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THE HEARSAY RULE

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HEARSAY—WHAT IS IT?

Any attempt to define a legal concept makes advisable an inquiry into its origin and evolution. If it be a substantive law concept, the social purpose that is designed to serve—whether the avoidance of evils or the creation or furtherance of positive benefits—must be considered. If it be a concept of procedural law, the functions it is, or is thought to be, designed to perform in the process of reaching the factual and legal bases for satisfactory determination of disputes between litigants must be examined. It is proposed, therefore, first to look briefly at the causes which brought the hearsay rule into being, next to consider the dangers in testimony that it is designed to eliminate or limit, then to discuss the commonly accepted statements, and finally to suggest a revised definition.

It has been frequently said that our exclusionary rules of evidence owe their origin to the jury. This is an easy generalization, but how much truth does it contain? Pretty obviously the reasons which led the courts to prohibit fully competent persons from testifying on account of religion, interest, infamy and marital relationship had no connection with the jury. The rules of privilege which authorize the suppression of the truth are assumed to rest upon a sound social policy; and however unfounded in fact the assumption may be, it cannot be seriously argued that the supposed policy is applicable only when the trial tribunal includes a jury. The preference upon which the law insists for one sort of evidence or one class of witnesses over another has its justification, as Mr. Wigmore believes, in the judicial determination to insure "a supply of trustworthy evidence which otherwise the partisan interests of either side might fail to furnish."¹ The so-called opinion rule has a close connection with the rule against hearsay in that it requires a witness to relate his personal experience rather than his deductions from what he has learned from others; but neither in origin nor in development are its objectionable features due to the kind of tribunal to which the opinion is submitted.

What of the hearsay rule? It will be remembered that the Nor-

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¹2 WIGMORE, EVIDENCE (2d ed. 1923) § 1286, p. 937.

mans introduced into England trial by inquest which soon developed into trial by jury, as a substitute for the Anglo-Saxon trial by ordeal and by compurgation. This was an epochal reform, for it not only substituted a rational inquiry for an appeal to superstition, but it replaced a system in which the adversaries conducted the trial under public supervision, by a procedure in which the adversaries had to submit to the test of a body of witnesses with whose selection they had nothing to do. To be sure they were permitted to make to these jurors statements of their respective contentions; but the jurors were expected to base their answers upon information obtained, principally if not solely, elsewhere than in court. Soon the parties gained the privilege of presenting additional statements through witnesses. As time went on, the body of information given the jury by the witnesses formed a greater and greater proportion of the data upon which the jury relied for its decision. In the earlier 1600s Coke tells us that the jurors are "most commonly led by deposition of witnesses".² And by the middle of the 1700s, our present system had evolved, in which the jury must base its verdict upon the evidence given in court. And, it must be noted, this evidence is presented by the parties. Thus trial by jury, which began as an investigative or inquisitorial proceeding in substitution for an adversary system, was transformed to an adversary proceeding.

During this process of transformation the hearsay rule was evolved. There was no thought of prohibiting hearsay until the middle of the sixteenth century. During its latter half there were many objections directed to the value of such evidence rather than to its admissibility. By the middle of the 1600s there were a number of rulings rejecting it; and before 1700 the generally accepted doctrine excluded hearsay except in corroboration of other evidence. The reasons earlier given, as expressed by Chief Baron Gilbert, emphasize two things: that the court and jury should rely upon what the witness knows and not upon his mere credulity; and that the hearsay declarant was not under oath; "and if a man had been in court and said the same thing and had not sworn it, he had not been believed in a court of justice".³ But that these reasons were not decisive is indicated in *Rex. v. Paine*,⁴ decided in 1696, wherein the King's Bench, after conference with the Justices of the Common Pleas, excluded depositions of a deceased witness because "the defendant not being present when they were taken before the mayor, and so had lost the benefit of cross-examination". Doubtless in the ordinary case both lack of oath and lack of oppor-

²COKE, THIRD INSTITUTE 163 (ed. of 1817).

³GILBERT, LAW OF EVIDENCE (ed. of 1756) 152 (Written before 1726).

⁴5 Mod. 163, 165.

tunity to cross-examine combine to justify rejection; perhaps lack of either would be sufficient.

In so far as the former is an effective bar, there is little ground for asserting that the jury has anything to do with it. The oath was insisted upon in the forms of trial which trial by jury displaced. It does no more than assure the trier that the witness realizes his obligation to speak the truth. In so far as the latter is effective, it might be argued that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth";⁵ and an untrained trier, such as a jury, must have the benefit of a cross-examination of all statements offered to induce persuasion as to the facts. But we shall be instantly met with two rules universally recognized, (1) that the adversary may waive cross-examination, and (2) that the judge is not required to cross-examine. (Indeed, in most states of this Union, if he undertakes to do so, he must conduct the examination with great circumspection, lest perchance he indicate to the jury his opinion upon the credibility of the witness.) As no official inquisitor is provided, the *jury* may, therefore, be required to do its best (or worst) with testimony that has not been purified by this greatest of truth-revealing devices. But the *adversary* may not be compelled to forego cross-examination. Though there are a few English cases (in Chancery) which retain and consider evidence given on direct examination where cross-examination has been rendered impossible for reasons other than the fault of the proponent, the accepted rule in this country requires the rejection of the direct examination where an adequate cross-examination has been prevented by any cause for which the cross-examiner is not responsible.⁶ And it seems an inescapable deduction from the authorities that a cross-examination by the judge, be it ever so searching, would not suffice as a substitute. Suppose that a witness should refuse flatly to answer any question put by the adversary, but should announce his willingness to reply to any and all questions put by the judge. It is inconceivable that his direct examination would be permitted to stand. The early and late cases, therefore, seem to me to warrant the conclusion that it is more than a coincidence that the evolution of the hearsay rule synchronizes with the evolution of our system from an investigative to an adversary system, and that as early as 1696 we find not lack of cross-examination but lack of opportunity to cross-examine stated as a reason for the exclusion of hearsay. And so great is the emphasis upon cross-examination in modern decisions that it seems

