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## HERESY ABOUT HEARSAY\*

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A WELL-WORN story has an anxious old lady say to her granddaughter: "My dear, do me a great favor and promise to stop using two words. One of them is 'swell' and the other is 'lousy.'" To which the child dutifully replies: "Why, of course, grandmother. Just tell me what the words are."

My trouble also is with two words, and I will tell you what they are. One of them is "conventional" and the other is "ingenious." If you deem my remarks conventional, you will *ipso facto* tag them as not worth hearing; and if you term them ingenious, you will have applied what to a lawyer is a subtly fatal description. Show me an opinion which characterizes as "ingenious" the argument of one side, and I need read no more to know who has lost the case. Between conventionality on the right and ingenuity on the left lies but a narrow and tortuous channel which I may not be able to navigate. One promise only will I make: that if there is a shipwreck, it shall be on the left hand shore.

This sinister assurance results from pessimistic appreciation of what has happened, in connection with the law of evidence, to those explorers and toilers who have confined their exertions to the right bank. They have, at least recently, found it on the whole a region of laborious futility. Most lawyers who do any thinking will agree that the art of proof in American courts suffers from serious distortions. Confusion, misunderstanding, anomaly, and inconsistency are only too commonly displayed. But efforts to square the pattern by frankly exposing the wandering roots of old mistakes and seeking the overruling of the cases which embody them have

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met, even in this Wigmorean era, only rather rare and undistinguished success. Piecemeal reform by legislation has been proving almost incredibly difficult. The law-maker seems even less inclined to yield to sweet reasonableness than does the judge. And I doubt whether any well-informed practitioner would bet much on the wide and speedy adoption of the wholesale reform which the American Law Institute is going to offer in the form of a code.

All these complete or partial failures involve conventional attacks upon obstructive errors. There remains for measurably hopeful consideration the possibility of an occasional unconventional thrust by means of novel analysis, boldly applied in the trial of causes. The jaded modern brain, even in a judicial head, may react more briskly to sharp and sudden shock than to dull, deliberate commonplace. And, if we must in some degree respect convention, an informed mind—I had almost stumbled into saying an ingenious one!—which plans such a thrust can pick up, by rummaging through the welter of evidentiary decisions, bits of judicial reasoning sufficient to furnish at least a sheath of precedent for disguising the virgin steel of his dagger.

The case of *Shenton v. Tyler*,<sup>1</sup> argued to an English court of appeal in January 1939, seems an excellent illustration, because in it a surprise attack upon a generally accepted major premise completely upset a conventional appletart. Complainant sued to enforce a secret trust obligation. The obligation was asserted to have arisen out of a confidential communication made to respondent by her husband, since deceased. Complainant sought to interrogate respondent about the communication; respondent refused to answer; the judge of first instance sustained the refusal, and complainant appealed. The published summary of argument by claimant's counsel indicates a shrewdly planned approach to a radical suggestion. These gentlemen realized full well that anybody who thinks he knows anything about the Anglo-American law of evidence is confident of the existence of an "old common law rule" that neither spouse "could be compelled to divulge [marital communications] even when the marriage is at an end."<sup>2</sup> Counsel began by seeming to recognize this privilege but with a suggestion that it failed to cover a "trust . . . not intended to be kept secret after the death of the person creating it," and that the immediate use of the privilege was unconscionable and should be prevented. Counsel added that a subsequently created statutory privilege

<sup>1</sup> [1939] 1 Ch. 620.

<sup>2</sup> The quoted passages are from the summary of argument in the Law Reports.

endured only so long as the marriage did, and then swung boldly on their fundamental point. The supposed common law privilege, they said, had "no authority establishing it," and they challenged respondent to demonstrate its existence. Opposing counsel made the orthodox answer: "If this contention were correct, it is remarkable that the text-books all assume the existence of the privilege at common law." Whereafter the judges went to work upon the problem and about two months later emerged with the unanimous conclusion—one of them frankly expressing "some surprise at the result"<sup>3</sup>—that there has never been in England any common law privilege whatever peculiar to private communications between husband and wife. This pronouncement, the court believed, required the overruling of not a single decision, although it did necessitate disapproval of some judicial dicta and numerous assertions and assumptions of text writers. The court also agreed with complainant's contention as to the limited durability of the statutory privilege and therefore allowed the appeal.

Commenting upon this decision *The Law Quarterly Review*<sup>4</sup> says: "From the purely legal standpoint . . . [it] is almost the ideal case, for it contains ingenious and difficult problems . . . , and is not complicated by being of any practical importance at all." The lethal word! "Ingenious"—enough said. However, for purposes of our immediate discussion, I can put before you a general topic and a particular problem which may have very painful practical consequences indeed.

It must be agreed, of course, that the kind of attack proposed will get nowhere with a really hidebound judiciary. But, if you seek to trip me by suggesting the difficulty of finding an open-minded jurisdiction, I respond by retiring into the Commonwealth of Ames and inviting you to follow me. This famous community, in which I spend practically my entire professional life, exists to satisfy the litigious needs of the Law School of Harvard University. It is unknown to the atlas and has no visible representation in Congress. Yet it is one of the states of the United States. In its great vaulted court room have sat Justices of the Supreme Court of the United States and of the highest state courts, as well as judges of the lower federal tribunals. Ames is a fit subject for the poet. It contains everything essential for law suits, including

. . . cities of men,  
And manners, climates, councils, governments.

<sup>3</sup> [1939] 1 Ch. 620, 636.

<sup>4</sup> 55 L.Q. Rev. 329 (1939); but see Holdsworth's comment in 56 L.Q. Rev. 137 (1940).

