English practice in preliminary disputes of fact seems obvious. These later developments and possibilities, however, have no immediate bearing upon the American situation. We are concerned with the general run of English cases before the Judicature Acts. These cases, except perhaps some relating to certain useless, objectionable, and now discarded rules of exclusion, lend little support to the decided statement by Wigmore which opens this article. Phip-

---

1, § 4 (3); 1 TAYLOR, *op. cit. supra* note 4, § 517, n. (p). But Willes cites the case with careful and honest discrimination.

<sup>48</sup> L. R. 1 C. P. at 712, 714.

<sup>49</sup> *Ibid.*

<sup>50</sup> M'Pherson v. Parnell, 40 L. J. (N. S.), Probate, 30 (1871), does not carry the question forward a single step. Taylor v. Witham, 3 Ch. D. 605 (1876), is more properly touched upon at p. 1123, *infra*.

<sup>51</sup> For the application of this rule see Blackburn Union v. Brooks, 7 Ch. D. 68 (1877), and Elias v. Griffith, 46 L. J. (N. S.), Ch. 806 (1877).

son's comparative caution more accurately reflects the old law of England.

### III

The American cases all fall after the date when stagnation began to still the current of English decision. Consequently, we had best abandon our historical approach in favor of an attempt to categorize the contemporary confusion.<sup>52</sup>

The first problem is how far American precedents support Wigmore's premise. To be sure, multiple arguments might be made in defense of his position. We have already mentioned its merit of expediting collateral inquiries which interrupt the course of a trial. Again, wrangles and reversals on ordinary evidential points are so distasteful that one welcomes a theory which avoids quibbling still further removed from the substance of the controversy. Yet in the last analysis, the chief argument—and the one upon which Wigmore relies—is that the common law has matured its system of technical rules solely for the protection of *jurors*.<sup>53</sup> These babes in the judicial woods, beset by unfamiliar problems amid the courtroom's strange surroundings, need a fussy guardian with a long list of "Don'ts." Not even laymen, we are reminded by Sir Henry Maine, brook such control when handling matters within their own realm of experience: "A policeman guiding himself by the strict rules of Evidence would be chargeable with incapacity; and a general would be guilty of a military crime."<sup>53a</sup> How much less, runs the contention, are these restrictions required by a judge, who is accustomed to the atmosphere of litigation and far exceeds a layman in the asserted poise and acuity of his mind.<sup>54</sup>

---

<sup>52</sup> The splattering American plan of digesting cases on evidence blocks any effort to cover the field intensively without using such page-by-page methods as we employed on the early eighteenth century English reports. The number of American reports makes these methods impracticable. We present, however, what we think is a fair sampling of the American decisions.

<sup>53</sup> The learned author says that ". . . jury-trial rules are intended for a constantly changing tribunal of fact composed of inexperienced jurymen dealing with hundreds of types of cases". I WIGMORE, *op. cit. supra* note 1, 30. Wigmore also quotes THAYER, *op. cit. supra* note 6, 509: ". . . our law of evidence is a piece of illogical, but by no means irrational, patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system . . . where ordinary, untrained citizens are acting as judges of fact."

<sup>53a</sup> Quoted by 1 WIGMORE, *op. cit. supra* note 1, at 26.

<sup>54</sup> This is very forcibly put by a letter published in (1922) 36 HARV. L. REV. 193 (written by a judge now sitting on the Massachusetts bench): "It is an actual fact that four-fifths of the contentious litigation in Massachusetts—numerically—is tried to the court, not to a jury. So far as the true law of Evidence goes—the tail is wagging the dog, and the judiciary is reveling in this *reductio ad absurdum*—'we, the judges (of superior men-

Leaving it for heretics to question the vast superiority of a judge over twelve jurymen as an arbiter of fact, we shall ask only how the judges have responded to this flattering line of argument. If they accept it, one would rather expect the judge to be relieved of evidential blinders when an action is tried before him on the merits without a jury.<sup>55</sup> A thorough-going examination of this situation is all the more important because it has been far better worked out by American courts than has the situation in which we are primarily interested, and so sheds light on many of our subsidiary problems.

In extradition and habeas corpus proceedings and the like, there is a noticeable disposition to dispense with the rules of evidence.<sup>56</sup> But the decisions do not purport to be laying down a rule for anything except interlocutory or *ex parte* hearings. Equally distinguishable from our test case are the very liberal holdings on appeals from a judge sitting in equity.<sup>57</sup> This equitable laxity has its roots in the practice of an older day, when an appeal in chancery carried up the whole record, which traditionally contained only written evidence, for re-determination

---

talities) are able to discern and segregate those matters by which you, the jurors, might be led astray or biased. But when we come to take your place and try the facts, we will put the same legal blinders on our own eyes, lest we be led astray or biased, though we are all the time able to discern, and so to avoid, that which is liable to lead astray or bias'.

"Wanted—a Moses to lead the lost legal tribes!"

<sup>55</sup> See (1915) 1 IOWA L. BULL. 144, an interesting discussion, but not adequately supported by the cases cited.

<sup>56</sup> In *Robertson v. Heath*, 132 Ga. 310, 64 S. E. 73 (1909), Lumpkin, J., very carefully reviews the authorities as to affidavit proof on habeas corpus proceedings. *Collins v. Loisel*, 259 U. S. 309, 317 (1922); and *Ex Parte Germain*, 155 N. E. 12 (Mass. 1927), illustrate the liberality in extradition hearings and the reason therefor. *Goodwin v. Blanchard*, 73 N. H. 550, 64 Atl. 22 (1906), collects decisions permitting the use of affidavits on motions made before or after trial. But *Kipp v. Clinger*, 97 Minn. 135, 140, 106 N. W. 108, 110 (1906), points the obvious moral that cases upholding the substitution of affidavit evidence for testimony, do not give *carte blanche* for more serious violations of the hearsay rule. A very strict doctrine as to *ex parte* matters is enunciated by *In re McGraven*, 87 N. J. Eq. 28, 99 Atl. 619 (1916).