⁵ WIGMORE, *op. cit. supra* note 1 § 1367, p. 27.

⁶ See *People v. Cole*, 43 N. Y. 508 (1871); *State v. Rouse*, 138 S. C. 98, 135 S. E. 641 (1925); (1927) 27 Col. L. Rev. 327.

reasonable to assert that the principal ground for rejecting hearsay is an idea basic to our entire system of litigation: the adversary has a right that the trier shall not be influenced by testimony which the adversary has had no opportunity to cross-examine. If this is true, then the scope of the rule and the establishment of exceptions to it should depend upon the extent to which an adversary will be prejudiced by deprivation of his opportunity to cross-examine. This, in turn, cannot be determined without an inquiry into the defects in testimony that a well-conducted cross-examination may eliminate.

While the exposure of deliberate falsehood is the most dramatic function of cross-examination, one needs only a brief experience in the courtroom to learn that its more frequently and effectively exercised functions are to bring to light faults in the perception, memory, and narration of the witnesses. When a witness testifies to a visual experience, his capacity for seeing, his opportunity and motive for exercising his sense of sight, and all the circumstances of the particular incident of its alleged exercise are pertinent and important. If the witness says that the traffic signal was for or against the plaintiff at the time of an accident, was he relying upon the color of the light, or its relative location at the top or bottom of the set of signals, or upon the movement of other traffic? If the first, is he totally color blind or blind to particular colors or does he have full vision? If the event occurred some time before, how many of the details does he remember? What part of his testimony is reconstruction rather than recollection? Likewise it is important to know how a witness uses language, accurately or carelessly, precisely or loosely, with the usual construction or one peculiar to himself. For example, in the Sacco-Vanzetti case, Captain Van Amberg when testifying as to the cause of certain pitting in the barrel of Sacco's pistol said: on cross-examination:⁷ "I believe it has been caused by rust".

"Q. . When you say, 'I believe', have you anything back of that that you don't feel quite sure of? A. Yes, I have a slight reservation. I have known pitting to be in metal when it came from the mill, and it was due to a flaw or some little imperfection in the metal, and, therefore, I would not say every time I see a pit in a piece of metal it was caused by rust. . . . That I believe explains my reservation, mental reservation, on the matter of rust".

On direct examination upon another point he had been asked: "Have you formed an opinion, Captain, as to whether or not No.

⁷THE SACCO-VANZETTI CASE, TRANSCRIPT OF THE RECORD OF THE TRIAL OF NICOLA SACCO AND BARTOLOMEO VANZETTI IN THE COURTS OF MASSACHUSETTS AND SUBSEQUENT PROCEEDINGS, (1928) Vol. 1, p. 924.

3 bullet was fired from that particular Colt automatic? A. I have an opinion.

Q. And what is your opinion? A. I am inclined to believe that it, No. 3 bullet, was fired from this Colt automatic pistol". Note that here is a witness who framed his answers carefully. "I believe" implied a mental reservation or doubt. What then of "I am inclined to believe"?

Captain Proctor in this same case chose his words circumspectly. When asked whether No. 3 bullet came from Sacco's gun, he testified that in his opinion it "is consistent with being fired by that pistol". How nicely he selected his phraseology is shown by his affidavit given after the trial;⁸

"At no time was I able to find any evidence whatever which tended to convince me that the particular mortal bullet found in Berardelli's body, which came from a Colt automatic pistol . . . came from Sacco's pistol and I so informed the District Attorney and his assistant before the trial . . . Had I been asked the direct question: whether I had found any affirmative evidence whatever that this so-called mortal bullet had passed through this particular Sacco's pistol, I should have answered then, as I do now without hesitation, in the negative."

On the other hand most lawyers have had experience with illiterate clients like the Italian who gave an insurance investigator a written statement containing the following sentence concerning the destruction of the insured building: "And, then, I burn her up". Investigation showed the fire to have been entirely accidental and to have been due to no conduct of the assured; and counsel had to demonstrate his client's inaccurate use of English by allowing him to repeat the story in his own words upon the stand; followed by questions which directly accused him of setting the fire. These were immediately answered by emphatic negatives punctuated by picturesque profanity that amused and convinced the jury.