For example, a brilliant literary man of Ames thus depicted one of the commonwealth's greatest inhabitants:

Now Williston lives in a zoo  
 With beasts suppositious.  
 There's John's white horse, and Peter's too,  
 One eyed and very vicious.

Canary birds are fitting by  
 With vigor undiminished—  
 But all these animals will die  
 Before the contract's finished!<sup>5</sup>

Everything in Ames leads to orderly litigation. Yet, oddly enough, Ames cannot be called

A land of settled government,  
 A land of just and old renown,  
 Where Freedom slowly broadens down  
 From precedent to precedent.

For Ames never, never has a precedent on all fours or even in point with respect to the case at bar. Ames is so open-minded a jurisdiction that, until now, she has lacked any legal history. I am going to give her some.

Not very long ago—as you can tell for yourselves from the subsequent citation of more than one 1940 case by counsel—the presiding judge in a civil session of the Ames trial court of general jurisdiction came back to the bench full of the certitude which arises out of a good lunch, directed a verdict, stilled the wailings of defeated counsel, and cleared the decks for his next case. While the clerk spun his little wooden barrel, pulled slips therefrom, and called the names of jurymen, His Honor looked over the papers. At first glance the suit seemed common enough—a motor vehicle collision case—but the judge's eye began to catch on little oddities. To begin with, the name of the plaintiff, a millionaire munitions manufacturer turned philanthropist, whose wife was said to have an insatiable yearning for the company of literary lions; second, the fact that nothing but property damage was claimed; third, the names of counsel. For the defense appeared no less a person than Henry Stout. Stout tried for insurance companies often enough, and an insurance company was indicated as the real defendant here, but Stout was far too costly an advocate for any ordinary small case. The judge knew him, professionally and otherwise. He was a vigorous, erect, thick-set man aware of all the standard court room moves and not hesitant to make them. He affected a style of

<sup>5</sup> Plimpton, *In Personam* 25 (privately printed 1925). Cf. Williston, *Life and Law* 205 (1940).

advocacy solid and assured. Part of his stock in trade was belligerent confidence in the righteousness of his clients, and a rather shocked contempt for the motives and behavior of their opponents. Somebody—either Mr. Stout or the client—must be pretty hot under the collar over this collision litigation. The judge and Mr. Stout attended the same church. Mr. Stout's pew bore a large sign "RESERVED." So did the judge's. But His Honor felt there was a difference. Mr. Stout always acted as if the word on *his* sign began with the letter "D" instead of the letter "R." Somehow the judge did not much like Mr. Stout.

For the plaintiff appeared one Thorne, a youngish lawyer, son of a highly successful inventor of fulminating materials who had unfortunately invented once too often and died in the explosion of his final achievement. The father, His Honor remembered, had been very serviceable in the plaintiff's factory. Probably that explained half the line-up in the immediate case. Young Thorne did not usually work for millionaires. His clientele was shifting. He won some hard cases and lost a lot of apparently easy ones. His methods, many of the bench thought, were to blame. Some deemed him brilliant but unbalanced. They pointed to his father's resounding finish and suggested that the son would maintain family tradition. One judge had likened young Thorne to the irrepressible Wildy Wright, who after a tempestuous morning was addressed as follows by a recent appointee to the English bench: "Mr. Wright, I have carefully considered the objection you raised before the adjournment and consulted my learned brother, and we are both agreed that I ought to overrule it. *And I may say for your assistance that if in the course of the case you make any other objections, I shall feel it my duty to overrule those also.*"<sup>6</sup> Nobody went to sleep, though, while Wright was performing, and the same can be said of Thorne before the courts of Ames.

His opening was mild enough in the case we are reviewing. The collision, he said, had occurred at dusk in a street intersection. The chauffeur driving his client's car had been killed. An action for wrongful death was pending, but the executrix had decided that it would be inadvisable to associate the trial of her case with the trial of the present one. (Something like a snort was heard from Mr. Stout at this point; his expression indicated belief that the executrix had made a wise choice.) There had, however, been a passenger in the plaintiff's car. This passenger's version of the occurrence would be given (an unmistakable snort from Mr. Stout this time, accompanied by a glare which suggested: "Over my dead body!")—or perhaps it would be fairer to say that the passenger's version would be

<sup>6</sup> Parry, *My Own Way* 43-44 (1932).

offered. And so on. Mr. Stout elected to postpone his opening, intimating darkly that it might become superfluous.

Mr. Thorne then called and had sworn a single witness, stating that others, if needed, would be produced later. The witness, one Saner, was a tall, square-shouldered fellow, with a tanned face and an air of expectant amusement. Seemingly accustomed to the witness box, he described himself as a physician engaged in treatment of mental cases at a well-known mountain sanitarium, and settled back for the first real question.

"Dr. Saner," said Thorne, "can you tell us whether any patient was received at the sanitarium in the morning of December 18, 1938?"

The judge remembered that, according to the opening, this was the day following the accident.

"Yes," said the doctor, "one and only one."

"And that patient was?"

Dr. Saner gave a name which startled the judge—Bernard Galsworthy Wells. The papers would have liked this information in December, 1938. Mr. Wells stood high in the field of authorship.

"We shall prove, your Honor," said Thorne, "possibly by this witness, that Mr. Wells was the passenger in my client's car at the time of the collision."

"Just one moment." Mr. Stout rose majestically, like a heavyweight champion issuing from his corner; there was menace in his aspect. "I should like to know how my friend intends to establish the identity of this passenger—if there *was* any passenger—by the testimony of Dr. Saner. Is it asserted that the doctor witnessed the accident?"

