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THE HEARSAY SYSTEM: AROUND AND THROUGH THE THICKET

JOHN M. MAGUIRE*

INTRODUCTION

All these complicated rules about hearsay are very strange for us, our judges having the right to evaluate the importance of what a witness says or a paper may prove. In this regard, the position of our judges is much freer than yours; in general a German judge can refuse any means of evidence only if he thinks that the fact to be proved is without relevance to the case, or if he accepts the fact to be proved as true, or if the evidence cannot be reached or in his opinion is only designed to delay the procedure. The administration of these rules is controlled by the Supreme Court and as far as I can see we do not have any difficulties in this field.

The foregoing sentences are quoted from a letter written in 1960 by a skilled and scholarly West German lawyer after he had read an elementary American textbook on Evidence. They speak for themselves—and, according to the thought of a good many practitioners in the United States, speak persuasively by suggesting that our treatment of hearsay evidence entangles us in an unintelligible thicket. Such became, the writer believes, the common view of most persons who worked seriously on the American Law Institute's Model Code of Evidence.

But history, down to date, of the Code and of its modified offspring, the Uniform Rules of Evidence, shows that their respective solutions of this particular problem were too radical for quick general adoption.¹ It is, after all, typical in these days of the common law's maturity that the pace of important procedural change should be deliberate.

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1. The American Law Institute's MODEL CODE OF EVIDENCE rules 501 *et seq.* (1942), sweepingly provided for admissibility of a large number of hearsay statements solely and simply on the ground of unavailability of the declarants who had uttered them. Far more cautiously, although with greater liberality of admission than prevails under existing practice, the National Conference of Commissioners on Uniform State Laws in its UNIFORM RULES OF EVIDENCE 62 *et seq.*, left hearsay subject to objection and exclusion except so far as numerous carefully drafted exceptions applied. As of the time of writing, no jurisdiction has adopted the technique of the MODEL CODE, and only a single jurisdiction, namely the Virgin Islands, has substantially gone along with the UNIFORM RULES in their treatment of hearsay evidence. 1 VIRGIN ISLANDS CODE, tit. 5, c. 67, §§ 931-35 (1957). In New Jersey, however, serious consideration is being given to the question of adoption through combined legislative and judicial action. 1960 N.J. SESS. LAW SERV., Reg. Sess., c. 52. See also references given in Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204 (1960), by the first five footnotes.

Professional fear of explosive disruption by sudden acceptance of fundamental analytical attack upon things as they are is far from baseless. Our traditional attitude of disapproval toward hearsay, even though manifested in practice with much disregard of logical consistency, does have elements of solid merit which ought not to be casually sacrificed.² Recurring to the metaphor already suggested, the unintelligible thicket may call for bramble-clearing and careful landscape architecture rather than burning the bushes.

Obviously with lively appreciation of these considerations, several highly capable American commentators, writing both shortly before and during the years after promulgation of the Model Code, have published historical and analytical studies of bedrock factors involved in the hearsay rule.³ This paper is to a large extent reiterative of what they well say, but also includes some attempt to extend and broaden their suggestions. Because these earlier writers have so skillfully dug out and arranged the rudimental case materials, the immediate treatment is not smothered in citations.

The job on hand may be approached in two ways: (1) getting *around* the hearsay thicket by so defining its outer limits as to put beyond them at least a moderate quantity of useful evidence now dubiously classified; and (2) getting *through* the thicket by broadening exceptions to the exclusionary rule into thoroughfares which will carry more traffic than do present twisting cowpaths.⁴ As will become apparent, the underlying reasons for both definitional limitation and exception-making are so largely identical that they tend to merge. Discussion falls into four divisions. We begin with a survey of the place of hearsay in the evidential scheme, with comment upon its characteristic defects. This is quite completely non-contentious and familiar, but requires explicit statement as leading up to highly

2. For instance, it keeps inquiry and information much more tightly on point than does a proliferating investigation of what X asserted to W that Y had told X. See the quotation from an undisclosed but respected "heresiarch" in MAGUIRE, *EVIDENCE: COMMON SENSE AND COMMON LAW*, 149 (1947).

3. Studies which have especially stimulated the present writer include McCormick, *The Borderland of Hearsay*, 39 *YALE L.J.* 489 (1930) (a competent piece of exploration) [hereafter cited as McCormick, *Borderland*]; Falknor, *Silence as Hearsay*, 89 *U. PA. L. REV.* 192 (1940) (a carefully pointed commentary, with implication of considerable possible expansion) [hereafter cited as Falknor, *Silence*]; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 *HARV. L. REV.* 177 (1948) (the fruit of thinking hard and then rethinking) [hereafter cited as Morgan, *Hearsay Dangers*]; Rucker, *The Twilight Zone of Hearsay*, 9 *VAND. L. REV.* 453 (1956) (broad survey raising many considerations); Cross, *The Scope of the Rule Against Hearsay*, 72 *L.Q. REV.* 91 (1956) (indicating very little judicial analytical progress in England since 1838).

4. There seems to be at least a suggestion from the very best source that if the awesome possible coverage of hearsay haggling were made clear to the judges, they would insist upon broadening the cowpaths. Morgan, *Hearsay Dangers*, 62 *HARV. L. REV.* 177, 218-19 (1948).

contentious matters beyond. Next, there is a description and criticism of the one full-dress leading definitional case. Third, a proposal is made of what is termed a functioning definition of hearsay. And fourth, there follows a very condensed commentary on the exception-making process, covering present condition and current development.

I. SHORTCOMINGS OF TESTIMONIAL EVIDENCE

Hearsay is one kind of narrative or testimonial evidence, using the latter term broadly to cover showings of human behavior which transmit or communicate ideas from one person to another, commonly by verbal means but quite often by other means. Communication may be intentional or unintentional. When intentional, communication nearly always involves conscious formulation of ideas. But conscious formulation may occur without immediate communication. Ideas may be verbalized and expressed in a secret diary, or framed—perhaps in unuttered language—by mere inner operation of the human mind.⁵ Behind the formulation of ideas lies, of course, the process of acquiring information, and the whole sequence of sensory, mental, and demonstrative processes from acquisition to ultimate transmission must be considered in gauging the reliability of various types of testimonial evidence.

Under the view enforced by our law of trial, hearsay has come to be habitually downgraded as a means of proof. With us, the standard presentation of narrative is of supposedly superior quality by witnesses on hand in person to establish solely such matters as they have themselves observed.