The testimony of the witness in open court may be affected by any or all of these potential deficiencies. He is necessarily purporting to convey to the trier of fact the idea that he has in his mind. This will usually be a then present mental picture of an event that occurred some time in the past. His perception, memory, narration and veracity, all, are involved. When he is reporting a statement of X, the cross-examination will completely cover all four as to what he heard X say. But if the statement of X is offered as tending to prove the truth of what X stated, then no matter how accurate and truthful the witness, his testimony is still subject to all the dangers of possible defects in the perception,

⁸*Id.* Vol. 1, p. 896; *Id.* Vol. 4, p. 3642-43.

memory, narration and veracity of X. X is the real witness and the man in the witness chair in the courtroom is merely the conduit through which X's testimony is conveyed to the trier of fact. Consequently, any definition of hearsay must cover the statement of X. Generally, any assertion which is offered for the truth of the matter asserted in it, without being subject to cross-examination in a judicial proceeding by the party against whom it is offered, is freighted with all the dangers of error in the perception, memory, narration, and veracity of the asserter, and is, by common consent, classified as hearsay. Mr. Wigmore says the hearsay rule "prohibits the use of a person's assertion as equivalent to testimony to the fact asserted, unless the asserter is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and his qualifications to make it".⁹

In the application of this definition only two classes of case have been the subject of dispute. First, admissions. In his first edition, Mr. Wigmore puts admissions outside the scope of hearsay, contending that they were not admissible for the truth of the matter stated in them. He later abandoned this position. Second, reported testimony. Here Mr. Wigmore says that where the reported testimony is received, it is not as an exception to the hearsay rule, but as an example of the satisfaction of the hearsay rule. Why it is excluded in many instances where the court finds some requisite unsatisfied, he explains, but he puts forward nothing which tends to show that the excluded testimony is rejected on any other ground than that of hearsay. Certainly both admissions and former testimony fall within the suggested definition. There is, however, no profit in quarreling over their classification, for their admission or rejection is not made to depend upon it.

Where the assertion is offered for some other purpose than as evidence of its truth, none of the dangers that usually accompany hearsay is present, except where that purpose requires that the asserter believe his assertion to be true. To use Mr. Wigmore's example, if a woman's statement that she is the Pope is offered to prove her insanity, it is relevant only in case she believes it. If she said it in jest or for the purpose of creating a belief in her abnormality, it would not tend to show that she was insane. Consequently, her sincerity is involved—the same moral element as in veracity. For instance, if in order to show her own irresponsibility at a given date, she should testify that at that date she was telling people that she was the Pope, would she not on cross-examination have to answer whether at that time she actually believed what she was saying? If she refused to do so, could that portion of her

⁹3 WIGMORE, *op. cit. supra* note 1 § 1364, p. 9.

direct testimony stand against a motion to strike? This is, doubtless, a mere academic question, for the assertion would under modern cases be received no matter what the analysis: it is relevant; if hearsay, it falls under an exception.

It is too obvious for argument that an assertion may be made by non-verbal conduct. Wherever by such conduct a person intends to express a proposition, he is merely using nonverbal action in place of words. In many instances the conduct is capable of only one construction; in many others, of more than one. The person may be doing the acts with the intent to express a proposition, or for an entirely different purpose. If the former is true, and a witness describes the conduct as evidence of the truth of the proposition thus intended to be asserted, the witness is as clearly reporting hearsay as if he were testifying to words used by another. Thus, if after a crime has been committed, X flees under suspicious circumstances intending thereby to express the proposition that he is guilty or that he believes himself guilty, and evidence of the flight is offered as tending to show his guilt, it is hearsay. Usually if he intends this, it will be to protect another. If X is the defendant, it is admissible against him; if X is a third party, it is in most jurisdictions inadmissible for the defendant. But what if X flees not for that purpose, but solely for the purpose of escape? His conduct is still regarded by the courts as relevant, for if X is the defendant, the flight is everywhere admissible against him. By what process of reasoning is it relevant? His flight is circumstantial evidence that he believes himself guilty. His belief in his guilt is evidence that he is guilty. "The wicked flee when no man pursueth but the righteous are bold as a lion", say the courts, quoting a much respected precedent, of doubtful validity psychologically, from a source none too familiar to present-day lawyers. To put it generally, X's conduct may be circumstantial evidence of his state of mind, and his state of mind may be circumstantial evidence of the external facts or condition producing that state of mind. If thus offered, is it hearsay? Certainly not within the definition thus far developed. Should the definition be framed so as to include it?

Since by hypothesis X did not express the proposition of his guilt or his belief in his guilt, his veracity is in no way involved. He did not use words; thence, there is no danger of a peculiar use of language. There is, however, a danger that an improper deduction will be drawn from his conduct. His flight, for example, may have been for a purpose totally disconnected with the crime in question. Yet there is no more danger of a wrong deduction here than in other cases of circumstantial evidence. X's perception,

however, is important; indeed, it is primary. His belief is necessarily dependent upon the accuracy of his observation. If the conduct occurred some time after the event, X's memory is also involved. Of course, in our supposed case of his flight, there is not much danger of mistake in perception or in memory. But where X's conduct is offered to prove X's state of mind as a basis for an inference, of something other than X's own previous conduct, the accuracy of X's perception and memory may be almost, if not quite, decisive. Suppose, for instance, that X has insured the life of A for the benefit of B, and has paid to B the full amount of the policy. In an action against Y on another policy, or in a proceeding to recover land as the heir of A, B offers the payment of the policy by X as evidence of the death of A. Here the importance of correct observation by X is too clear to call for comment. If X were available and, when called as a witness, testified that A was dead, would he not be required to answer all questions which tested his perception and memory; and if he refused to submit to cross-examination, would not his direct examination be stricken? To ask the question is to answer it.