"Oh, not at all," responded Thorne cheerfully, "but Mr. Wells told him all about it."

Mr. Stout changed with impressive deliberation from a heavyweight champion to an offended deity in whose presence sacrilege has occurred. Words formed behind his lips. His mouth opened. But Thorne, still very cheerful, cut in:

"I might say, your Honor, that if we come to grips on this particular aspect of the issue we shall miss the fundamentally interesting point. Suppose I pass momentarily the question of identifying the passenger—for that I have an alternative witness to whose testimony even Mr. Stout cannot object—and make a specific offer of proof in respect of a matter upon which I cannot produce other reliable testimony. I propose to show by Dr. Saner that Mr. Wells is in an emotional state, as a result of this collision, which makes it inadvisable, to say the least, that he should be subjected to the ordeal of testifying. I propose next to offer, again through Dr. Saner, testimony and memoranda of a highly detailed statement or

series of statements made by Mr. Wells, while at the sanitarium, with regard to the unfortunate event which caused him to go there for treatment."

"And I," thundered Mr. Stout, more than ever the affronted deity, "shall object to the admission of any such testimony by Dr. Saner on the ground that it would be hearsay, the alleged statements not having been made in the presence of my client and not being part of the *res gestae*."

"Certainly I do not mean to suggest that they were part of the *res gestae*," responded Thorne sweetly. "I am mindful of the remark by Mr. Justice Holmes that, in place of using that term, he preferred to give articulate reasons for his decisions.<sup>7</sup> In fact, I mean to avoid the Latin language entirely and stick to English. I contend that my brother, in resting his objection upon the ground of hearsay, is really giving a false name to the principle he invokes."

Mr. Stout hung fire for a second. The remark about articulate reasons had at the same time stung him badly and borne in upon him the fact that he did not know how to define *res gestae*. Now he began to wonder whether he could define hearsay. At this point the young man who served as Mr. Stout's junior, so meek and mouse-like that he had not hitherto caught the judge's attention, slipped a sheet of paper into his chief's hand. Mr. Stout glanced at the sheet, returned it to the junior, and proceeded with confidence:

"This discussion seems astoundingly rudimental, to speak charitably of it. The nature of hearsay is so well understood that Wigmore does not trouble to define the word. However, to enlighten my friend, I suggest the agreement of all the best modern authorities on the general proposition that the hearsay rule excludes evidence of a declaration by a person not under oath and subject to cross-examination in the very case, if that evidence be offered to prove the truth of the matters declared. Now that is exactly what we have here. If I understand Mr. Thorne, the declarant Wells is unable to stand up under cross-examination."

"If the Court will permit me to make an offer of proof, my contention will become clear," responded Thorne.

"Is this important?" queried the judge.

"Fundamentally so."

"Then I think your offer had best be made out of the jury's hearing. We have only thirty minutes left. Are you likely to consume that length of time in argument on the matter?"

The usual wrangle followed as to whether the matter would consume

<sup>7</sup> Mr. Thorne apparently obtained his information about this remark of Mr. Justice Holmes from the American article on "Evidence" in the 14th edition of the *Encyclopaedia Britannica*.

three minutes or three hours. Finally the hours had it and the judge excused witness and jurors for the day.

"Now," said Thorne, "here, your Honor, is my offer:

"Dr. Saner can and will qualify as an expert in mental ailments. He will testify that Mr. Wells, after arriving at the sanitarium, was put under his special care; that in the course of treatment he found it advisable to obtain from his patient a full account of the accident involved in this case; that this included a description of the street intersection and its surroundings (we can prove, incidentally, that Mr. Wells saw the place once and only once, namely, at the time of the collision); that Dr. Saner carefully checked this description by personal observation on the spot; that from this check and from other matter elicited during treatment Dr. Saner reached the conclusion that Mr. Wells is a man of singular accuracy of perception, great power of memory and exact expression, and extreme truthfulness."

"And then," interjected Mr. Stout with elaborate irony, "I suppose you will suggest that Dr. Saner be given sole occupancy of the jury box for the purpose of rendering a plaintiff's verdict?"

"Not at all. Although he is an expert—"

"An expert in veracity?" sneered Stout.

"For the purposes of this case, exactly so. But although he is an expert, the jury will be entitled to determine his credibility, and he will have given them the material for determining the credibility of Mr. Wells and the desirability or undesirability of accepting his story of the unhappy event which led to this litigation. I propose to your Honor that in this case, at least, what my brother has spoken of as a problem of hearsay is really a problem of opinion. The only possible reason for keeping out evidence of Mr. Wells' statement is that under the circumstances the jury are deprived of the information for forming their own opinion of his credibility which would be furnished if he could take the stand subject to the standard sanctions of testimonial evidence, particularly cross-examination by my brother." And he bowed to Mr. Stout, who remained stonily unresponsive. "Instead, we offer corresponding information in really better form through the medium of a singularly appropriate witness. If evidence of the declarations be kept out, I venture to say the ruling must constitute a holding that although we accept expert opinion testimony on a thousand matters, great and small, it is improper to accept such testimony, even in most cogent shape, with respect to the matter of human veracity."

"Well, what do you think of it, Mr. Stout?" asked the judge, who himself thought the whole thing sounded wildly unconventional.



Mr. Stout paused, as if searching his mind for words in which to express his disgust. At length he found three:

"Preposterous, grotesque, ludicrous."

"Would the Court like to consider my precedents?" inquired Thorne.