The exhaustive discussion to be found in 1 WIGMORE, *op. cit. supra* note 1, § 4c, of how far rules of evidence obtained in administrative proceedings, and the more specialized article by Frank A. Ross in (1923) 26 HARV. L. REV. 263, make futile any further citation of cases on that subject.

<sup>57</sup> *Boulder & White Rock Ditch Co. v. Leggett Ditch & Reservoir Co.*, 36 Colo. 455, 458, 86 Pac. 101, 102 (1906); *Hicks v. Stevens*, 121 Ill. 130, 198, 11 N. E. 241, 245 (1887); *Sawyer v. Campbell*, 130 Ill. 186, 204, 22 N. E. 458, 464 (1889); *Colomb v. First Nat. Bank*, 208 N. W. 404 (S. D. 1926); *Salt Lake F. & M. Co. v. Mammoth Mining Co.*, 6 Utah, 251, 23 Pac. 760 (1890). In many of these cases the courts quite unnecessarily rely on a presumption that the trial judge considered only competent evidence.

of the facts by the appellate tribunal.<sup>58</sup> Manifestly, an error in the admission of evidence could not of itself be ground for reversal, if there was enough competent testimony to convince the upper court upon its trial *de novo*. And this limitation is always stressed in the equity cases.<sup>59</sup>

In any sort of proceeding before a judge, some of the formalities of a jury trial are bound to get short shrift. The judge sitting in lieu of a jury can obviously suit his convenience as to the order of presentation of evidence, and as to whether documents should be read to him or left for his perusal.<sup>60</sup> Other apparent deviations from evidential practice are nothing more than sudden transitions from the role of jurymen to that of judge. For example, after hearing evidence *qua trior*, His Honor will not be violating any rules if he asks, *qua judge*, for a written summary of the testimony as part of a legal argument—even though his quick change into the robe leaves us rubbing our eyes a bit.<sup>61</sup>

---

<sup>58</sup> 2 DANIELL, CHANCERY PLEADING AND PRACTICE (6th Amer. ed. 1894), \*1484, states: "Where the appeal is against the whole decree, the cause is, in ordinary cases, actually reheard: that is, the case is stated, and the cause proceeded with, exactly as if it were an original hearing."

For decisions pointing to this as the true explanation, see *Clapp v. Fullerton*, 34 N. Y. 190, 195 (1866), and cases cited *supra* note 57. *Degginger v. Martin*, 48 Wash. 1, 92 Pac. 674 (1907), urges the inclusion of doubtful evidence in the appeal record to facilitate the trial *de novo*, though it is not careful to confine itself to chancery cases. *Cf.* the dictum in *Nichols & Shepard v. Stangler*, 7 N. D. 102, 104, 72 N. W. 1089 (1897), which turns upon the peculiar statute involved.

<sup>59</sup> See *Small v. Harrington*, 10 Idaho, 499, 510, 79 Pac. 461, 464 (1904); *King v. Pony Gold Mining Co.*, 28 Mont. 74, 94, 72 Pac. 309, 316 (1903). *Barrie v. United Rys.*, 125 Mo. App. 96, 102 S. W. 1078 (1907), reversed a decree based solely upon incompetent evidence; and *Farmer's Bank v. Gould*, 42 W. Va. 132, 24 S. E. 547 (1896), reversed for the exclusion of competent evidence. *Cf.* *Spanagel v. Dellinger*, 38 Cal. 278 (1869), which changes the emphasis to whether the judge below acted upon the bad evidence. *Kaczmarczyk v. Dolato*, 191 Ind. 540, 133 N. E. 829 (1922), refuses to follow the old equity rule because the code has assimilated equitable and legal appellate procedure. See also *Murdick v. United States*, 15 F. (2d) 965 (C. C. A. 8th, 1926), which applies something like the equity rule where hearsay had come before a grand jury.

The equity rule here discussed differs from the old King's Bench rule for jury trials, and from the New York rule in workmen's compensation cases. In calling for reversal when there is not enough competent evidence to convince the upper court, it is midway between the King's Bench rule, which calls for reversal whenever the lower court's decision was probably affected, and the compensation cases, which reverse when there is no competent evidence on the issue.

<sup>60</sup> *Hall v. U. S.*, 267 Fed. 795 (C. C. A. 5th, 1920) (form of questions). See *Webb v. Archibald*, 28 S. W. 80, 81 (Mo. 1895) (whether document must be read); *Pease v. State*, 155 S. W. 657, 661 (Tex. Civ. App. 1913) (leading questions).