It is, therefore, suggested that hearsay be defined so as to include (1) evidence of any conduct of a person, verbal or nonverbal, which he intended to operate as an assertion if it is offered either to prove the truth of the matter asserted or to prove that the asserter believed the assertion to be true, unless the assertion is subject to cross-examination by the party against whom it is offered at the trial at which it is offered, and (2) any conduct not intended to operate as an assertion if it is offered to prove both the state of mind of such person and the external event or condition which caused him to have that state of mind. The first part of this definition is entirely orthodox. The part including the assertion when offered to prove, not the truth of it, but the asserter's belief in its truth, is perhaps unorthodox, though its application would make no difference in the result in any reported case. The last portion has support in a number of cases which do not spell out the analysis. In the cases where the flight of X, a third person, is offered to prove that X rather than the defendant committed the crime in question, most courts say that X's flight is the equivalent of a confession by X and exclude it without further ado. In other situations the courts declare the conduct to be hearsay or non-hearsay, and then reject or admit it accordingly, without troubling to go further.

Now, if the courts were agreed that such evidence is not to be treated as hearsay, and that its admissibility should depend solely on its relevancy, it would be a waste of time to discuss the logical

soundness of their analysis. It would be enough to say merely that in this connection, as also in their treatment of many exceptions to the hearsay rule, they had acted as if the sole or chief objection to hearsay were the danger of conscious falsehood by the hearsay declarant. But the serious objection is that in dealing with these cases, the courts do not ordinarily get down to fundamentals. They do not bother to go through the series of inferences which must be made in the mental journey from the item of evidence to the fact which it is offered to prove. They do not inquire into the reason upon which the rejection of hearsay must be based under our system of trial. Consequently, they reach results similar to that in *State v. Minella*.¹⁰ There one Lovrea shortly after a killing had a revolver and cartridges, concealed them, denied he had ever had them, and fled after being accused of the murder. The defendant requested two instructions: (1) in effect that flight under these circumstances was to be considered by the jury in determining whether defendant or Lovrea fired the fatal shot, and (2) that if the jury believed Lovrea had the revolver and cartridges and shortly afterwards hid them and subsequently denied the possession of either, they might properly consider these facts in determining who fired the shot. The court held that refusal to give the first was correct, while refusal to give the second was reversible error. It seems too obvious for argument that Lovrea's motive in fleeing was to escape and not to assert that he was guilty, just as his concealment and denial were intended not to express his guilt but quite the opposite. In each case his conduct was relevant only as a basis for a deduction as to his state of mind—a belief in his own guilt—which, in turn, was the basis of a deduction of guilt. If one was hearsay, so was the other. But the court, by a failure to analyze, treated them differently. In a North Carolina case evidence was offered that X never mentioned an event which, it seems to have been conceded, he would have mentioned had it occurred. The court declared the evidence inadmissible as hearsay.¹¹ In a similar case in Texas the court admitted the evidence insisting that no hearsay was involved.¹² Both courts assumed that the only question was hearsay or non-hearsay. In a Minnesota case one question was whether the plaintiff's statement was true that in an emergency stop all standing passengers in a street car were thrown to the floor. The court admitted evidence that no other claims had been presented against

¹⁰177 Ia. 233, 158 N. W. 570 (1916).

¹¹Lake Drainage Commissioners v. Spencer, 174 N. C. 36, 93 S. E. 435 (1917).

¹²Latham v. Houston Land & Trust Co., 62 S. W. (2d) 519 (Tex. Civ. App., 1933).

the defendant company, assuming the only question was relevancy.¹³ Now obviously the line of inferences here involved is from lack of assertion of claim by any other passenger to his belief that he had no claim, from such belief to the fact that he had no claim, from such fact to the fact that he received no injury, and from lack of injury to the fact that he had not fallen. And this chain of inferences necessarily involved not only the perception and memory of the passenger but also the validity of his mental processes in drawing deductions, as to all of which the opponent would desire to cross-examine. Contrast this with a New York decision where the trial court was reversed for allowing defendant to show that no other customers had complained of the quality of oil sold from the same lot: "The fact these other customers had made no complaint as to the quality of the goods sold to them was pure hearsay evidence upon the question of the quality of these goods."¹⁴