Even in this carefully supervised form, testimonial evidence is usually a decidedly inferior substitute for direct current observation of the facts at issue.⁶ Inherently it suffers from easily appreciated physical and psychological weaknesses. The clearest familiar judicial listing of these weaknesses is found in discussions of admissibility of

5. As to whether in such circumstances, even without subjective verbalization, hearsay problems must be faced, see pp. 772 *et seq.*, *infra*; see also Morgan, *Hearsay Dangers*, 62 HARV. L. REV. 177, 214-15 (1948). Often, of course, where observation leads to an immediate inner decision manifested by quick action *other than a declaratory statement* something fairly analogous to a spontaneous assertion is brought about, and appeal to the familiar hearsay exception for this sort of declaration is valid. Cf. note 77 *infra*.

6. The most obvious departure from this generalization appears in expert testimony. Testimony by an expert observer as to what he perceived when carefully scrutinizing a phenomenon is almost certain to be superior in probative value to the product of direct scrutiny of the same phenomenon by unskilled jurymen. A significant illustration of the general proposition stated in the text is the varying regard with respect to due process as between summary trial and punishment for (a) contempts committed within sight and hearing of the judge and (b) contempts committed otherwise. *In re Oliver*, 333 U.S. 257, 274-76 (1948); cf. *Levine v. United States*, 362 U.S. 610 (1960), *rehearing denied*, 363 U.S. 858 (1960).

testimony by young children.

Momentarily centering attention upon the child witness, we find four items in the catalogue of his weaknesses:⁷

First, risk of faulty perception.⁸

Second, risk of defective, confused, or distorted memory.⁹

Third, risk of a general propensity or particular inclination to express and communicate inexactly such memory or other mental or physical state as does exist. A convenient term for this third item is failure or lack of sincerity.

Fourth, and finally, risk that the child narrator, although striving to

7. Illustrative cases include *Commonwealth v. Tatisos*, 238 Mass. 322, 130 N.E. 495 (1921) (full and specific presentation); *Maynard v. Keough*, 145 Minn. 26, 175 N.W. 891 (1920) (brief but pointed); *State v. Statler*, 331 S.W.2d 526, 528-29 (Mo. 1960) (explicit formula, according to text above, quoted from earlier opinion); *Rosche v. McCoy*, 397 Pa. 615, 619-24, 156 A.2d 307, 309-12 (1959) (full and specific presentation); cf. *State v. Butler*, 32 N.J. 166, 189-95, 160 A.2d 8, 20-25 (1960) (witness claimed to be mentally defective and unworthy of belief; explicit formula according to text above; full presentation). Sometimes not all the factors are specifically mentioned, those unmentioned being taken for granted or relegated to the background by reason of particular facts. *Litzkuhn v. Clark*, 85 Ariz. 355, 359-60, 339 P.2d 389, 392 (1959) (error in summarily refusing to hear child of six with respect to event occurring when the child was five; factors mentioned: ability to receive and truly narrate just impressions of the facts); *People v. Pike*, 7 Cal. Rptr. 188 (Cal. App. 1960) (factors mentioned: recollection and narration; perception obviously implied); *People v. Burton*, 6 Cal. Rptr. 124, 129 (Cal. App. 1960) (factors mentioned: ability to receive and truly relate just impressions of facts, and realization that evil would result from telling lies); *Wozniak v. Luta*, 103 N.W.2d 870, 873, 875 (Minn. 1960) (not abuse of discretion to refuse to receive testimony of boy aged eight about accident suffered when he was five; perception and memory obviously the disqualifying weak points, since boy was allowed to testify "as to his complaints at the time of the trial"); *Artesani v. Gritton*, 252 N.C. 463, 113 S.E.2d 895, 897-899 (1960) (error to disqualify solely on ground of chronological age child of seven years and three months with respect to accident suffered when of four years and eight months; factors mentioned: capacity to understand and relate under obligation of oath; full discussion).

The *Butler* case above correctly suggests close connection of the testimonial problems of children and of mental defectives. With the latter, however, one encounters special medical problems, presumptions from commitment to institutions, etc., which blur the elemental analysis.

8. The term "faulty perception" is meant to cover every kind of fault from complete lack of any observation through all sorts of major and minor misperceptions and nonperceptions; also of course every kind of sensory perception with or without artificial aids. Further, it is meant to apply whenever, although the senses are brought to bear on phenomena, understanding or comprehension of what is perceived is more or less lacking.

9. Here again the terminology is meant to be sweeping, covering drop-outs in recollection; transposition of dates, persons, episodes, and what not, whether by way of subtraction or addition; and all sorts of deviations in size, proportion, or significance. This weakness can often, in the case of ordinary adult witnesses, be obviated or lessened by prompt preparation of memoranda. See Maguire and Quick, *Testimony: Memory and Memoranda*, 3 How. L.J. 1 (1957). It must be borne in mind that much significant testimony does not involve memory at all, because it is a purported description of such concurrent things as pain, fear, belief, like or dislike, intention, and so on.

convey a correct account, may be incapable of exact verbalization.¹⁰ The result of such incapacity will often resemble the result of insincerity. Fundamentally, though, the two risks are different. A purely verbalistic shortcoming, unlike an uttered deviation from actual belief, has no moral content. It is failure in form, not failure in spirit. We have here a feature of attempted communication which presents a double-ended hazard, involving not only capability of the person who seeks to express a proposition of fact but also capability of any person who seeks to grasp correctly the intended meaning.¹¹ With the latter capability, important as it is, this paper makes no attempt to grapple.

Several comments of major significance are needed to put the preceding paragraph in proper setting for purposes of the present discussion. First, the quadripart analysis, here offered only with respect to witness competency, properly runs through the whole topic of testimonial evidence.¹² It bears strongly upon both bolstering and impeachment of ordinary witness stand testimony, and has fundamental significance, sometimes only fractionally perceived, in handling hearsay evidence. Second, the four potential factors of weakness are scarcely of equal or unvarying importance from either the point of view of an intelligent layman applying common sense to these problems or of a lawyer applying technical learning and skill. For instance, aside from the young child with a limited and unanchored vocabulary, or the foreigner deficient in the common local tongue yet attempting to use it when testifying, the risk of inexact verbalization is not commonly very threatening. This inequality and variability of risk will at a later point be pursued in other applications. Next, while any proposed witness must, to be acceptable, have *some* power or fall under some sanction adequate to avoid or diminish each of the testimonial risks enumerated above, his evidence may be received despite great likelihood of infirmity on one or more of the

10. As will appear later, the word "narrator" is too narrow in ordinary connotation to suggest all the forms of communication belonging within the concept at the base of the present discussion. See pp. 772-73 *infra*. For the moment it is enough to remark that propositions of fact may be purposely conveyed from one mind to another by means of expression not involving words either spoken or written.