<sup>61</sup> See *Coniglio v. Conn. Fire Ins. Co.*, 180 Calif. 596, 600, 182 Pac. 275,

Greenleaf could not be persuaded that such lightning transformations were possible. The learned author felt that no rules of evidence could bind the judicial trier of fact, because in his capacity as judge of the law he had to pass upon the proffered evidence whether good or bad.<sup>62</sup> Now, there is much sound psychology in this view. Nature does not furnish a jurist's brain with thought-tight compartments to suit the convenience of legal theory, and convincing evidence once heard *does* leave its mark. To a certain extent, however, this can be obviated by substituting summarized offers of proof for the evidence itself, when a question of admissibility impends. At all events, the usual attitude is to be profoundly confident that an occupant of the bench can erase from his mind even the strongest evidence, once he decides it inadmissible by ever so small a margin.<sup>63</sup>

Two kinds of cases show Greenleaf's influence. The first talks bravely in some such fashion as: "Upon a trial before a court, the same strictness in regard to the admission of evidence is not required as upon a trial before a jury"; but invariably ends up by declaring that the error was harmless anyhow.<sup>64</sup> These dicta indicate an attitude of mind, not a rule of law. The second and stronger line of authority advances the *presumption* that the court, in weighing the evidence, was governed by correct rules of law.<sup>65</sup> It is presumed that after all the evidence was in, the

---

276, 277 (1919). The converse case is presented by *Willcox v. Forbes*, 173 Mass. 63, 53 N. E. 146 (1899), where the judge's role merges into that of the jurymen. But *cf.* *Jones v. Gammans*, 11 Nev. 249 (1876).

<sup>62</sup> 1 GREENLEAF, EVIDENCE (16th ed. 1899) § 81c, which in earlier editions is § 49: "In trials of fact, without the aid of a jury, the question of the admissibility of evidence, strictly speaking, can seldom be raised; since, whatever be the ground of the objection, the evidence objected to must, of necessity, be read or heard by the judge, in order to determine its character and value. In such cases, the only question, in effect, is upon the sufficiency and weight of the evidence."

So also, THAYER, *op. cit. supra* note 6, at 529, talking of incompetent evidence in depositions: "In most instances there is small profit in fighting over the admissibility of evidence which is already in, and has once been read by or to the tribunal; under such circumstances the whole doctrine of the exclusion of evidence is in great degree inoperative."

But see (1915) 1 IOWA L. BULL. 144, which stresses the practice of charging juries to disregard incompetent evidence.

<sup>63</sup> But *Spanagel v. Dellinger*, *supra* note 59, reversed a trial judge even though he declared he had erased the effect of certain incompetent evidence from his mind before his decision.

<sup>64</sup> *Shelley v. Westcott*, 23 App. D. C. 135, 140 (1904); *Powers & Boyd Cornice & Roofing Co. v. Muir*, 146 Mo. App. 36, 56, 123 S. W. 490, 496 (1909); *Andrews v. Key*, 77 Tex. 35, 38, 13 S. W. 640, 641 (1890); *Waldie v. Brooklyn El. R. R.*, 89 Hun, 608, 35 N. Y. Supp. 40 (N. Y. Sup. Ct. 1895); *Smalley v. Mores*, 65 Iowa, 386, 389, 21 N. W. 690, 692 (1884).

<sup>65</sup> *Holmes v. State*, 108 Ala. 24, 26, 18 So. 529, 530 (1895); *Andrews v. Hayden's Adm'r.*, 88 Ky. 455, 460-1, 11 S. W. 428 (1889). See *Moffitt*

grain was winnowed from the chaff, and only the proper evidence considered. As we have seen, the mere fact that the judge listened to incompetent evidence is no ground for reversing him, since he has to determine admissibility. Even if he did not forthwith rule that the evidence was bad, it might well be that he was merely deferring his determination of the preliminary question. But circumstances may clearly negative this charitable interpretation. If after an evidential objection and argument thereupon, he definitely admits the improper evidence, it requires an appellate Pollyanna with fingers crossed and tongue in cheek, to presume that the trial judge discovered and remedied his error before judgment. Some courts abandon the "presumption" at this point.<sup>66</sup> Others, undaunted in their optimism, adopt the position most often asserted by the Nebraska cases that the mere admission of immaterial and incompetent evidence can never of itself be reversible error.<sup>67</sup>

But if the proponent of the judge's freedom from the rules of evidence seeks to rely upon these lines of decision, he will find them mere ropes of sand. Nothing is clearer than that a trial judge in any jurisdiction will be reversed for lack of enough material and competent evidence to support his finding, no matter how much inadmissible evidence there was in his favor.<sup>68</sup>

---

v. Hereford, 132 Mo. 513, 522, 34 S. W. 252, 254 (1895); *Lewis v. Frankle*, 158 Mo. App. 262, 265, 138 S. W. 64, 65 (1911).

This crystallizes into a form of statement that the judgment will not be reversed if there is sufficient evidence to sustain it. *Sutton v. Hasey*, 58 Wis. 556, 562, 17 N. W. 416, 418 (1883); *Barnes v. Cole*, 138 Wash. 481, 483, 244 Pac. 728 (1926); *Knippa v. Umlang*, 27 S. W. 915, 917 (Tex. Civ. App. 1894). *Nutter v. Sydenstricker*, 11 W. Va. 535, 543 (1877), adopts this position for curiously confused reasons, and is followed in the criminal case of *State v. Denoon*, 34 W. Va. 139, 11 S. E. 1003 (1890), which treats the appellant convicted of a misdemeanor before a single judge as a demurrant to the competent evidence.

<sup>66</sup> *Weibert v. Hanan*, 202 N. Y. 328, 95 N. E. 688 (1911), reversing 136 App. Div. 388, 121 N. Y. Supp. 35 (1910), and followed in *Harding v. Conlon*, 159 App. Div. 441, 144 N. Y. Supp. 663 (1913); *Jones v. Snow*, 64 Calif. 456, 2 Pac. 28 (1884) (evidence excluded); *Baker v. Baker*, 43 Ind. App. 26, 31, 86 N. E. 864, 866 (1909).