The fault to be found with the decisions which admit the evidence is not with the result, but with the failure to explain the reasons for the result so that other courts and counsel would be aided in the analysis of similar situations. The quarrel to be had with the decisions excluding the evidence is that they proceed on the assumption that when once the evidence is classified as hearsay, it must be excluded. The truth is that when this analysis has been made, the problem has not been solved; but merely intelligently stated. There was a time under our system when no hearsay was excluded; there never has been a time when all hearsay has been excluded. Exceptions to the hearsay rule have been multiplying. To be sure, all of the orthodox exceptions are formulated to cover assertions offered for the truth of the matter asserted. But when a court analyzes non-assertory, nonverbal conduct as hearsay, it ought then to examine all the recognized exceptions to the hearsay rule to ascertain whether the hearsay in question does not fall within one of them. If no apt exception is found, it ought then to ascertain whether the dangers of error in perception or memory which might be eliminated by cross-examination are so substantial as to call for its exclusion. If not, the evidence should be received, for by hypothesis neither veracity nor narration is involved.¹⁵ A failure to follow this suggested process results in increasing the manifestations of absurdity which

¹³Sullivan v. Minneapolis Street Ry. Co., 161 Minn. 45, 200 N. W. 922 (1924).

¹⁴James K. Thomson Co. v. International Compositions Co., 191 App. Div. 553, 557, 181 N. Y. Supp. 637 (1920). See generally McCormick, *THE BORDERLAND OF HEARSAY* (1930) 39 YALE L. J. 489.

¹⁵See Morgan, *Hearsay and Non-Hearsay* (1935) 48 HARV. L. REV. 1138.

crowd the pages of our reported decisions dealing with hearsay. The only consolation to be derived from this unhappy situation is that it may soon get so bad as to be intolerable even to the profession; and intelligent legislation may follow.

EXCEPTIONS TO THE HEARSAY RULE—ON WHAT THEORY?

As already stated, there never has been a time when all hearsay was rejected; and it is difficult to tell upon what basis the courts proceeded, when they began to discriminate between that which should be received and that which should be excluded. The early opinions reveal very little except that the judges were not doing much more than applying their own rough notions of psychology, and the generally accepted idea that litigants should produce the best available evidence. They point out, for example, that if the witness were alive, he could testify; since he is dead, his written hearsay is the next best evidence.¹⁸ About the beginnings of the 1800s, however, they begin to attempt a rational justification of the rules that they have been applying. By that time they seem to be accepting the thesis that all hearsay is inadmissible except where the precedents require its reception. The exceptions they limit rather strictly, often saying that they number no more than three or four. Contrast this with Mr. Wigmore's enumeration. His treatise reveals some eighteen or nineteen different classes of hearsay for the admission of each of which some respectable authority may be cited. For the admissibility of learned treatises and statements of voters the authority is scant; that for receiving commercial lists and reports is not great but is growing. Former Testimony, Declarations against Interest, Personal Admissions, Vicarious Admissions, Official Written Statements, Entries in the Course of Business, Declarations of Subscribing Witnesses, Statements of Pedigree, Reputation, Statements in Ancient Documents, Declarations as to Boundaries, Dying Declarations, Declarations of a presently existing State of Mind, Spontaneous Declarations, Contemporaneous Declarations, and Narrative Statements of Testators,—all these have the support of a considerable number of adjudications. Mr. Wigmore seems to have persuaded himself that admissions and former testimony can be regarded as completely satisfying the hearsay rule, and that in each of the others two principles will be found. First, there must be a necessity for using this evidence. This necessity is usually due to the unavailability of the hearsay declarant, but it may lie in the fact that the hearsay declarant is likely to be more reliable than the testimony

¹⁸See *Manning v. Lechmere*, 1 Atk. 453 (1737), where the Lord Chancellor said: "Where there are old rentals, and bailiffs have admitted money received by them, these rentals are evidence of the payment, because no other can be had."

of the declarant. Second, the circumstances under which the hearsay utterance was made furnish a guaranty of trustworthiness which serves as a substitute, however feeble, for cross-examination. By this last he seems to mean no more than the the circumstances are such that the jury may make an intelligent appraisal of the value of the testimony in spite of the fact that the declarant is not testifying before them subject to cross-examination. Since he treats each exception separately, he does not make articulate any trouble he may be experiencing in harmonizing the application of his principle in one exception with that in another. One may, of course, analyze a hearsay situation and point out therein a factor which does not exist in hearsay generally, and be satisfied to denominate this a guaranty of trustworthiness. But if one's aim is a system in which consistency obtains except where the inconsistency is rationally justifiable, a more searching technique is necessary.

The assertion is ventured that the hearsay rule in its present form is the result of a conglomeration of conflicting considerations modified by historical accident. The adversary theory of litigation clashes with the theory that the jury should be protected against being misled by untrustworthy testimony. Both these theories at times have to give way to the notion that in many instances hearsay is better than nothing, especially where its rejection will leave the litigants without evidence. And the doctrine of *stare decisis*, applied to previous rulings on evidence, may make an historical accident a stumbling block to intelligent decision.