11. Thus Thoreau's famous sentence, quoted by the late Mr. Justice Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801, 863 (1951): "It takes two to speak the truth,—one to speak, and another to hear."

12. 2 WIGMORE, EVIDENCE § 478 (3d ed. 1940), cuts the number by one, combining the third and fourth enumerated in the text. Falknor, *Silence*, 89 U. PA. L. REV. at 194 (1940), and Morgan, *Hearsay Dangers*, 62 HARV. L. REV. at 178-79, 185-88 (1948), adhere to the full four. In typical Anglo-American judicial discussions of hearsay and testimonial evidence at large, the third—sincerity—has received what may well be exaggerated emphasis; the fourth—inexact verbalization—is often passed over as of rare significance.

four grounds. This is commendable because a judge or juror, in finding facts, needs all the helpful information he can get, and is supposed to use his shrewdness to distinguish between sound, on the one hand, and dubious or even flatly misleading information, on the other. There is indeed a strong and growing general tendency to accept the vast bulk of testimony, subject to critical appraisal by the trier of fact, rather than to declare even a frail witness incompetent because of belief that he was a slipshod observer, has an unreliable memory, is inclined to falsify with respect to the subject-matter being investigated, or (perhaps *and*) suffers from limited power to communicate his ideas.

But even the most capable witness, and still more the one of questionable reliability, is subject to impeachment. While conduct of witness impeachment is susceptible to infinite skilled variation, furnishing one of the most severe tests for trial judgment and ingenuity, the bare bones of its technique are hard and definite. Their modeling traces back to the testimonial risks previously listed.¹³ So, too, does much of the modeling of the processes for corroborating or rehabilitating witnesses.¹⁴ In other words, the testing of a compe-

13. This is most easily demonstrated by running the outlines of a differentiation familiar to every trial lawyer. He knows that subject to discretionary restraint by the trial judge he has a fairly free field on cross-examination for purposes of casting doubt upon the credibility of witnesses put forward by his opponent. But he also knows that if the results of cross-examination do not satisfy him, he will be definitely restricted in introducing extrinsic impeaching evidence. He may, by proper procedure, utilize the following: (1) Evidence of conviction of opponent's witnesses for crime (commonly confined to convictions for misconduct involving moral turpitude); this evidence is assumed to have an adverse bearing upon sincerity. (2) Evidence of bad reputation for truth and veracity; again, a bearing upon sincerity. (3) Evidence tending to show bias with respect to present parties litigant or one or more of the issues on trial; once more, sincerity. (4) Evidence of prior inconsistent statements by the witnesses with respect to material or "non-collateral" aspects of their testimony (definition of "material," "non-collateral," and other supposedly corresponding limiting words is difficult, but that difficulty need not be pursued here); this may bear adversely on sincerity, or it may bear adversely upon accuracy of observation or of memory. (5) Evidence of inability to observe, for lack of opportunity, defective powers of observation, etc.; this has a direct bearing upon perception, and quite possibly an indirect bearing upon memory or sincerity if the testimony of the witness has indicated exact detail of perception. These are the stereotyped permissible lines of extrinsic attack; under particular circumstances the impeaching lawyer may win the trial judge's permission to go into other miscellaneous areas, and an appellate court may acquiesce.

14. *E.g.*, evidence of good reputation for truth and veracity—the obvious primary bearing is upon sincerity; evidence of earlier statement consistent with testimony, introduced to offset a cross-examiner's claim of "recent invention"—the bearing may be upon sincerity, power of memory, or accuracy of observation, disjunctively or conjunctively; cross-examiner charges witness with falsification because of self-interest, and proponent of witness introduces evidence that witness made a thoroughly consistent statement before any self-interest existed or was anticipated—the bearing normally is on sincerity; cross-examiner attacks testimony of witness to assault on ground that fragments of broken eyeglasses had lodged in his eyes, and proponent of witness

tent witness for purposes of appraising his evidence has as its underpinning the selfsame considerations invoked to determine his physical, mental, and moral competency.

All this discussion of ordinary witness stand testimony is of course only preliminary. We are concerned with hearsay, matter so different that in our law it has been given a distinct and unfavorable classification. The difference is familiar and fairly easy to state, and involves no departure from, but rather a compounding of, the four fundamental criteria of testimonial credibility.

If we seek to prove that a blow was struck, or a slanderous statement uttered, and for this purpose adduce a witness who testifies that he was present and heard or saw the action, the testimony can duly, and often with great fullness, receive framing and backing which will help judge or jury decide how much or how little reliance it deserves. Acuity of the witness's sight or hearing can be inquired into and tested on cross-examination or otherwise. The vital fact of his presence within seeing or hearing distance can be probed. His attention or inattention at the crucial moment lies open to inquiry. Effective exploration of interest or bias with respect to the particular issue or parties litigant is frequently possible—*e.g.*, he may have been charged, or may fear being charged, with participation in the beating of the plaintiff, or the defendant may be a person whom he hates. The reader will perceive without more words that this list of relevant modifying circumstances is naturally extendible to the full limit of accepted practices respecting impeachment or fortifying or re-establishing of witnesses.

Now suppose the witness in the case of *Robinson v. Smith* proposes to testify that Tom Jones—not present in court—told him Smith hit Robinson, or that the absentee Jones purported to quote Smith as having said Robinson stole a leg of lamb from the corner provision merchant.¹⁵ Under such circumstances counsel find it harder to give effective depth and color to any picture of Jones' credibility.¹⁶ Of course it is permissible to contradict hearsay by counter-evidence, and theoretically possible to impeach it by applying various techniques

introduces testimony of eye specialist whom witness consulted after the episode that fragments did not impair vision—the bearing is certainly on ability to perceive and perhaps on sincerity; etc.

15. A special question arises if Tom Jones is present and open to cross-examination; see pp. 767 *et seq.*, *infra*.

16. The text speaks mainly in terms of effective *attack* upon the cogency of hearsay evidence. Of course there is likely to be corresponding difficulty in legitimately *strengthening* it. A hearsay declarant may have consulted adequate memoranda for refreshment of recollection, for instance; but assuming the condition of declarant's unavailability which is the most common reason for resorting to hearsay, such consultation may not be ascertainable, much less provable.

usable against a witness present on the stand.¹⁷ But only cross-examination is likely to reveal some important sources of contradiction, many of the impeaching leads, and much of the impeaching substance. Thus hearsay, even though the person asserted to have uttered it is but once removed¹⁸ from the witness who testifies to its content, is essentially more subject to latent narrative or testimonial weakness than is direct testimony from a living person claiming to have perceived the matters at issue. This might have had most severe exclusionary consequences by producing the following rule:

Any possible shortcoming in perception, memory, sincerity, or precision of interpretation, even though it would suffice only to impeach, not disqualify, the testimony of a witness in court, will cause classification as inadmissible hearsay of a communication made outside the sanctions imposed upon such a witness.