<sup>67</sup> *Enyeart v. Davis*, 17 Neb. 228, 22 N. W. 449 (1885), is the hesitant progenitor of the Nebraska line. *Willard v. Foster*, 24 Neb. 205, 213, 38 N. W. 786, 790 (1888), seeks to explain the doctrine as merely permitting the judge to defer examination of the evidence. But *Monroe v. Reid*, 46 Neb. 316, 328, 64 N. W. 983, 987 (1895), shows that the court is ready to go far beyond this. Dogmatic statements of the Nebraska rule appear in *National Masonic Accident Ass'n. v. Burr*, 57 Neb. 437, 441, 77 N. W. 1098, 1100 (1899); *Smith Premier Typewriter Co. v. Mayhew*, 65 Neb. 65, 90 N. W. 939 (1902). The Nebraska language may have influenced *Eureka Steam Heating Co. v. Sloteman*, 69 Wis. 398, 34 N. W. 387 (1887).

<sup>68</sup> *Simmons v. Poole*, 227 Mass. 29, 116 N. E. 227 (1917); *Wadleigh v. Parker*, 34 Okla. 213, 218, 124 Pac. 957, 959 (1912). This is made clear

That is to say, if the judge stands convicted beyond a reasonable doubt of having decided on the basis of improper evidence, neither Greenleaf nor Wigmore nor Willes has power to absolve him. Thus the presumption-indulging courts swing into line with the bulk of authority<sup>69</sup> in holding the trial judge bound, albeit somewhat less finically, by the rules of evidence.<sup>70</sup> That they seem to compromise with the opposite view is due, one suspects, to an excessive indulgence toward the venial errors of their brothers of the robe, and to an unreasoning imitation of the result reached for historical reasons in that type-case of the judicial prior, the judge in equity.

## IV

In *People v. Plyler*,<sup>71</sup> the prosecution offered a transcript of the testimony given at a prior trial by one Bradley. The California code provided that such evidence was admissible "upon its being satisfactorily shown to the court" that the former declarant was dead. To meet this requirement, there was introduced an affidavit by Bradley's sister that he had died since the previous proceeding. The trial court admitted the transcript. On appeal this was held reversible error, the California court saying: "Any evidence introduced to show the death of the witness was as much a part of the trial as any other part of it. And the fact that the witness was dead could no more be shown by affidavit than the fact that [*sic*] dying declarations could be shown by affidavit to have been made under a sense of impending death, or that [*sic*] the contents of a written document could be shown, supplemented by an affidavit to the effect that the document was lost."<sup>72</sup>

---

inferentially by the cases in notes 65 and 67 *supra*. Even Nebraska accords. See *Merchant's Nat. Bank v. McDonald*, 63 Neb. 363, 376, 88 N. W. 492, 496 (1901). Cases reversing where there was other competent evidence but proof that the judge acted upon the incompetent, are *Viele v. McLean*, 200 N. Y. 260, 93 N. E. 468 (1910); *Jackson v. Thornton*, 8 Okla. 331, 344, 58 Pac. 951, 955 (1899). *Hirshman v. H. D. Best & Co.*, 125 N. Y. Supp. 476 (Sup. Ct., App. T. 1910), and *Clapp v. Engledow*, 72 Tex. 252, 10 S. W. 462 (1888), show how the last type of decision tends toward adoption of the stricter King's Bench rule.

<sup>69</sup> A recent Maryland case applies the orthodox rule to homicide prosecutions tried to three judges. The court split widely, but the dissenters contended for nothing more than indulgence of a strong presumption. The opinions are worth reading. *Dobbs v. State*, 143 Md. 34, 49, 64, 67, 129 Atl. 275, 281, 287, 288 (1925), criticized in (1925) 11 *CORN. L. Q.* 89. An earlier case betokens a slightly more liberal spirit. *Cothron v. State*, 133 Md. 101, 110, 115, 113 Atl. 620, 624, 626 (1921).

<sup>70</sup> To be sure, this might be due to a policy of assimilating trials with a jury waived to jury trials, a consideration which does not exist in the case of a judge hearing evidence upon the *voir dire*.

<sup>71</sup> 126 Calif. 379, 58 Pac. 904 (1899).

<sup>72</sup> *Ibid.* at 381, 58 Pac. at 905.

This brings us to the heart of our problem. Square, deliberate holdings on these matters occur in the American reports less frequently than might be supposed. Before seeing how far California is representative of her sister states in throwing the gauntlet down before Wigmore,<sup>73</sup> we will do well to note the reasons for this comparative scarcity of decision. For one thing, there are happily a few upper courts which refuse under any circumstances, and many which refuse under some circumstances, to re-examine trial judges' determinations of preliminary questions of fact.<sup>74</sup> Logically this does not prevent an upper court from reversing for an erroneous admission of evidence upon which the determination was based.<sup>75</sup> Yet to do so certainly violates the spirit of the rule of finality. It does not follow that judges are invited to ignore the rules of evidence; but merely that the time of supreme courts will not be wasted by appeals concerning specific infractions. Even in jurisdictions not adhering to the rule of finality, lawyers may feel that though the admission of incompetent collateral evidence is reviewable error, there is little likelihood of its being reversible error. A practice of keeping impromptu disputes over the admission of evidence off the stenographic record may also thwart the would-be appellant.

In the few states permitting or requiring the judge to shift all disputed preliminary questions of fact to the jury,<sup>76</sup> our question has small chance of arising. In many other states the rule prevails that any question of fact as to evidence presented by the prosecution in a criminal case must, if the judge decides

---

<sup>73</sup> Curiously enough, an early California case goes further than almost any American authority in supporting Wigmore's thesis. *Bagley v. Eaton*, 10 Calif. 126 (1858). But the rule of the *Plyler* case is regarded as settled law in California by *People v. Frank*, 193 Calif. 474, 225 Pac. 448 (1924), which reversed a conviction because depositions of the prosecuting witnesses were admitted upon a showing of unavailability by letters not technically authenticated.