Perhaps these generalizations can be made to appear to have some sense by considering a suppositious case. Let it be supposed that a car driven by X collides with a car driven by S, the servant of D. A and C are riding with X, and both are injured, C so badly that he dies within a short time. First A sues D, and W, an eye-witness, testifies for A, describing the conduct of D and of X in the operation of their respective cars just prior to the crash. There is a mistrial, and W dies before the second trial begins. It is universally conceded that W's testimony as given at the first trial is admissible at the second trial against D, and, though here the authority is meagre, against A.¹⁷ The adversary theory is satisfied as to D because he had full opportunity to cross-examine W at the first trial. It is satisfied as to A because the proponent of a witness vouches for him, and has opportunity to bring out

¹⁷See *People v. Bird*, 132 Cal. 261, 263, 264, 64 Pac. 259 (1901); *Roberts v. Gerber*, 187 Wis. 282, 202 N. W. 701 (1925). The cases admitting reported testimony only where the doctrine of mutuality is applicable seem to assume that the evidence could have been offered by the opponent against the proponent.

all the witness knows, though he is forbidden to impeach him. The second jury is amply protected against misleading because it can evaluate W's testimony almost as well as if W were present. Assume, however, that, before W's former testimony is offered at the second trial, A dies as a result of his injuries, and his administrator is substituted under the provisions of the local wrongful death act. If this act makes A's right of action survive and descend to the administrator, W's former testimony is still admissible. Of course, it is just as trustworthy as before. As against D, there is no difference regarding opportunity to cross-examine. A's administrator, however, neither presented W as a witness nor had any opportunity to cross-examine him. How is the adversary theory satisfied as to A's administrator? Well, he is seeking to enforce the very same right of action which A was litigating. Substantively he stands in A's shoes. Does it follow, then, that he stands in them evidentially? Not necessarily. There are numerous instances in which the substantive legal rights of two parties are identical, but evidence receivable against one is inadmissible against the other. For example, the admission of one partner as to partnership affairs made after dissolution of the partnership; the confession of one joint perpetrator of a crime; the statement of an agent concerning the agency transaction; the admission of a joint-tortfeasor; each of these will be received against the declarant himself but not against his associate or principal even though the substantive liability of both be identical. Of course, reception of W's former testimony against the administrator may be rationally justified on grounds of trustworthiness and on the ground that A had exactly the same motives for presenting and examining W as the administrator now has. But is its reception put on that ground?

To test this, change the supposition as to the local wrongful death act: make it like Lord Campbell's Act, which creates in A's personal representative a new right of action for the pecuniary loss suffered on account of A's death by survivors to whom he has contributed financial aid. Of course, the statute gives the administrator no action unless A, had he lived, would have had an action. The rights of A and of the administrator are identical substantively, but the administrator is not enforcing the right which A was trying to enforce. So far as the trustworthiness theory and the adversary theory are concerned, there is no room for a distinction between this case and the case under a survival statute. But the orthodox view makes a distinction. It identifies the evidential question with the substantive question in a peculiar sense: the right or liability which a party in the former trial was seeking to enforce

must have passed to a party in the pending trial. This, it is suggested, may be due to the fact that the early English judges make the same identification in the cases involving vicarious admissions. They gave no reasons for making it except to state the result in Latin declaring the statement of the predecessor in interest to be "*res inter eosdem acta*" as to the successor in interest, and refuting the claim of counsel that the evidence was "*res inter alios acta*".¹⁸ It was easy to apply the same notion to cases involving former testimony. Of course, it does not follow that where the administrator is not seeking to enforce the very right A had, W's former testimony should be rejected merely because the former testimony should be received where the administrator is seeking to enforce such right. But where a court regards an item of evidence as normally inadmissible and admits it because of identity of substantive interests, it is likely to make that identity a test of admissibility. And so it has happened here. Under the Lord Campbell statute, W's former testimony is "*res inter alios acta*" and inadmissible against the administrator.

But surely it is admissible against D, for he is the very same person in both actions, the issue is identical, and he had the fullest opportunity to cross-examine. This argument, however, proceeds on the assumption that the adversary theory is completely satisfied by opportunity to cross-examine. It neglects the idea that in a contest, fair play prevents one antagonist from using a weapon not available to the other. It also overlooks a concomitant of the principle making admissibility depend upon identity of substantive rights. If the parties to a second action are not either identical or in privity with the parties to a former action, they are not bound by a judgment in the former action as to the substantive rights of the first parties. If the rules of evidence follow the rules of substantive law, the analogy of the doctrine of *res judicata* will apply. If D could not use the judgment in the first action against the administrator, the administrator could not use it against D. Since D can not use W's testimony against the administrator, the administrator can not use it against D. This is the orthodox view, and only comparatively recently have the more progressive courts begun to break away from it.¹⁹ The result

¹⁸See Morgan, *Rationale of Vicarious Admissions* (1929) 42 HARV. L. REV. 461, 471-472.

¹⁹In *Arsnow v. Red Top Cab Co.*, 159 Wash. 137, 292 Pac. 436 (1930), the court recognized and applied the orthodox view. There plaintiff was suing for wrongful death of her husband. The court held that testimony given by him in an action for the injuries which later resulted in his death could not be received in the action for wrongful death in so far as the action was for pecuniary loss suffered by the survivor, saying ". . . her second cause of action never was his, but is hers alone, being based upon the fact of her husband's death. Under no theory, therefore, could

is that testimony which has all the *indicia* of trustworthiness that are possible as to any testimony not given in open court at the pending trial, is rejected, even when offered against a party who had the fullest opportunity to cross-examine.