Of course no such stringent rule exists. But when anybody seeks authoritatively to establish how far, and on the basis of what recognized principles, the current designation of inadmissible hearsay falls short of this stringency, simplicity and certitude are hard to attain. Respective significance of the four standard testimonial risks is usually unstated or at best obscurely handled. An approach, at least, can be essayed by bracketing an affirmative formula and a matching negative formula of which the first has substantially unanimous, and the second at least respectable, support from case law and professional thinking.

The affirmative formula is: Hearsay invariably constitutes a present problem when extrajudicial human behavior is sought to be proved as tending to establish a proposition of fact which the actor intended his behavior to communicate or at least express.¹⁹ The negative formula is: Hearsay never constitutes a present problem unless human behavior is sought to be proved for the particular purpose just stated. As a practical application of this formula, the most familiar case uses human behavior to prove the desired proposition of fact

17. Subject, of course, to such handicaps as may be presented by the requirement of "laying a foundation" for admission of extrinsic evidence of self-contradiction by the declarant.

18. Compound or multiple hearsay, coming down through a succession of declarants, or assembled bit by bit from a number of declarants, is obviously a still more rickety probative vehicle.

19. Freak cases turn up at intervals, but need not be taken too seriously. *E.g.*, *Johnson v. State*, 254 Wis. 320, 326, 36 N.W.2d 86, 89 (1949) (identification by boy of defendant as man who had mistreated the boy; police officer picked up boy so that he could see defendant through one-way glass at police station "and he pointed this Mr. Johnson out as the man who had him in the park"; such testimony by officer not hearsay; "testifying to something he saw, something Richard did in his presence . . . relying on what he observed and not what the boy told him").

only by inference as contrasted with assertion. This is fairly commonly accepted, particularly if the term "assertion" is taken to include declaratory gestures. Certainly it would be a rather natural consequence of early talk about the general hearsay exclusionary principle, and early development of recognized exceptions to it, because the weight of emphasis was so much on the peril of insincerity as the prime testimonial frailty.²⁰ In assertive testimonial evidence, sincerity is nearly always involved.²¹ Remove the factor of assertion, and risk of insincerity normally vanishes simultaneously. Definition along this line shrinks risks of faulty perception, of blank or unruly memory, of imprecise verbalization to the size of defects regrettable but not fatal. Arguments in favor of such drastic shrinkage certainly exist, and are known to every student of evidence, but many thoughtful lawyers fear it more than they dislike even our present tangle of uncertainties and restrictions. Can a satisfactory middle course, giving some reasonable and practicable recognition to risks other than that of insincerity, be derived from available material? Let search for an answer to this question start with examination of the single great leading case, now aged very near a century and a quarter, and lead on to some consideration of hit-or-miss modern authority.

II. THE HEARSAY RULE AND INFERENCES FROM HUMAN BEHAVIOR

In 1822 an English country gentleman named John Marsden made a purported will of great elaboration, following up in 1825 with a simple codicil. By these instruments, coupled with his death during 1826, Mr. Marsden started in the courts²² and local society²³ a really

20. Probably it would be unfair to assert that the English judiciary of the development period assumed declarants would lie at the drop of a hat; but there was certainly an assumption that very slight material or emotional temptation would tend to induce mendacity. Consult the old cases conveniently collected in THAYER, *A SELECTION OF CASES ON EVIDENCE AT THE COMMON LAW*, 354, 373-78, 416-17, 474-76, 507-08, and elsewhere (2d ed. 1900); cf. COWEN & CARTER, *ESSAYS ON THE LAW OF EVIDENCE*, 8, 23-37, 39 (1956), suggesting some continuance of this view beyond the middle of the 20th century.

21. A shade of qualification must be indulged. Imagine a literally spontaneous declaratory exclamation, springing from the speaker under the impulse of excitement or horror.

22. The fullest professional account of the situation is *A VERBATIM REPORT OF THE CAUSE DOE DEM. TATHAM V. WRIGHT, TRIED AT THE LAMMAS ASSIZES, 1834, BEFORE MR. BARON GURNEY AND A SPECIAL JURY (1834)*, two volumes of 371 and 360 pages respectively. For convenient brevity this account is hereafter referred to as V.R. The compiler of these volumes was Alexander Fraser of Clifford's Inn, the accredited reporter in the case. This is the third of the four trials mentioned in the text. The *London Morning Chronicle* for September 3, 1834 remarks that mortality of witnesses had been heavy, and that Mr. Fraser by producing transcripts of prior testimony saved bar and bench from a sea of troubles. Incidentally, by this time so many leaders of the bar, since elevated to the bench, had previously represented one side or the other that it was difficult to find a judge of appropriate detachment to preside. The *Times* (London), September 1, 1834. The *Chronicle* on August 26, 1834 speaks of

astounding rumpus. Thanks not only to the ordinary law reports but also to a printed verbatim report of one of the four trials, we know a good deal about Mr. Marsden and can believe that the widely publicized litigation would have shocked him. The evidence, not entirely uniform, would support this description:

He was a mild, polite, shrinking, shortish man, not bad-looking and with "fresh colour," rather afraid of dogs, big or little, at ground level and of horses when he attained the elevation of the saddle. Although friendly and hospitable, he did not carve well enough to meet the demands of a table at which many were habitually served. So myopic that he could not recognize people even a few yards away, he had a habit of contracting his brows and distorting his face to overcome the visual difficulty. He was quite uneducated, entirely unmarried, and sometimes bumbling in the presence of ladies. The ringing of bells fascinated him; so did check aprons worn by the servant maids. He took an interest in music, but the variety of his performance and tastes was too limited to give others much joy. He did become well-informed and competent as a genealogist, having a tenacious memory; and was also something of a drum-and-trumpet military historian.²⁴ His religion and politics were conservative.

"the great will case"; Mr. Baron Gurney opened his summing up on September 3, 1834 with: "Gentlemen of the Jury—This great cause . . ." 2 V.R. 295. Will and codicil are fully printed in 2 V.R. 346-56.