<sup>74</sup> *Dunklee v. Prior*, 80 N. H. 270, 116 Atl. 138 (1922), points with pride to 1 WIGMORE, *op. cit. supra* note 1, § 16, which points with pride to prior New Hampshire decisions advocating this position. Chief Justice Shaw of Massachusetts enunciated the rule of finality as far back as *Dole v. Thurlow*, 12 Metc. 157, 159 (Mass. 1846). Of course, most states do considerable revising of the trial judge's determination under the guise of seeing whether discretion has been abused. In some states the judge's ruling seems to be final unless he chooses to report the evidence for appellate consideration. *Sarle v. Arnold*, 7 R. I. 582, 586 (1863).

<sup>75</sup> *Cf. People v. Kunz*, 73 Calif. 313, 14 Pac. 836 (1887). And see *State v. Monich*, 74 N. J. L. 522, 526, 64 Atl. 1016, 1017 (1906), where Justice Pitney declares a preliminary ruling not reviewable "if there be any legal evidence".

<sup>76</sup> *Robin v. Bartlett*, 64 N. H. 426, 13 Atl. 645 (1887); *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502 (1877). See *King v. Hanson*, 13 N. D. 85, 100, 99 N. W. 1085, 1090 (1904); 1 GREENLEAF, *op. cit. supra* note 62, § 81c.

in favor of admissibility, be resubmitted to the jury.<sup>77</sup> It requires such hardihood for a lawyer in these states to contend that different rules of evidence should apply to the successive trials of the same dispute, that Wigmore's argument is seldom heard in criminal appeals.

The *Plyler* decision brings up our problem with startling emphasis. That the case arises under a code provision does not detract from its authority, since the vagueness of the legislative language compelled the interpreters to fall back upon what they conceived to be the common law. The infraction of evidential rules could scarcely be less objectionable: the admission of testimony which the accused had had prior opportunity to cross-examine, upon the basis of sworn declarations by the witness's own sister that he had died. Where would a judge need less protection than in the use of affidavits to lay a predicate for the admission of evidence, and where would departure from the orthodox rules be more expedient?<sup>78</sup> Yet the California court considers this a transgression serious enough to call for a new trial, and indicates that it would be similarly severe as to other types of preliminary inquiry.

Even the court's statement that the preliminary evidence was "a part of the trial" is by no means a truism. In *Oborn v. State*,<sup>79</sup> the prosecution sought to prove an issue upon a *voir dire* examination by introducing an official certificate. Without deciding whether use of certificate evidence would ordinarily violate the prisoner's constitutional right of confrontation, the Wisconsin court held that giving evidence upon the *voir dire* is not testifying against the prisoner. Of these clashing views, the better seems to be California's.<sup>80</sup> Probably nobody would disagree with

---

<sup>77</sup> *Lesieurs v. State*, 170 Ark. 560, 280 S. W. 9 (1926); *Musser v. State*, 157 Ind. 423, 443, 61 N. E. 1, 8 (1901), annotated (1901) 15 HARV. L. REV. 320. Authorities on the practice in regard to dying declarations and confessions are collected in THAYER, CASES ON EVIDENCE (Maguire's ed. 1925) 106, n. 1. See also (1925) 25 COL. L. REV. 673 and (1925) 24 MICH. L. REV. 196.

<sup>78</sup> But there is much sound sense in the depreciation of affidavit evidence by Lumpkin, J. in *Robertson v. Heath*, *supra* note 56, at 312, 64 S. E. at 71: "To see and listen to a witness for ten minutes, with the privilege on the part of the court to interpose a question when it is necessary for the full development of the truth, often gives the presiding judge a clearer insight into the real situation . . . than to listen to affidavits for an hour . . . Affidavits on the same side are sometimes as uniform in appearance as eggs in a shell; but if one of them be prodded with the point of a cross-question or two, the yolk is at once exposed."

<sup>79</sup> 143 Wis. 249, 266, 126 N. W. 737, 744 (1910). This case is undoubtedly sound in result in admitting authenticated copies of public records to be used against a criminal defendant.

<sup>80</sup> *Moore v. State*, 45 Tex. Cr. 234, 75 S. W. 497 (1902), and *Osborne v. Com.*, 282 S. W. 762 (Ky. App. 1926), offer collateral support for this view.

the suggestion made at the outset of this article that rules of evidence which are based upon considerations of policy, rather than a desire to insure the truth, necessarily apply to the judge as much as to the jury. Such rules, especially when formulated in constitutions or in statutes, should be safe from evasion *via* the narrowed construction adopted in the *Oborn* case.

*People v. Plyler* is not alone in refusing to permit proof by affidavits in controversies over the admissibility of evidence. The same stand was taken by the Massachusetts judges in 1829,<sup>81</sup> and by a good many others down to 1926.<sup>82</sup> Courts so holding do not overlook the well established common law rule that a party's affidavit was competent to prove the loss of a document and other preliminary matters.<sup>83</sup> Neither are they deterred thereby, for this rule was always regarded as a distinct exception to the usual course of things. Its origin must be ascribed not to confidence in the judge's superior acuity, but to the necessity for escaping an unendurably onerous result of the disqualification for interest.