Now suppose that two other items are offered in the trial after A's administrator has been substituted under the Lord Campbell statute. When S drove D's car into collision with X's car, D was in a distant city. Upon his return, after hearing of C's death, he called upon C's widow, and by way of consoling her, told her that C was in no way to blame, the collision was caused by the driving at very excessive speeds of both X and S, and he would get hold of X and see what could be done about it. About a week after the accident A told Y that the collision had been caused by X's driving at 50 miles an hour and failing to slow down for the intersection, that S was driving slowly and had almost passed the center line of the street when X's car struck S's car. The administrator calls C's widow and offers to have her testify to D's statement. D objects and offers to show his absence from the city and total lack of first-hand information. D calls Y and offers to prove A's statement. There is no doubt about the result. The testimony of C's widow is admitted;²⁰ Y's testimony is excluded.

Thus far in this case, then, we reject the former testimony of W, an eye-witness, given in open court under oath and subject to cross-examination; we reject the former unsworn statement of A, an eye-witness and participant, upon whose right the right of the administrator is founded although not identical with it; and we admit the former unsworn, uncross-examined statement of D who could not at the trial give the same statement in open court under oath because of lack of testimonial qualification. Why? Because, in the first instance, the chief element of the adversary theory and the trustworthiness test are both subordinated to a mistaken notion of identity of procedural with substantive rights coupled with a sporting element of the adversary theory; in the second instance, the adversary theory is prevented from operating by the same mistaken notion, and the trustworthiness test is not otherwise satisfied; in the third, the adversary theory is applied to its full extent and the trustworthiness test completely disregarded.

In most of the other exceptions the adversary theory is thrown completely overboard, and the trustworthiness doctrine is recognized with varying degrees of attenuation. Dying declarations have

Mr. Arsnow's testimony be held admissible in support of plaintiff's second cause of action".

²⁰See *Reed v. McCord*, 160 N. Y. 330, 54 N. E. 737 (1899); *Mayhew v. Travelers' Protective Ass'n. of America*, 52 S. W. (2d) 29, 31 (Mo. App., 1932).

always been admitted. The reason usually given for their reception is thus expressed by Lord Alverstone:²¹ "They are declarations made . . . when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice." To what extent is this reason applied? If in our supposed case, S were indicted for manslaughter of C, C's dying declaration would be admissible against him; if he were indicted for the manslaughter of A, who died as a result of the same wrongful act which caused C's death, C's dying declaration would be inadmissible; if C's widow were suing S civilly for the wrongful death of C, C's dying declaration would be excluded. It is to obvious to require even mention that the trustworthiness of the declaration can not vary with the character of the action in which, or with the purpose for which, it is offered. Consequently when courts are put to it to explain these decisions, they may content themselves with saying that the rule is established by the great weight of authority, (although they can find no cases to that effect before 1820) and that any change must come from the legislature.²² Or they may repudiate the trustworthiness test entirely, as witness Judge Redfield.²³ "It (the dying declaration) is not received upon any other ground than that of necessity, in order to prevent murder going unpunished. What is said in the books about the situation of the declarant, he being virtually under the most solemn sanction to speak the truth is far from presenting the true ground of admission." To this extent both adversary theory and trustworthiness give way to the notion that hearsay is better than nothing in cases where failure of all evidence is likely to be disastrous and where, because the chief witness is removed by death, a failure of all direct evidence is likely. (To be sure, it is a bit difficult to explain to a layman why an item of evidence which may be used against a man on trial for his life should not be usable against him when only a civil liability is involved. But laymen are so dumb anyway!)

The *pedigree exception* also is probably older than the rule. Hubback, writing in 1844, says that "the law having, from necessity, admitted in matters of pedigree, an exception to the rule which excludes hearsay evidence, has yet guarded" it by two rules.²⁴ The first requires the declaration to have been made by a

²¹In *King v. Perry*, (1902) 2 K. B. 697.

²²See *Commonwealth v. Stallone*, 281 Pa. 41, 126 Atl. 56 (1924).

²³In *Railing v. Commonwealth*, 110 Pa. 100, 105 (1885).

²⁴See HUBBACK'S LAW OF SUCCESSION, 652.

blood relative or spouse; the second that it have been made before controversy. The first is a fail guaranty of knowledge; the second, of trustworthiness. By the English doctrine, which has now been abandoned by most courts in this country, the declaration is admissible only where the issue is one of inheritance or descent; thus demonstrating that *necessity* is the chief reason for recognizing this exception.