23. Toward the end of the 1834 trial the *Chronicle* for September 3 asserted that interest in the matter hourly increased and that the controversy had actually become a local party question; also that no expense was being spared on either side. This source had previously estimated the cost of the pending trial at £10,000. *Chronicle*, August 26, 1834. The principal property at issue, a great country estate complete with Hornby Castle (which rose to the dignity of water closets in 1811 or 1812, 2 V.R. 152-53), commons, mines, fisheries, manorial rights, and all the trimmings (1 V.R. 137, 149, 161), was according to one 1834 estimate worth £8,000 a year; this shrank to £7,000 and upward; then there was an admission that, because of depression in the value of agricultural produce, current realization was under £5,000 annually—still something substantial. *Chronicle*, August 26 and 28, 1834; *Times*, September 1, 1834. The jury, as listed in 1 V.R. 1, is obviously of blue ribbon quality—preponderantly merchants in the proportion of ten to the dozen; the other two are labeled "Esq.," as the jurors were about to retire after the summing up, one of the merchants received word that his mother had died, and was excused by common consent (2 V.R. 343-44). During the trial, this occurred: "Gurney, B. —I will not have this court made a scene of disturbance, and therefore if there be any symptoms of it renewed, I will clear it." 1 V.R. 243. Hence it seems to have been discreet to hold the first of the four trials—on directed jury issues out of Chancery—at York on account of prejudice supposed to prevail in Lancashire, where John Marsden had lived. *Wright v. Doe d. Tatham*, 7 Ad. & E. 313, 314, 112 Eng. Rep. 488, 489 n.(a) (K.B. 1837). Mr. Justice James Allan Park presided at York, and there were collisions between him and Brougham; the handling of this trial came in for acid criticism by Admiral Tatham's counsel in 1834. 1 V.R. 273; 2 *id.* 77.

24. Aside from this incidental military touch and a sartorial flurry about uniforms for a volunteer regiment which never materialized (2 V.R. 101-02, 104), the VERBATIM REPORT reflects little of the prodigious political and military struggle which went on through a large part of John Marsden's life.

Riding grandly by carriage, he led his freemen to the polls on election days. Indecisive, slow of perception, submissive, and indolent, he relied much upon his steward Wright, a positive and unlovable man who, as a principal testamentary beneficiary, became a target of attack in the court proceedings.²⁵ Since, by the early death of his elder brother, Mr. Marsden inherited substantial properties, in one way or another he was drawn into many acquisitive dealings. All in all, it was not too surprising that his cousin and sole heir-at-law Admiral Tatham should promptly, vigorously, and tenaciously have attacked the validity of the testamentary dispositions.²⁶

John Marsden's mental competency was sharply drawn into issue. The litigation came to its ultimate climatic focus in 1838 over a nice point involving proper definition of hearsay evidence. Items adduced to prove incompetency included testimony:

. . . that Marsden was treated as a child by his own menial servants; that, in his youth, he was called, in the village where he lived, "Silly Jack," and "Silly Marsden," . . .; that a witness had seen boys shouting after him, "There goes crazy Marsden," and throwing dirt at him, and had persuaded a person passing by to see him home. . . .²⁷

No complaint was made over reception of this material. Evidence adduced to prove competency included three letters, dated respectively in 1784, 1786, and 1799, addressed and sent to Marsden or his steward Wright for Marsden's attention. The first was a friendly

Seemingly wars, even against Napoleon, were not then so disturbing to the stay-at-homes.

25. The copious available trial record, much fuller than concurrent newspaper reports, discloses testimony (frequently reiterative) from many witnesses bearing upon the description given above. See the passages beginning at 1 V.R. 133, 184, 193, 350, 368; 2 *id.* 13, 47, 62, 103, 195, 212, also 259 for an amusing exchange between Pollock and Starkie about Marsden's standards of horsemanship. James Lonsdale, a native of Lancaster and one of the leading portraitists of the day (see *DICTIONARY OF NATIONAL BIOGRAPHY*), painted John Marsden about 1814, finding him "by no means a disagreeable looking man" with "nothing at all repulsive" about him "until he spoke"—"I could get no conversation at all from him." 2 V.R. 208-09.

26. The persistence had to be pumped in from outside. Although during the 1834 trial Admiral Tatham was the popular favorite (*Chronicle*, September 3) the *Times* on September 1 commented that the litigation was understood to be "now" carried on at the instance of a gentleman named Pudsey Dawson, to whom the estate would descend on the death of Admiral Tatham, already of an age "beyond the ordinary bound of human life" and without issue. This is tantalizing. Somehow "Pudsey" suggests money instead of refinement; certainly he was none of the decorous Dawsons in the *DICTIONARY OF NATIONAL BIOGRAPHY*; it may well be guessed that both the *Times* and its readers knew more of him than we and history do; tracing devolution of title to Hornsby Castle after the Admiral's legal victory in 1838 might be interesting.

27. *Wright v. Doe d. Tatham*, 7 Ad. & E. 313, 316, 112 Eng. Rep. 488, 490 (K.B. 1837). This part of the report seems to be summarizing the evidence at the 1834 trial; 2 V.R. 136 has it: "There was a blacksmith called John Greenwood passing by, and as I was on horseback I said, if he would take Marsden up to Lister, he would get a pint of ale."

letter from a cousin, telling about a voyage to America and the conditions found on arrival; the second, from the vicar of nearby Lancaster, had to do with a legal controversy involving Marsden; the third, from the curate of the chapelry of Hornby upon the occasion of his resignation, expressed fulsome thanks for favors received.²⁸ All were on subject matters, and couched in language, suited to the understanding of a person having reasonable intelligence. All the writers had died before trial. With respect to evidentiary utilization of these letters as tending to prove *belief of the writers* that Marsden possessed adequate understanding, and derivatively that he *did in fact* enjoy such understanding, the controversy went all the way to the House of Lords, eliciting opinions or statements of views from more than 17 judges—several of them famous legal personages.²⁹

Here, then, was what might have been an almost miraculously appointed opportunity for authoritative determination of the claim that where there is no intentional communication of the proposition at issue, where that proposition is come at only by inference, there can be no hearsay. Time and approach seemed apt. As a general exclusive principle, the hearsay rule was solidly established. The foundations of the main exceptions admitting some assertive hearsay had also been laid. Those exceptions certainly did not include anything covering the needs of the litigant offering the letters in the immediate situation, nor does there appear in the long and varied

28. The letters appear in full 7 Ad. & E. at 317-19, 112 Eng. Rep. at 490-91; *Wright v. Doe d. Tatham*, 5 Cl. & Fin. at 673, 676, 678, 7 Eng. Rep. at 559, 561-62 (K.B. 1838); also 1 V.R. 20, 25, 35.