"If any," interpolated Stout.

"Well, I suggest, your Honor, that the case of the lifted eyelid is in point.<sup>8</sup> There are elements of distinction, but not fundamental ones."

This cryptic description delightfully suggested a bit of facial surgery or a cynical detective novel to the judge, and evidently suggested nothing at all to Mr. Stout. Satan entered the judicial mind. The judge yielded to temptation:

"Ah, yes—possibly; still, I feel a certain difficulty. Mr. Stout, do you think that case fundamentally distinguishable from this?"

Stout gulped but held his ground: "I see nothing in common whatever."

"Yes, but in just what particulars is there divergence?"

Stout gulped twice, turned brick red, and stood mute. He was well supplied with citations of cases holding that, while an attending physician may testify to the patient's assertions of contemporaneous physical sensation, he may not testify to the patient's account of the cause of an injury. But there was not a lifted eyelid in a carload of this stuff. Stout's junior rooted frantically in a brief case; less like a mouse than a terrier down a rat hole, thought the judge. Mr. Stout certainly smelled a rat, but knew not what to do about it. The silence became oppressive.

"I fancy," said Thorne smoothly, with no outward sign of his inward and far from Heavenly bliss, "that your Honor has in mind this detail which causes hesitation: The child—who, it must be remembered, was too young to testify—was present in court so that the jury could observe her actions when she illustrated her inability to close the damaged eye. Consequently her performance might be thought of as a bit of real evidence, something like, say, a motion picture, supplementing but independent from the expert testimony of the physician as to the extent to which the injury had impaired her power to close the eye. But the court said—and this seems to me particularly significant—that 'the demonstration may be regarded as a part of the physician's testimony and under the sanction of his oath.'<sup>9</sup> Indeed, that interpretation is forced on us and made available for use in connection with the situation at bar by a case decided in the same state, Connecticut, during 1940.<sup>10</sup> In that later case the appellate court took the trial judge to task, although it did not re-

<sup>8</sup> *Friedler v. Hekeler*, 96 Conn. 29, 112 Atl. 651 (1921).

<sup>9</sup> *Ibid.*, at 33.

<sup>10</sup> *State v. McLaughlin*, 126 Conn. 257, 264, 10 A. (2d) 758, 761 (1940).

verse, for his instruction that the jury might obtain material for otherwise unavailable inferences by observing a witness in some other part of the court-room than the witness box. The opinion says that the trier of fact is entitled to take into account his observations of the demeanor of a witness only to the extent of such genuine and spontaneous reactions on the latter's part while occupying the stand as bear upon the credibility of his testimony given under oath.<sup>11</sup> Thus it would seem that the testimony of the expert as to the sincerity of the child's efforts to close her eye was from a technical point of view the important matter in the earlier case, and that, except for the purpose of dramatic effect, he might just as well have asked the child in his office to show how far she could draw down her eyelid and have presented to the court his view as to whether she had tried her best to obey the request. So, while the situation was rudimentary, I think it fairly comparable with the one covered by my offer of proof in the present case."

By this time the mouse-terrier junior had emerged from his brief case clutching three or four papers, which he urgently handed to Mr. Stout with whispered explanations. Wisely avoiding attempts to deal directly with lifted eyelids, Stout crashed into a counter-attack.

"If the Court please, we should like to call attention to a substantial series of New York decisions, running over a stretch of forty-nine years, in which the testimony of alienists as to the sanity or insanity of criminal defendants was held inadmissible when based upon hearsay histories of the defendants' behavior. I quote briefly from *People v. Strait*, decided by the New York Court of Appeals in 1896: 'The witness was an expert on diseases of the mind, but he was not an expert on determining the facts, where such facts had to be obtained from the statements of others. . . . He might have been deceived by a false statement prepared for the occasion and for the purpose of making him a valuable witness at the trial.'"<sup>12</sup>

Thorne thought he knew the answer to that one: "In these New York cases, your Honor, many of the statements of fact were made to the alienists by persons other than the defendants. There is no showing whatever that the alienists attempted any intelligent study of the mentality,

<sup>11</sup> Mr. Thorne here combined two statements made in the McLaughlin opinion, and perhaps pressed the interpretation a bit strongly his way. But this opinion in explaining *Friedler v. Hekeler*, 96 Conn. 29, 112 Atl. 651 (1921), although it speaks of "a demonstration . . . carried to the point of using the child as a witness," concludes by saying "we held that this could only be permissible under the sanction of the oath administered to the doctor conducting the demonstration."

<sup>12</sup> 148 N.Y. 566, 570, 42 N.E. 1045, 1045-46 (1896). Another citation on the sheets of Stout's junior was *People v. Keough*, 276 N.Y. 141, 144, 11 N.E. (2d) 570, 572 (1937).

let alone credibility, of these third parties. And, even so far as the statements were made out of court by the defendants themselves, it does not appear that the experts scientifically studied *credibility*, however carefully they may have worked on the problem of sanity. Now I respectfully suggest that here we have, by virtue of Dr. Saner's meticulous check on Mr. Wells' credibility, something at least roughly analogous to the scale-ticket and thermometer cases, and in consequence testimony which is properly admissible."

At this point in his remarks Thorne was standing directly behind opposing counsel. He paused to observe the effect of his last dart. The back of Mr. Stout's neck turned first a rich red and then purple. Thorne felt sure that the front elevation must be equally worthy of critical attention. The judge, horrified by the hue of Stout's face, hastily yielded to qualms of conscience:

"Come, come, counsellor, once is enough for a single afternoon. Tell us what those cases are and don't trifle with our blood-pressure."