The trustworthiness of some *official statements* is, of course, very high. Where an official has the duty to record events within his personal knowledge, he usually has no motive to falsify and his duty furnishes a motive to record accurately. Consequently, once grant that the adversary theory is to be sufficiently discounted, an exception for official written statements was to be expected. But to what extent is it to be extended? Is a census return, for example, to be admissible as evidence of the date of birth of a particular person? The particular census taker may have obtained his information from the person himself, from a relative, servant, or friend. Slight acquaintance with the methods ordinarily used is convincing that while the census returns are accurate enough as bases for anonymous summaries, they have little or no guaranty of accuracy as to any particular item. Some courts, therefore, restrict their admissibility;²⁵ other receive them for the truth of every statement contained in them. Some courts go to great extremes in other applications of this exception. In Connecticut, for instance, a birth certificate filed by the attending physician was received against the defendant in a bastardy proceeding for the truth of the statement therein that the defendant was the father of the child;²⁶ and in an action upon a life insurance policy the certificate of a medical examiner, who there takes the place of the coroner, was held admissible, for the statement therein contained that the assured had committed suicide.²⁷ The orthodox rule, however, limits admissibility to statements which official duty, by statute, regulation, or custom of the office, requires to be made concerning matters within the knowledge of the recorder. And we might, therefore, put this exception forward as a perfect illustration of Mr. Wigmore's theory. The protection of the jury seems to be the predominant consideration.

²⁵See *e. g.* *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201, expressly disapproving *Flora v. Anderson*, 75 Fed. 217, 231 (1896), which had received a census list. See also *Hegler v. Faulkner*, 153 U. S. 109, 117, 14 S. Ct. 779 (1894).

²⁶*Gett v. Isaacson*, 94 Conn. 317, 105 Atl. 678. Washington seems to be very liberal in admitting records of vital statistics. See *Armstrong v. Modern Woodmen of America*, 93 Wash. 352, 160 Pac. 946.

²⁷*Branford Trust Co. v. Prudential Insurance Company of America*, 102 Conn. 481, 129 Atl. 379 (1925).

The same would seem to be true of the *exception admitting declarations against interest*, in so far as the statement is offered to prove the fact which is against interest. The notion that a man will not concede even to himself the existence of a fact which runs counter to his interest seems sound; and a statement of such a fact carries its own guaranty of verity. But how is it applied? First, consider facts against pecuniary interest. The book or diary of a physician records that he attended Mrs. Jones on such a date and delivered her of a male child for which services he received \$50.00 at a later date. This entry is offered not to prove that he received \$50.00, but that Mrs. Jones gave birth to a male child on the designated date. If it be shown by other evidence that he attended Mrs. Jones, the entry is a disserving fact. Without this evidence the entry itself is not disserving and it merely neutralizes a self-serving statement in the earlier part of the entry. Yet the courts generally admit it, and not only for the disserving portion but for all parts of it which are inextricably bound up with the disserving portion.²⁸ One of the famous cases is *Taylor v. Witham*²⁹ where Sir George Jessel admitted a series of entries because two or three of them were acknowledgments of receipt of money. The issue was whether the decedent Taylor had lent Witham £2000 or whether he had made a gift of £2000 to Witham. Taylor's administrator offered entries showing receipt of several payments of interest and of one payment of £20 on principal, leaving a balance of £1980. These entries of receipt were received not to prove that the sums had been paid but that the original transaction was a loan and that £1980 was still due. By assuming that any entry of the receipt of money is an entry of a fact against interest, and by holding that such a statement carries with it all neutral and self-serving assertions bound up in it, this doctrine is made the vehicle for admitting hearsay which has no real guaranty of trustworthiness.

A like result is reached in its application to declarations against proprietary interest by setting up the presumption that every person in peaceful occupancy of property is the owner thereof in fee simple absolute. The declaration of such a person that his interest in the property is less than a fee simple is the declaration of a fact against his interest. Hence, his statement that he has paid a quarter's rent has been received to show not only that he was not the owner of the premises but that he paid the rent.³⁰ Now, it would be difficult to imagine that when a tenant entered

²⁸See *Higham v. Ridgway*, 10 East 109 (K. B. 1808); *Knapp v. Trust Co.*, 199 Mo. 640, 98 S. W. 70 (1906).

²⁹L. R. 3 Ch. Div. 605 (1876).

³⁰*Queen v. Governors and Guardians of Exeter*, L. R. 4 Q. B. 341 (1869).

in his diary a statement that he had paid his rent, he was conscious that he was stating a fact against his proprietary interest. And it is only by the operation of a highly artificial presumption that the judicial assumption achieves this result.

But the declaration must be against pecuniary or proprietary interest. A declaration against penal interest will not be received.^{§1} Why? Because the House of Lords said so in 1844. Why did they say so? Because as they interpreted the precedents, the cases admitting such declarations were confined to those against pecuniary or proprietary interest. They did not stop to examine the reason for those decisions or the reason of the exception in general.

A consideration of the other exceptions would merely disclose additional examples of incongruities and inconsistencies of a similar sort. A detailed examination of some of those already mentioned as well as of some others would demonstrate not only repugnancies between the reasoning upon which one exception is founded and that by which another is justified, but also antagonisms between the basis for a single exception and the alleged rational justification for qualifications of that same exception. But nothing more is required, it is believed, to support the assertion earlier ventured, or to demonstrate both that there is no consistent theory underlying the exceptions to the hearsay rule, and that some portions of the law governing hearsay are in hopeless confusion. It has long cried aloud for drastic revision; but the courts have failed to respond.‡

^{§1}See *State v. English*, 201 N. C. 295, 159 S. E. 318 (1931).

‡One of a series of papers upon the law of evidence presented by Professor Morgan to the Seattle Bar in July, 1936, revised by the author for publication. Others in this series will appear in subsequent issues of the Review.