29. The array of counsel was also glittering. Pollock, on his way to and after attaining knighthood, battled throughout to sustain the will; he had associates perhaps less well remembered. In connection with the initial trial at York in 1830, Brougham assailed the will; but he became Lord Chancellor before this phase of the matter ended, and thus Sir James Scarlett and Solicitor-General Horne came to have a voice in argument; against the latter Sir E. Sugden appeared but was not called upon. The Lord Chancellor most properly in substance abstained from the ultimate appellate proceedings, Lord Chief Justice Tindal and Lord Chief Baron Lyndhurst taking over. *Tatham v. Wright*, 2 Russ. & M. 1, 4, 10, 12, 39 Eng. Rep. 295, 296, 298, 299 (K.B. 1831). Lord Brougham functioned in the concluding stage of the controversy before the House of Lords, but his vote was not decisive. 5 Cl. & Fin. 670, 768-69, 7 Eng. Rep. 559, 595. In connection with the first trial of the ejectment before Baron Gurney at Lancaster, Sir James Scarlett attacked the will. *Wright v. Doe d. Tatham*, 1 Ad. & E. 4, 11, 14, 110 Eng. Rep. 1108, 1112, 1113 (Ex. 1834). In connection with the second and third trials at Lancaster (the former again before Baron Gurney, the latter before Justice Coleridge), Sir James Scarlett at first continued, but departed to be made Lord Chief Baron of the Exchequer in December, 1834, and Baron Abinger early in 1835, with Cresswell and Starkie taking his place in the Marsden will contest. The second of the two counsel last named, who had become Downing Professor of the Laws of England in 1823, was an evidence expert, a new edition of his text on that subject having come out in 1833. 7 Ad. & E. at 313, 322, 336, 343, 350, 112 Eng. Rep. at 488, 492, 500, 503 (1834, 1836, 1837). Before the House of Lords, Cresswell and Starkie won the final victory. 5 Cl. & Fin. at 670, 679, 683, 7 Eng. Rep. at 559, 562, 564 (1838).

discussion much special urging to fabricate a new hearsay exception. Argument of counsel and judges can on the whole be most easily referred to as effort for and against restricting definition of the exclusionary rule's scope.

But, on the other side, general conditions and particular problem contained unfavorable legalistic elements. The 1830's, during which the case was presented, fell in an era of somewhat pompous professional satisfaction as to the technical English rules of proof at common law.³⁰ Consider, for instance, that Mr. Justice Coleridge in the instant litigation saw fit to decry before the House of Lords "the fallacy, that, whatever is morally convincing, and whatever reasonable beings would form their judgments and act upon, may be submitted to a jury."³¹ Liberalized reception of evidence, by definition or otherwise, was scarcely the order of the day.

30. Consider, for instance, the exhibition of extreme technicalism in the famous trial scene presented by WARREN, *TEN THOUSAND A YEAR* (1841) (the timing of events narrated in this book is explicitly stated as contemporaneous with *Wright v. Tatham*; the first chapter made its initial appearance in *Blackwood's Magazine* for October, 1839, and the first full edition was dated 1841). It should be frankly admitted that the *VERBATIM REPORT* of the second ejection trial in *Wright v. Tatham* contains no excruciating hairsplitting about evidence; instead it shows a highly complicated matter moved ahead with deliberate speed in the commendable sense; but the reader should remember that the trial of the Chancery issues and the first ejection trial had already occurred; technicalism was worn pretty threadbare. The opinions of Park, J., in the Exchequer Chamber on writ of error to the result of the final 1836 trial, and in the House of Lords, urge liberal admissibility and amusingly throw a quotation "from Mr. Starkie's invaluable work" back in the face of the author himself as counsel for Admiral Tatham. 7 Ad. & E. at 395-401, 112 Eng. Rep. at 519-20; 5 Cl. & Fin. at 751-58, 7 Eng. Rep. at 589-91. But as an author, the invaluable Mr. Starkie was favoring consideration of a wide range of illuminating facts "provided they can be established by competent means." See his and Cresswell's argument as summarized in 5 Cl. & Fin. at 683-84, 7 Eng. Rep. at 564. The textbook on evidence was talking about relevancy, not playing ducks and drakes with any sacred technical rule of legal proof. Nor did Park, J., differ with his brethren about the inadmissibility of the challenged letters *apart from evidence of intelligent action upon them by Marsden*. See note 38 *infra*.

31. 5 Cl. & Fin. at 690, 7 Eng. Rep. at 566. A remarkable fallacy, indeed, particularly when associated, as it is throughout discussion in this early 19th century case, with the proposition that in juryless ecclesiastical courts evidence more or less like that here considered might be safely received because of the more sophisticated character of the triers of fact. *E.g.*, Cresswell and Starkie in argument—7 Ad. & E. at 346-47, 353-54, 112 Eng. Rep. at 501-02, 504; Bosanquet, J.—7 Ad. & E. at 374-76, 112 Eng. Rep. at 511-12; Parke, B.—7 Ad. & E. at 389, 112 Eng. Rep. at 517; Tindal, C. J.—7 Ad. & E. at 400-02, 112 Eng. Rep. at 521-22; Coleridge, J.—5 Cl. & Fin. at 692, 7 Eng. Rep. at 567; Williams, J.—5 Cl. & Fin. at 701-02, 7 Eng. Rep. at 570; Littledale, J.—5 Cl. & Fin. at 748-49, 7 Eng. Rep. at 588; Lord Brougham—5 Cl. & Fin. at 770-71, 7 Eng. Rep. at 595. Are not jurors "reasonable beings"; and if they are, why deprive them of a kind of evidential material, familiar to them from everyday use in formation of judgments and decisions to act, because of fear that they will not be mentally capable of appraising the material? And with specific reference to this very case, be it remembered that at the one trial in which the contested letters were admitted, and in which the will was sustained, there was a special jury principally composed of tough-minded merchants.

Also the particular issue was such as to demand that the content of the letters, if they were admissible, be considered an implied showing of their writers' *opinion* respecting Marsden's mental grasp of the practical matters which must be comprehended for the making of a valid will. Doubt was manifested as to whether unskilled witnesses on the stand would have been allowed to testify in words to that kind of opinion, and inferences drawn from out-of-court, non-explicit utterances were obviously deemed even less acceptable.³² When hearsay or something that looks like hearsay gets compounded with opinion, its admissibility is doubly unlikely. Then, besides, after a fashion which still prevails more in Great Britain than in this country, there was no effective effort to produce common statements in the areas of agreement.

The ultimate upshot was a confused miscellany of opinions, doing little to clarify the concept of hearsay or helpfully to free any broad category of evidence from its shackles. And it must, with considerable shame, be conceded that subsequent judicial analyses and pronouncements in the United States have not, on the whole, greatly advanced comprehension of the evidentiary problems raised by the battle over John Marsden's will. Even so, somewhat useful commentary is possible:

(1) In the *Marsden* will case, the three letters already mentioned formed only a small fraction of the documentary evidence. Along with them, seemingly in the same place of deposit, were found items of a voluminous correspondence to and from Marsden running over the years 1787-1820.³³ Usability in evidence of this correspondence is conceded throughout the discussion, because its content and the attendant circumstances plainly allowed a reasonable finding that

See notes 22, 23 *supra*; also the summing up in 2 V.R. at 298: "most of you, gentlemen, I believe, are engaged in manufactures, or in commerce."