"Suppose I describe the scale-ticket case,<sup>13</sup> it being the more striking of the two," said the unabashed Thorne. "That was an action by a woman for personal injuries in which it was material to prove that since the injury she had lost weight. The trial judge allowed her husband to testify that when she stepped on a penny-in-the-slot scale and inserted a coin, the scale disgorged a ticket which said: 'Your weight is so many pounds.' The objection that the testimony embodied hearsay<sup>14</sup> was overruled. Yet obviously the objection was as soundly phrased as that by Mr. Stout in the present proceedings. The operation of the scales constituted an assertion of fact which was reliable or unreliable according to the accuracy and integrity with which the workmen who constructed or from time to time adjusted the internal machinery had performed their duties. The court was in substance taking judicial notice of the dependability of manufacture and adjustment.<sup>15</sup> Here I am not asking judicial notice of the precision and comprehensiveness of Mr. Wells' observation, memory, or expression. I am offering convincing expert evidence on all these matters. My case is stronger for admissibility than was the scale case. It cannot be distinguished on the ground that the latter involved the working of a mechanical device, for the accuracy of that device rested upon the craftsmanship of human beings never called to the stand."

<sup>13</sup> De Filippo v. Di Pietro, 265 Mass. 186, 163 N.E. 742 (1928).

<sup>14</sup> That the objection was on this ground is only implied in the report and the record. Defendant's brief puts the point as a hearsay problem.

<sup>15</sup> See Morgan, Hearsay and Non-Hearsay, 48 Harv. L. Rev. 1138, 1145-46 (1935).

"Where," asked Stout, now returned to approximately his normal hue of countenance, "where and when was your scale-ticket case decided?"

"Massachusetts, 1928."

"Ah," Stout went on with dangerous suavity, "and do you mean to tell us that the Supreme Judicial Court of Massachusetts, under Mr. Chief Justice Rugg, indulged in the kind of speculation with which you have been regaling us?"

Thorne inwardly thanked heaven that his use of the scale-ticket case had in it the elements of a mouse-trap play on the football field. He said:

"Counsellor, your suspicions are justified. So far as I can tell from the report, the record, and the briefs, this analysis never seemed necessary to any of the persons involved. The dispute centers on the issue: 'Did the husband actually see the transaction which produced the scale-ticket and read the ticket himself, or did his wife tell him how she got the ticket or what it said?' The opinion assumes that he saw the card issue from the scale and asserts that in consequence of this assumption his testimony stood 'on the same footing as testimony of the indication of the weight upon an ordinary platform scale.'<sup>16</sup> The fundamental analysis is implied only. But this is probably because that analysis was made familiar by the thermometer case as long ago as 1896. There Judge Given of the Supreme Court of Iowa, in a somewhat intricate situation, treated the problem of proving temperature in connection with a 'flash test' of oil, and sustained the admission of evidence of what a thermometer had registered, although recognizing that its scale was 'but the unsworn statements of the manufacturer.' My analysis is directly derived from his."<sup>17</sup>

Thorne's mousetrap had a hole in it, as he later frankly admitted to the judge in his memorandum of authorities. The Given opinion appears in the Northwestern Reporter only and not in the Iowa reports, the court's views being presented in the latter place by Mr. Justice Robinson, under whose hands the result remained the same, but with reasoning less forthright and clear.<sup>18</sup> Stout, however, was running no risk of being sidwiped again, and went off on another line.

"But the scale case," contended he, rising belligerently as Thorne paused, "and the thermometer case as well, involved the operations of groups of men engaged in the discharge of business duties, accurate from habit, probably to some extent checking on each other's work, and with no personal interest which might tempt them to maladjustment of the

<sup>16</sup> *De Filippo v. Di Pietro* 265 Mass. 186, 188, 163 N.E. 742, 743 (1928).

<sup>17</sup> *Hatcher v. Dunn*, 66 N.W. 905, 908 (1896).

<sup>18</sup> *Hatcher v. Dunn*, 102 Iowa 411, 418-19, 71 N.W. 343, 345 (1897).

scales or the thermometer. Each scale-ticket, each reading of the thermometer, resembled somewhat a postponed entry in the course of business duty."

"Now *that*," exclaimed Thorne, "is a downright ingenious distinction! But what will my brother say to the cases in which confessions although obtained under conditions of pressure or inducement which render them likely to be false and therefore would normally have made them inadmissible, are nevertheless received because circumstantial evidence indicates truthfulness of part of the confessing person's assertions and thus makes possible an intelligent appraisal of the rest?"<sup>19</sup>

"My reply is that the investigation for corroborating circumstances is normally made by the police, who apply systematic and time-proved methods."

"Which is just what Dr. Saner will testify he applied in the present instance," responded Thorne. "I can also refer to other lines of authority, none precisely in point but all having a valuable bearing. First, in connection with what is commonly entitled the impeachment and rehabilitation of witnesses it is recognized as perfectly orthodox and proper to put before the jury evidence of community reputation for truth and veracity,<sup>20</sup> evidence of convictions for crime,<sup>21</sup> evidence of pardons,<sup>22</sup> and so on, all in forms immensely more difficult for the jury's intelligent appraisal than the proposed testimony of Dr. Saner."

"But," cut in Stout, "none of this material is employed to accomplish the admission or rejection of testimony. It is intended purely to qualify the effect of testimony concededly admissible.