At first blush it seems strange that decisions more frequently sanction the introduction of oral hearsay declarations than of affidavits. The fact that the cases admitting hearsay are all of one type suggests the clue.<sup>84</sup> *Interstate Investment Co. v. Bailey*<sup>85</sup> may be taken as representative. To account for the non-production of a deed, the defendant traced it into the hands of one S, and then offered evidence of unsworn declarations tending to prove that S had left the jurisdiction and lost the document. In holding the evidence admissible, the upper court was not prepared to say that loss could be proved by hearsay. It preferred to rest upon the argument that the offeror of secondary evidence need merely show the unsuccessful termination of a reasonably diligent search for the original. Since he will often

---

<sup>81</sup> *Poignand v. Smith*, 8 Pick. 272 (Mass. 1829).

<sup>82</sup> *Valenzuela v. State*, 248 Pac. 36 (Ariz. 1926); *Becker v. Quigg*, 54 Ill. 390 (1870); *Viles v. Moulton*, 13 Vt. 510 (1841). The argument of *State v. Allen*, 253 Pac. 371, 373 (Ore. 1927), points to the same result. Today the situation is often complicated by statutes requiring preliminary proof "under oath", as in *Steagald v. State*, 22 Tex. App. 464, 3 S. W. 771 (1886).

<sup>83</sup> *Taylor v. Riggs*, 1 Pet. 591, 596 (U. S. 1828); *Bachelor v. Nutting*, 16 N. H. 261 (1844); *Beall v. Francis*, 137 S. E. 251 (Ga. 1927). See the alternative explanation by Field, J. in *Bagley v. Eaton*, *supra* note 73. Modern statutes have often perpetuated this anomaly after its reason disappeared. See Ill. Rev. Stat. (Smith, 1921) c. 30, § 36; Wyo. Comp. Stat. (1920) § 4587.

<sup>84</sup> *Pilié v. Kenner*, 2 Rob. 95 (La. 1842); *Harper v. Scott*, 12 Ga. 125, 135 (1852); *Bridges v. Hyatt*, 2 Abb. Prac. 449 (N. Y. Sup. Ct. 1856); *People v. Fay*, 255 Pac. 239, 242 (Calif. App. 1927). English cases are cited *supra* note 41.

<sup>85</sup> 93 S. W. 578 (Ky. App. 1906).

be justified in ending his search if inquiries directed to well-informed people prove fruitless, the declarations of such people become circumstantially relevant, and the hearsay rule is not violated. But not every case which has permitted the use of hearsay can be distinguished upon this ground. Here and there one finds appellate approval of the introduction of a declaration which had obviously been used for its assertive value.<sup>85</sup> The fact that this will almost inevitably be the case where affidavits are admitted, explains their higher mortality rate.<sup>87</sup> Lest the general rule be obscured in our discussion of the exceptions, it is well to repeat that the majority of cases flatly forbid the judge to receive affidavits or evidence of unsworn declarations when making his preliminary decisions.<sup>88</sup>

There have been decidedly few attempts to dispense with truth-insuring rules other than the hearsay rule. An apparent one is the long standing practice of allowing oral proof of the contents of a writing upon the *voir dire*.<sup>89</sup> But this can be as well accounted for by that vaguely defined exception to the best evidence rule covering documents "collateral to the action," as by any distinction between judicial and lay triors.<sup>90</sup> On the other

<sup>85</sup> *Higgins v. Watson*, 1 Manning 428, 431-2 (Mich. 1853). *Bridges v. Hyatt*, *supra* note 84, though purporting to go on this ground, can be explained as in the text.

<sup>87</sup> See *Meldrum v. State*, 23 Wyo. 12, 36, 146 Pac. 596, 600 (1915), in favor of admission. *Bagley v. Eaton*, *supra* note 73, and *Taylor v. McIrvin*, 94 Ill. 488 (1880), are inconsistent with later decisions in their respective jurisdictions. *Pilié v. Kenner*, *supra* note 84, perhaps comes under the traditional exception discussed *supra* note 83, since the affidavit was by a party's attorney.

It is interesting to note that these cases are characterized as *unsound* in 3 WIGMORE, *op. cit. supra* note 1, § 1709, n. 7; just as the use of party's affidavits is referred to as an exception to the hearsay rule in 2 *ibid.* 737 (but *cf. ibid.* 756, n. 6).

<sup>88</sup> Hearsay: *Chapin v. Taft*, 18 Pick. 379 (Mass. 1836); *Kenworthy v. Slooman*, 62 Ore. 604, 125 Pac. 273 (1912); *Ogburn v. State*, 96 Tex. Cr. 339, 257 S. W. 887 (1924). See *Fry v. Bennett*, 4 Duer 247, 251-4 (N. Y. Sup. Ct. 1855). As to affidavits, see cases *supra* notes 71, 81, and 82.

*Commonwealth v. Waite*, 5 Mass. 261 (1809), is typical of the cases which refuse to allow a witness's extra-judicial assertions of his interest to be used in disqualifying him. Compare its English prototype, *supra* note 28; and distinguish such cases as *State v. Wilson*, 111 So. 484 (La. 1927), where the state of an impeached witness's mind is material.

<sup>89</sup> *Lett v. State*, 124 Ala. 64, 27 So. 256 (1900); *Babcock v. Smith*, 31 Ill. 57 (1863); *Oaks v. Weller*, 16 Vt. 63, 68 (1844). See *Miller v. Mariner's Church*, 7 Greenl. 51, 54 (Me. 1830).

<sup>90</sup> See cases collected in 2 WIGMORE, *op. cit. supra* note 1, § 1254. The language of many is broad enough to cover this situation, though they do not deal with preliminary inquiries. Wigmore's own explanation of the deviation from the best evidence rule has no reference to the peculiar immunity of a judge. *Ibid.* § 1258: "Since the person to be called as witness might

hand, there is much to confirm one's suspicions of a lessened respect for rules of evidence which are essentially procedural. This has been invoked to justify refusal of cross-examination,<sup>91</sup> but it is clear that at least in criminal cases the majority of courts will not go so far.<sup>92</sup> Of rules based upon policy we have spoken above.