In addition to Coleridge, J., it is worth quoting Vaughan, J., speaking of extrajudicial acts manifesting even such opinions as are adverse to the interests of the actors: "They are merely opinions expressed in different language, in the language of conduct, instead of the language of words. . . . [A]s moral evidence, they may be very cogent. Yet does the law, more rigid and inflexible, resist the weight of such moral evidence, although, in the ordinary transactions of life, common sense and experience might possibly yield to it." 5 Cl. & Fin. at 739, 7 Eng. Rep. at 584. Is he proud of the law's pig-headed conduct, or apologetic about it? Even if the latter, he deems himself powerless.

32. Coltman, J.—7 Ad. & E. at 359-60, 112 Eng. Rep. at 506; Bosanquet, J.—7 Ad. & E. at 373, 112 Eng. Rep. at 511; Parke, B.—7 Ad. & E. at 388-89, 112 Eng. Rep. at 516-17; Coleridge, J.—5 Cl. & Fin. at 690-91, 7 Eng. Rep. at 566; Tindal, L.C.J.—5 Cl. & Fin. at 759-60, 7 Eng. Rep. at 592; also Cresswell and Starkie in argument—5 Cl. & Fin. at 687, 7 Eng. Rep. at 565.

33. *Tatham v. Wright*, 2 Russ. & M. 1, 22-26, 39 Eng. Rep. 295, 303-04 (K.B. 1831) (issues framed in Chancery); *Wright v. Doe d. Tatham*, 5 Cl. & Fin. 670, 707-08, 7 Eng. Rep. 559, 572-73 (1838) (Gurney, B.); also 1 V.R. 18.

Marsden had during the give and take of reading, writing, and other action manifested some business acumen and general intelligence.³⁴ Such employment of such evidence plainly removes from hearsay classification the incoming letters addressed to Marsden. Their substance is presented only because it embodies the stimuli to be considered in determining whether Marsden's responses or other reactions were those of a capable person or of a bungling idiot. Were the judges equally correct, however, in their immediate tacit assumption that Marsden's responsive behavior did not involve hearsay when evidenced as tending to establish testamentary competency? The answer to this question should surely be affirmative. Appraisal of the rationality of Marsden's reactions to these successive external stimuli is self-probative with respect to intelligent perception or the reverse. The stimuli were steadily before him to remove any necessary reliance upon powers of memory. Sincerity cuts no figure in the evaluation. If incapable of sound judgment, he could hardly fabricate an appearance of it; if capable of sound judgment, it did not matter whether he acted without reflection or with conscious intention to manifest his wisdom. Nothing like a risk of misinterpretation threatens. Even in a single instance the whimsies of a fool are unlikely by chance to match the behavior of a person having common sense; such matching over a period of 33 years is inconceivable.³⁵

(2) On return to the three seriously litigated letters, the risk of insincerity was less confidently dismissed. Some of the opinions assert that one writing a letter to an addressee whose intelligence he deems defective may deliberately disguise that belief for any of a number of reasons running all the way from affectionate consideration to contemptuous derision.³⁶ By and large, though, the opinions state or imply a view that likelihood of such conscious duplicity in the particular letters was inconsiderable, and indeed that no thought of manifesting any belief as to Marsden's mental capacities occurred to the writers.³⁷ Even so, none of the judges who participated in the

34. Put succinctly by the Lord Chancellor (Baron Cottenham) at the end of the litigation. 5 Cl. & Fin. at 773, 7 Eng. Rep. at 597 (letters admissible for gauging intelligence of action thereon; inadmissible if uncoupled with action).

35. Does this analysis square with proper analysis of testimony offered to establish the degree of impairment of declarant's hearing, and consisting of assertion (1) that with declarant blindfolded a tuning fork was vibrated at varying distances from his ears and (2) that he stated with respect to each step in the test that he could or could not hear the sound, these statements building up into a consistent pattern of impairment? *Edwards v. Druien*, 235 Ky. 835, 837, 32 S.W.2d 411, 412 (1930).

36. *Denman*, L.C.J.—7 Ad. & E. at 326, 112 Eng. Rep. at 494; *Bosanquet*, J.—7 Ad. & E. at 381, 112 Eng. Rep. at 514; *Williams*, J.—5 Cl. & Fin. at 700, 7 Eng. Rep. at 570; *Littledale*, J.—5 Cl. & Fin. at 746-47, 7 Eng. Rep. at 587.

37. The statement by *Park*, J., in 5 Cl. & Fin. at 754, 757, 7 Eng. Rep. at 590,

final hearing of the case flatly committed himself to the proposition that the three letters should have been admitted as falling outside the hearsay area.³⁸

(3) It is reasonable, then, to conclude that this massive old litigation supplies definite authority against any doctrine of escaping the hearsay label *solely* by getting away from the kind of conscious assertion which gives rise to a sincerity problem. Indeed, that great judge Baron Parke was quite definite on the point:

But the question is, whether the contents of these letters are evidence of the fact to be proved upon this issue,—that is, the actual existence of the qualities which the testator is, in those letters, by implication, stated to possess: and those letters may be considered in this respect to be on the same footing as if they had contained a direct and positive statement that he was competent.³⁹

While this sentence as it stands is an assertion of a result without supporting reasons, those reasons can be gathered quite reliably from other portions of the reports. In various forms of words it is insisted that the assertion of a declarant—most particularly an assertion respecting the mental capacity of another person—must for real probative value be based upon adequate perception and appreciation of relevant facts.⁴⁰ This fundamental need remains even when a process of inference replaces forthright assertion. Removal of risk of insincerity does not at all cure a deficit of information. Cross-examination becomes on many occasions very useful to test possible existence of such a deficit. This is perfectly intelligible, and has plenty of reasonable appeal at large and in the abstract.

But common law does not shape its principles through abstract processes. It shapes them by continuous integration of perfectly concrete cases. The concrete situation as to the testator's mental competency in the *Marsden* case, from the plaintiff Admiral's point of view, involved intellectual inferiority then described as "connate imbecility" present from youth, easily recognizable through symptoms manifest to anybody, and not improved by advancing age.⁴¹ Each

591, is vigorous; that by Parke, B., in 7 Ad. & E. at 384, 112 Eng. Rep. at 515, less emphatic. Gurney, B., hammered this matter hard in 2 V.R. 320-21, 338. See also Sir F. Pollock in argument. 7 Ad. & E. at 341, 358, 112 Eng. Rep. at 499, 506.