"Passing that point, let me add that the verification Mr. Thorne offers has already, in part at least, been held improper. The United States Circuit Court of Appeals for the Sixth Circuit dealt last January with a criminal case involving an issue of identification.<sup>23</sup> The government's witness on this issue had seen from her window what was apparently part of the action in the crime, nearly 200 feet away. To bolster her testimony the government offered, and the trial judge admitted, testimony by law enforcement officers that they had been able from the identity witness's window to recognize individuals at the scene of the crime. The appellate court says that this supplementary evidence was improperly admitted."

<sup>19</sup> 3 Wigmore, Evidence § 856 et seq. (3d ed. 1940).

<sup>20</sup> *Ibid.*, § 922 et seq.

<sup>21</sup> *Ibid.*, § 980.

<sup>22</sup> On this point Thorne probably overstated his case. See 4 *ibid.*, § 1116(3). Additional references are given in Morgan and Maguire, Cases on Evidence 99 n. 1 (1934).

<sup>23</sup> *Ippolite v. United States*, 108 F. (2d) 668, 670-71 (C.C.A. 6th 1940).

"That episode," Thorne promptly replied, "is unlike the present one. There the supporting evidence was intended to bear out the claim that the identity witness not only *could* observe but *had* observed relevant events from her window. The conditions of verification were unfair to the defendant. The enforcement officers knew in advance what kind of thing to look for and when and where to look, were skilled in observation, and thus were likely to have used their eyes more effectively than the identity witness. Here the conditions of verification, if unfair to anybody, are unfair to my client. The question is not whether Mr. Wells *could* see, but whether his story, checked against persisting facts, shows that he *did* see and remember accurately. His observations, made in haste, excitement, and unfamiliarity, are critically tested by a shrewd observer, working coolly and at his leisure. And they pass the test. Hence I argue that as to facts contemporaneously observed, but not persisting, the jury may reasonably conclude that Mr. Wells saw straight and has talked straight."

"That seems a good answer," commented the judge. "Have you anything more at this stage, Mr. Stout?"

"Yes, your Honor, a case in Maryland held it improper for a prosecutor to bring to the jury's attention that a defense witness had previously given substantially identical testimony in his own behalf and been disbelieved by a bench of three judges—"<sup>24</sup>

"Who," interpolated Thorne, "had not qualified as psychological experts and were not available for cross-examination as to just what they had decided or why."

"I think, your Honor," roared Stout with every appearance of deep indignation, "that common professional courtesy should lead my brother to let me finish my remarks without an insinuated gloss. But, since he has spoken, I invite his and the Court's attention to the New Mexican case in which it was held error to permit the committing magistrate who narrated a confession by the defendant to go on and state that he found beyond a reasonable doubt that defendant was guilty, thus expressing his approval of the confession and of other testimony given for the State at the preliminary hearing."<sup>25</sup>

"I hardly think the magistrate had enjoyed Dr. Saner's specialized training and long experience in searching the human mind," commented Thorne. "Certainly both your Honor and Mr. Stout are aware of the respectable modern cases holding that a primary witness may properly be

<sup>24</sup> *Newton v. State*, 147 Md. 71, 89, 127 Atl. 123, 131 (1924); cf. *Green v. State*, 161 Md. 75, 83-87, 155 Atl. 164, 167-69 (1931).

<sup>25</sup> *State v. Paiz*, 34 N. Mex. 108, 109, 277 Pac. 966 (1929). See also *State v. Shumpert*, 11 S.E. (2d) 523, 527 (S.C. 1940).

impeached by expert testimony that he or she is a pathological falsifier or the like.<sup>26</sup> Why should we employ the advances of science only for the purpose of belittling evidence? Why not let them be used with other liberalizing factors to increase the quantity of relevant and useful information put to our jury? It is an unhappy characteristic of modern so-called civilization that technical achievements are perverted. No sooner do we learn to navigate the air than aviators drive us underground to escape their bombs. I am asking this court to reverse the vicious process and put scientific progress to constructive use."

"Well, gentlemen," said the judge, not too much moved by this outburst, "I think I see what is going on here. Mr. Thorne is utilizing—of course with the highest motives—the peculiar facts of this situation to frame a test case and Mr. Stout and his client and I are in a sense stooges." Mr. Stout, although gratified by his Honor's blunt description of the state of things, could not help feeling miffed at being called a stooge. However, he held his peace. The judge went on: "You both know my practice of dictating memorandum decisions in the presence of counsel. Now in this case at the present moment I am not sure which way I shall decide. So, I propose that each of you now dictate to the court stenographer the memorandum he would like me to use. The stenographer will run the memoranda off in time for me to take home with me—can you do it, Miss Spencer? . . . Yes, I'll hold down the length. . . . All right, good for you—and I shall make my ruling when we start again at ten o'clock tomorrow. Suppose you begin, Mr. Thorne; and remember what Miss Spencer said—this has got to be short."

"Very well, sir," answered Thorne, and commenced to rise.

"Oh, don't get up unless you dictate better on your feet." Thorne subsided gratefully, stretched out his legs, slumped in his chair until he was sitting on the small of his back, fixed his eyes on the ceiling, and opened his mouth. But his Honor was not quite finished: "And I want to say this, too. It seems to me you are putting to me a freak situation. It may get into the newspapers. I don't like that, unless my decision is really going to count for something. What can you answer to reassure me?"

"I can speak more frankly, sir, if what I say forms no part of the memorandum. This *is* indeed a freak situation. It may never come up again. But it is a situation tending and justly tending to cause sympathetic judicial consideration of my fundamental proposition that, analytically, a great deal of hearsay ought to be treated under a wise application of the doctrines governing opinion, rather than under an independent doctrine.