## V

All the cases thus far considered involved evidence concededly not admissible on the merits. They do not tell us how far the judge can go in extracting information from the writing or declaration or witness whose competency is being determined. Of course he is free to glean what he can from appearance, demeanor, phraseology, and the like.<sup>93</sup> But will he be permitted to ask the witness questions, or to give credence to the oral or written statement, before he has determined whether or not it may be introduced before the jury?

Under the Wigmore-Willes view, the reply is an obvious yes. We have, however, sufficiently indicated our skepticism as to the judge's exemption from most rules of evidence. Then are we forced to answer the present question in the negative, for fear of involving the judge in a vicious circle? Many a circle which comes in roaring with leonine viciousness submits to straightening as meekly as any lamb. So it seems to be here.

When a witness on the *voir dire* is asked whether he has an interest in the suit, or if he is married to the defendant who has objected to his testifying against her, the problem is presented in its easier phase, upon which we have already touched in our discussion of the English authorities.<sup>94</sup> It is, we said, perfectly legitimate to give effect to rules of incompetency only when the evidence is known, not barely asserted, to be

---

not be known in advance to the opponent, it would be practically impossible for him to have the document at hand."

<sup>91</sup> *Sarle v. Arnold*, *supra* note 74; *Com. v. Morrell*, 99 Mass. 542 (1868), followed in the more conservative decision of *Com. v. Hall*, 164 Mass. 152, 14 N. E. 133 (1895).

<sup>92</sup> See cases collected in UNDERHILL, *CRIMINAL EVIDENCE* (3rd ed. 1923) 313, n. 49; 2 WIGMORE, *op. cit. supra* note 1, 219, n. 4, 5.

<sup>93</sup> This is carried furthest when the contents of letters are used circumstantially to authenticate them, as in *People v. Dunbar Contracting Co.*, 215 N. Y. 416, 423, 109 N. E. 554, 555 (1915); *People v. Adams*, 162 Mich. 371, 384, 127 N. W. 354, 360 (1910).

<sup>94</sup> Interest: *James v. Fairall*, 168 Iowa, 427, 434, 148 N. W. 1029, 1032 (1914); and see *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502, 504 (1877). Marital incompetency or privilege: *State v. Lee*, 127 La. 1077, 54 So. 356 (1911); *Territory v. Cheong Kwai*, 15 Hawaiian, 280 (1903). See text, page 1106 *supra*.

incompetent.<sup>95</sup> This position is bulwarked by the usual presumption in favor of the admissibility of evidence not obviously incompetent.

A harder fight comes when the burden of going forward with preliminary evidence of competency is upon the offeror. Thus, in *Pittsburgh Coal Co. v. Foster*,<sup>96</sup> a corporate defendant summoned one of its officers to the stand. Upon the plaintiff's objection that an officer was presumably a stockholder, and so disqualified for interest, the witness offered to swear that he had assigned all his stock. But the trial court would have none of this rebuttal, and the upper court agreed that "it was clearly right to reject his oath as a means of *divesting* himself of his interest". The same situation arises when the prosecution offers a woman who has concededly gone through the form of marriage with the defendant, and seeks to have her qualify herself by testifying to facts which show the invalidity of the marriage.<sup>97</sup> While a ruling against admissibility is by no means unreasonable here, it is not inevitable. Even presumptively incompetent evidence falls outside the prohibition if rules are confined to definitely incompetent evidence.

The question most frequently arises as to unsworn declarations whose *prima facie* incompetency the offeror is seeking to remove by forcing them within one of the exceptions to the hearsay rule.<sup>98</sup> This situation has been much to the fore in the recent cases. For example, in *Armour & Co. v. Industrial Commission*<sup>99</sup> it became necessary to support a workman's compensation award by finding some technically competent evidence that the fatal injury had been sustained in the course of employment. The only bit of proof which could possibly qualify was

---

<sup>95</sup> When the privilege against self-incrimination is claimed—as it normally will be—during the preliminary inquiry to determine whether it can be claimed on the merits, a different rule obtains. Disclosure to the judge of the allegedly inculpatory matter is not required. *Burr's Trial*, 1 Robertson, 243, 25 Fed. Cas. No. 14,692 (*nisi prius*, 1807); *State v. Thaden*, 43 Minn. 253, 45 N. W. 447 (1890). Nor do documents as to which the attorney-client privilege has been claimed have to be produced on the preliminary determination of whether this privilege exists, it was said in *Bujac v. Wilson*, 27 N. Mex. 112, 196 Pac. 513, 514 (1921), and cases there cited.

<sup>96</sup> 59 Pa. 365, 366, 371 (1868); cf. 1 GREENLEAF, EVIDENCE (16th ed. 1899) §§ 422, 423, in App. II at 908-909.

<sup>97</sup> *Shaak's Estate*, 4 Brewst. 305 (Pa. 1867); *Hoxie v. State*, 114 Ga. 19, 39 S. E. 944 (1901); *Jeems v. State*, 141 Ga. 493, 81 S. E. 202 (1914).

<sup>98</sup> Had we not confined our analysis to American cases, this would have been the place to discuss *Taylor v. Witham*, *supra* note 50, where Jessel, M. R., was prepared to allow proof of a loan by the introduction, as statements against interest, of entries in the alleged creditor's ledger that £10 interest installments had been paid upon the alleged £2000 loan, in the absence of any other proof that the money was owing.