<sup>26</sup> 3 Wigmore, Evidence §§ 934a, 935 (3d ed. 1940); Morgan and Maguire, Cases on Evidence 94(E) (1934).

The vice of many test cases is that their facts appeal to neither the intellects nor the emotions of the courts which hear them. They tempt unfavorable decisions, and obstruct progress instead of furthering it. I have patiently waited for circumstances which enable me to avoid that vice. My hope is that a decision in favor of admissibility under these remarkable facts may gradually come to be applied in conditions less and less extraordinary, until finally the applications open for admission of so-called hearsay an avenue along which can travel not only evidence of declarations supported by worthy opinion testimony as to the credibility of the declarants but also evidence of declarations whenever accompanied by sufficient showings of the setting or background against which the utterances occurred to enable the jury intelligently to appraise their value. Your Honor will observe the breadth and importance of such a principle. It would admit, in addition to evidence of such declarations as seemed to have a singularly high degree of credibility, evidence of many only moderately credible, or even lower in the scale of veracity, yet still possessed of appreciable potential probative power."

"Very pretty alliteration," said the judge with critical literary approval. "Yes, I see your point. Conceivably there may be something to it. Get along with your dictation."

"You do the right headings on the memo, Miss Spencer," began Thorne, "and run the body of it this way:

"The witness Saner has qualified as an expert on mental disease. He has testified and I find that Bernard Galsworthy Wells is suffering from a serious nervous breakdown, and that this condition would be prolonged and recovery would become more doubtful if Wells attempted to testify in this litigation. I therefore find that Wells is unavailable as a witness.

"Saner, who has closely and carefully studied the veracity of the declarant Wells under conditions favorable to such study, and who has exceptional qualifications for the task, is offered to state to the jury, first, the nature and extent of his inquiry and the findings thereon, and, second, certain relevant declarations of fact, a number of them embodied in contemporaneous written records, uttered by Wells with reference to the issues in the litigation.

"The problem of admissibility thus presented is novel to the extent that it has rarely if ever been ruled upon in this particular form, but there are analogous precedents which I cite in a footnote."

"What's that—footnotes?" cried the judge. "I don't like them."<sup>27</sup>

"But they're all the fashion now in judicial opinions," explained

<sup>27</sup> Neither, it seems, does John W. Davis. See Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895 (1940).



Thorne. "Mr. Justice Brandeis started the habit in the Supreme Court of the United States over twenty years ago, and now nearly every one of the Justices exercises it.<sup>28</sup> The state courts have taken it up. Why, law professors now can hardly tell the difference between their own articles for the legal magazines and the opinions the judiciary is turning out. Confidentially, my own view is that the judges were jealous of the professors, and are using this form to convey the idea that they are equally learned."<sup>29</sup>

"Besides, to be purely utilitarian, in the present case the footnote will save a lot of time. My memorandum of authorities is so arranged that Miss Spencer can turn it into a note by prefixing an asterisk or a superior figure or whatever she thinks best."

"All right, all right," conceded the judge. "But what's going to be in your note?"

"The order of material is this: The scale-ticket and thermometer cases; a case or two on the use of so-called lie-detectors<sup>30</sup> (I did not mention these in argument, because evidence of this kind has rarely thus far been admitted except by mutual consent; but the very fact that mutual consent was obtained and that the courts countenanced the evidence shows that it has some standing; and of course this semi-mechanical means of presentation fits in nicely on the transition from machines to human opinion); then *Friedler v. Hekeler*, the case of the child's eyelid; next, cases on corroboration of confessions to get in some of those otherwise inadmissible; and finally all the analogous material about impeachment and rehabilitation of witnesses."

Thorne paused to get his breath. The ensuing silence jerked the judge's thought into sharp focus on a matter about which he had been dimly conscious for several minutes—the absence of a brooding and disapproving presence. Leaning forward, he thrust his head over the front edge of the barrier before him, and addressed the clerk on the lower level:

"What's happened to Mr. Stout? He's gone."

"Yes, sir, I know. He tried to catch your eye, but did not succeed. He seemed annoyed. At last he told me that his presence at these proceedings was apparently unnecessary. He left his memorandum of authorities, and told me what he would have Miss Spencer write out. Then he and his junior went away."

<sup>28</sup> Mr. Thorne's assertion must be taken with a grain of salt; but recent volumes of United States reports certainly carry much heavier documentation in footnote form than did those of the first two decades of the century.

<sup>29</sup> On the contrary, it may well be contended that such members of the court as Justices Douglas, Frankfurter, and Stone brought professorial habits with them to the bench.

<sup>30</sup> See 3 Wigmore, Evidence § 999 et circa (3d ed. 1940).

"Humph," said the judge. "And what does he want Miss Spencer to write?"

"Well, just two words, sir—it was short, he said, but quite enough. The words are: 'Evidence excluded.'"

"Gracious," said his Honor, "that's about the most pointed thing Mr. Stout has ever said. I don't think he likes the conduct of this case. The situation has become very irregular indeed, with no counsel for the defense present. I wonder if we ought to stop. But I don't think we will. Let's go ahead and finish this memorandum."

The judge now saw that more than defense counsel had departed. The spectators' benches were vacant save for a placid and probably slumbering person in ragged raiment at the right-hand rear corner. Not a lawyer was within the bar enclosure except Thorne. The court officer dozed in his little box at the side of the room. The judge felt lonely.

"Do you know," he remarked, "I think I'll come down from here so things won't be so formal and distant." Suiting the action to the word, he gathered up the skirt of his heavy silk robe and negotiated the steps to the court room floor. Somehow a table seemed a better place to sit than a chair. He tried it, but the robe got in the way. He took the robe off.