<sup>99</sup> 78 Colo. 569, 243 Pac. 546 (1926).

testimony that the workman, sitting in his accustomed place near his engine, had said to someone entering the room: "I got a dirty fall", and then given details of how the machine had just injured him. That was all, except that immediately thereafter the workman resumed his duties. The award was sustained, on the ground that these declarations followed soon enough after the injury to be spontaneous. Yet the only way for the court to know this, or to know that there was any injury at all, was from the very evidence in dispute.

The *Armour* opinion cites *Insurance Co. v. Mosley*,<sup>100</sup> decided by the Supreme Court of the United States in 1869. A majority of the Court in that case upheld the admission of declarations by the insured that he had just fallen and hurt himself, although nobody had seen or heard the fall which the declarations "characterized." However, the declarant's pained expression at the time he spoke, and to some extent his posture, contrasted with his normal appearance a little while before, showed that *something* had happened in the interim, so the ruling appears not damningly unorthodox. Slight circumstantial proof of a similar nature may explain several other cases in which spontaneous declarations seem to lift themselves in by their own bootstraps.<sup>101</sup> The *Armour* case is susceptible of no such explanation, as it itself points out. Nor are three other cases involving spontaneous declarations, decided within the past two years in the same fashion.<sup>102</sup>

Similar situations arising with regard to other hearsay exceptions find the courts far more chary. Thus, the California court, thinking its action called for by *People v. Plyler*, refused to admit depositions on the basis of statements contained in them that the declarants were and would continue to be outside the state.<sup>103</sup> A similar refusal is traditional where recitals in a sheriff's deed of the judgment and issue of execution under which he acted are introduced as official written statements of these facts.<sup>104</sup> The sheriff was under an official duty to make this deed only if in fact there had been a judgment and execution

<sup>100</sup> 8 Wall. 397 (U. S. 1869).

<sup>101</sup> *Guyer v. Equitable Gas Co.*, 279 Pa. 5, 123 Atl. 590 (1924) (declarant very pale); *Haubrock v. Lamping*, 20 Ohio App. 307, 152 N. E. 205 (1925) (declarant in fainting condition); *Kenney v. State*, 79 S. W. 817 (Tex. Cr. 1903) (child exhibiting evidences of having been attacked).

<sup>102</sup> *Bunker v. Motor Wheel Corp.*, 231 Mich. 334, 204 N. W. 110 (1925), and *Young v. Stewart*, 191 N. C. 297, 131 S. E. 735 (1926), admits such evidence. *Louisville & Nashville R. R. v. Rowland's Adm'r.*, 215 Ky. 663, 286 S. W. 929 (1926), in reversing for other evidential errors, expressly declares such evidence admissible on the new trial.

<sup>103</sup> *People v. Frank*, *supra* note 73. Cf. *Pollard's Heirs v. Lively*, 2 Grat. 216 (Va. 1845), which seems to reach an opposite result.

<sup>104</sup> See *Hihn v. Peck*, 30 Calif. 280, 288 (1866); *Lessee of Wilson v. McVeagh*, 2 Yeates, 86 (Pa. *Nisi Prius*, 1796).

issued thereupon. So too with the date on an allegedly ancient document as proof of its age.<sup>105</sup> In *State v. Walker*,<sup>106</sup> the Iowa court decisively denied that declarations of an alleged co-conspirator might be allowed in evidence against the defendant on the basis of their own assertion of the conspiracy. This is in harmony with the legion of cases refusing to permit declarations of an alleged agent to be used as vicarious admission until the agency is otherwise established, no matter how forcefully they themselves proclaim the existence of the agency relation.<sup>107</sup>

## VI

Only a few brief concluding statements seem necessary. If progress in the matters here discussed is to be measured by the liberality with which printed cases disregard the truth-assuring [or merely procedural] rules of evidence, one can hardly say that our American law is more progressive than the English law. But when seeking a standard of measurement we must not forget or undervalue certain facts already suggested. Points of evidence in this field of preliminary controversy arise abruptly and are handled summarily. Thus counsel and court often dispose of such points without clearly realizing the problem presented. Here the judge's innate liberalism and common sense may well lead to rulings unconsciously agreeing with the policy which Wigmore obviously approves. Even where the problem is clearly perceived, counsel may perforce or by custom accept the trial judge's ruling as final. Here is an excellent opening for conscious liberalism, with the trial judge's hand strengthened by the likelihood that if his ruling be asserted and recognized as an error on appeal, the upper court will declare the error immaterial. On the whole, then, it is perhaps wisest to think of the few reported cases as often being persuasive only, and to admit frankly that in this minor aspect we are unlikely to find a common law of evidence. Instead we must depend upon local or even individual judicial inclination. This is not clearly undesirable. It scarcely cuts deep enough to change our government of laws into a government of men. Rather it gives reasonable play to an inescapable humanizing factor of judicial administration.

<sup>105</sup> *E. g.*, *Bower v. Cohen*, 126 Ga. 35, 54 S. E. 918 (1906).

<sup>106</sup> 124 Iowa, 414, 100 N. W. 354 (1904).

<sup>107</sup> Cases are collected in 1 *MICHEM, AGENCY* (2d ed. 1914) § 285, and 2 *WIGMORE, op. cit. supra* note 1, § 1078, n. 5. Of course the declarations would not be admissible on any theory unless they convinced the judge both that the agency relation existed and that the agent's duties required him to disclose his role. If there is sufficient other evidence of the agency to raise only a *prima facie* case, there is some authority that the declarations are admissible on the merits, but this involves a different principle than the one discussed in this article. See (1927) 40 *HARV. L. REV.* 392, 418.