"Now," he said, comfortably swinging his legs, "get on with your business, so we can all go home."

Thorne gave tongue:

"Even if these precedents did not exist, there appears to be no reason for hesitating to deal with the issue in the light of reason and present scientific knowledge. A well-known opinion of the Supreme Court of the United States, written by the progressive Mr. Justice Sutherland—"

"Here, hold on!" cried the judge. "I respect Mr. Justice Sutherland, but you can't possibly call him progressive."

"My only choice, sir, was between 'progressive' and 'radical.' The latter word attracted me, for in this case the Justice rooted out of the federal judicial system a restrictive rule of evidence from which I venture to say that no state had ever succeeded in freeing itself save by legislation.<sup>31</sup> The opinion is a bold one. But somehow I don't think Mr. Justice Sutherland would enjoy being described as a radical. So I use the milder term. Do you insist that I strike it out?"

A sudden impulse of benevolent tolerance swept through the judge. With the glowering Mr. Stout removed he had a delightful sense of intellectual freedom. He hadn't felt so untrammelled since his days of fierce theoretical disputation in law school. He said largely:

<sup>31</sup> *Funk v. United States*, 290 U.S. 371 (1933); cf. 2 Wigmore, *Evidence* § 488 (3d ed. 1940).

"Oh, no, never mind. Go on. I can change the word later if it still seems inappropriate."

Thorne continued:

"—by the progressive Mr. Justice Sutherland, emphasizes the pride of common lawyers in the 'flexibility and capacity for growth and adaptation' of their legal system. The opinion says:

The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.<sup>32</sup>

This wise and dignified pronouncement furnishes ample intellectual warrant to other courts for improving the rules of proof so far as their shortcomings can be demonstrated. And as, in the present connection, the demonstration must begin somewhere, it may as well begin here."

"Shades of John Parker," murmured the judge.

"Quite right, sir," answered Thorne. "And I need not add the comment that as Captain Parker's cause could only be carried to success by a revolution, so nothing short of revolutionary activity can clear away the multitudinous absurdities countenanced by our current law of evidence. New paragraph, Miss Spencer:

"Accordingly, I rule that Dr. Saner may testify and note the defendant's exception."

An indefinable sensation of uplift had taken tight hold of the judge. He rose in spirit above the obstructed horizon of middle age and glimpsed once more the wide visions of youth. He also glimpsed a curious phenomenon right in the courtroom. Opposite his table, above the central door, was a decorative plaster panel bearing in low relief a symbolic figure of Justice. The lady as usual bore a pair of scales and had her eyes bound with a gilded bandage. As the judge looked at Justice, some freakish, slanting beam of the afternoon sun caught the face at an angle and created an illusion that the bandage was gone. The lady's eyes, clear, penetrating, and encouraging, seemed to look squarely into those of the judge. The judge, of course, had always known the symbolism of the blindfold as applied to figures of Justice. Yet he liked it not. To him, a blind tribunal weighing a case seemed as silly as a blind butcher weighing the Sunday roast. Well, he thought, why shouldn't I do something to strip that covering away and make Justice a bit less fumbling? A thrill of potential

<sup>32</sup> Funk v. United States, 290 U.S. 371, 381 (1933).

achievement coursed up and down his spine. He felt magnificently exalted. Justice continued to look at him steadily. Suddenly, though, there came a flickering in the beam of sunlight. Perhaps the windshield of some motor car squeezing toward the curb flashed a rival ray. The influence on Justice was startling. Adroitly, smoothly, definitely she winked one eye at His Honor. The sunbeam vanished, Justice's eyes disappeared behind her bandage, the judge came back to earth with an almost audible thump.

"No, sir! No, sir!" he exclaimed accusingly to Thorne. "Not a bit of it! I may let your testimony in—I don't know yet. But I won't use any memorandum with that sort of high-flying peroration in it. What would the Seven Septuagenarians on the Seventh Floor think of me if the case went to them on appeal?"

"Probably your Honor is correct," responded Thorne resignedly. "The Supreme Court which your Honor thus aptly describes is not noted for its warm human enthusiasms. It yearns for technical interest. But I think the first part of the memorandum would offer plenty of points for the technician."

"All the same," said the judge, now thoroughly reduced to his normal emotional state, "Heaven help your client on that appeal."

"My client," said Thorne, rising and bowing slightly, "is reconciled to the worst. Good afternoon and thank you for hearing me."

In the language of the detective story preamble, my characters are completely fictitious, and any resemblances between any of them and any real person living or dead is purely accidental. Indeed, it seems highly unlikely that the most ingenious could work out a convincing likeness. No young lawyer would be so brash and ready and unconventional as the imaginary Mr. Thorne. No veteran of the courts could possibly be so choleric and stupid and easily disturbed as the imaginary Mr. Stout. Above all, nobody gracing the Bench would behave as does my fanciful judge. If he belonged to an elective judiciary, he would be too much in fear of losing his seat at the next election; and if he belonged to an appointive judiciary, he would be too apprehensive lest an aroused populace find in his conduct a reason for replacing appointment with the elective system. In short, the whole bit of synthetic history is an extravaganza. It is worth while, though, to remind ourselves even by extravaganza that the forwarding of measures, in legal reform at least, is a job of working on men. And at any rate the citations are real, and the combination in which they are placed gives a certain justification for the proposed conclusion. Somewhere within this wreathing smoke of fancy may lurk a spark of realistic truth.