38. So stated by Lord Chancellor Cottenham in 5 Cl. & Fin. at 773, 7 Eng. Rep. at 597.

39. 7 Ad. & E. at 385, 388-89, 112 Eng. Rep. at 515, 516-17.

40. Starkie and Cresswell in argument—7 Ad. & E. at 351-52, 112 Eng. Rep. at 503, 5 Cl. & Fin. at 684-87, 7 Eng. Rep. 564-65; and see Sir F. Pollock—7 Ad. & E. at 349, 112 Eng. Rep. at 502; Coltman, J.—7 Ad. & E. at 361-62, 112 Eng. Rep. at 506; Bosanquet, J.—7 Ad. & E. at 373, 112 Eng. Rep. at 511; Williams, J.—5 Cl. & Fin. at 700, 7 Eng. Rep. at 569-70; Patteson, J.—5 Cl. & Fin. at 719-20, 7 Eng. Rep. at 575; Littledale, J.—5 Cl. & Fin. at 746-47, 7 Eng. Rep. at 587.

41. Testimony of Dr. Ambrose Cookson. 1 V.R. 360 *passim*.

writer of the letters challenged as constituting inadmissible hearsay was well acquainted with Marsden; the first as one of his nearest relatives and an associate, incidentally having when he wrote precisely the same interests in Marsden's property as the writer's brother Admiral Tatham, the ultimate heir-at-law; the other two writers as clergymen living and carrying on their duties in the vicinity of Marsden's home.⁴² There is no possible doubt that all had plentiful opportunity to observe those personal qualities in Marsden which were relevant to the issue, or that effective observation did occur.⁴³ Successful objection to the specific evidence for risk of inadequate perception is absurd unless the reality of the actual situation is to be remorselessly sacrificed to an inapplicable generality—certainly an evil paradox in the search for truth. And, at this point, it may be illuminating to consider two other paradoxes.

(4) How was it that judges dealing so solemnly with a single testimonial risk in the litigated letters were pleasantly acquiescent with respect to other rather rowdy evidence in the same case which exhibited not only this risk but also and glaringly the fundamental risk of insincerity? The reference of course is to the testimony that people contemptuously called the testator "Silly Jack" and "Silly Marsden," and that young rascallions shouted "There goes crazy Marsden" and threw dirt at him.⁴⁴ Here is blatant intentional assertion, reeking with doubt as to adequate basis of observation, and also reeking with the possibility of cruel immature distortion of truth. If the attitude thus taken without discussion in the Marsden will controversy is traceable to a vague extension of the principle admitting evidence of local reputation as bearing upon character,⁴⁵ there surely

42. 1 V.R. 35-36, 2 *id.* 247-51, 320-21, 338; Gurney, B., 7 Ad. & E. at 367-71, 112 Eng. Rep. at 509-10; Bolland, B.—5 Cl. & Fin. at 731, 7 Eng. Rep. at 581-82 (this judge was in a curiously embarrassing position; he had twice testified in support of the will's validity—*e.g.*, 1 V.R. 205-08—having once stayed in Marsden's home as a guest for 33 days).

43. If the description of Marsden's mental deficiency stated in connection with note 41 *supra* is accepted as correct, the remote dates of the three letters had no substantial bearing upon cogency. Marsden's condition was life-long and its symptoms were so broadly obvious as to lay no tax on the observers' memory. It is true that Park, J., when dealing with the probative worth of the letters used the expression "feather in the scales of justice" and said that it was scarcely "worth while to insist" upon either admission or rejection of them as evidence. 7 Ad. & E. at 399, 112 Eng. Rep. at 520; 5 Cl. & Fin. at 753 7 Eng. Rep. at 589. Tindal, C. J., also talked them down. 7 Ad. & E. at 408, 112 Eng. Rep. at 523. But these particular letters were not put in evidence during the trial before Park, J., Gurney, B., vigorously played up their importance in the trial before him where they were admitted, and the will was sustained in that trial. See 2 V.R. 320-21, 338; also Pollock at 247-51.

44. See p. 751 *supra*.

45. See 5 WIGMORE, EVIDENCE §§ 1608-21 (3d ed. 1940); *In re Wah-kon-tah-he-um-pah's Estate: He-to-op-pe v. Hanna*, 109 Okla. 126, 132, 234 Pac. 210, 216 (1925) ("old crazy woman"); *In re Lawrence's Estate*, 286 Pa. 58, 68, 132 Atl. 786, 790 (1926) ("normal talk about people who live a secluded life").

results a questionable choice, so far as probative merit is concerned, between the dignified evidence of the letters and the unbridled evidence of juvenile uproar. It is only fair to add (a) that the rapscaillon evidence never was discussed at top level and (b) that there is more recent authority against admissibility.⁴⁶

(5) More pointedly, suppose that the heir-at-law attacking Marsden's will had been the cousin who wrote the 1784 litigated letter,⁴⁷ instead of that cousin's brother Admiral Tatham. Is there any reasonable doubt that the letter, with its inference of sanity and testamentary validity, would have been received in favor of the devisees and against the heir-at-law?⁴⁸ The pervasive doctrine of admissions would surely now—and in all likelihood then—propel the writing past any hearsay objection. This, of course, is in some sense a bit of by-play. But it is by-play with a really serious purpose. The meticulous solemnity attendant upon enforcement of the hearsay rule in its more refined aspects seems decidedly ridiculous while we permit the admission, mimicking mischievous Till Eulenspiegel, so freely to pop through, over, and under the sacrosanct barrier.

(6) Risk of defective memory was mentioned often enough during the taking of testimony about the Marsden will,⁴⁹ but scarcely if at all in connection with use of the three letters on which the present discussion makes its focus. Speaking again in generalities, this seems an important neglect. With respect to disclosure and repair of defects of memory, there is a huge distinction between handling witnesses formally put on the stand and handling a declarant who makes an extrajudicial statement.

The prospective witness knows ahead of time he will be put under oath and subjected to various severe sanctions. Hence in the interests of making a respectable showing and avoiding penalties he will

46. *In re Hine*, 68 Conn. 551, 557, 37 Atl. 384, 386-87 (1897).

47. Or, for that matter, somebody claiming through the writer's cousin after the latter's death.

48. Even as matters actually stood, there was some attempt to charge the Admiral with the written implication of his dead brother's views. 2 V.R. 247-51, 338.

49. Perhaps the most vivid illustration is an expression of marked skepticism by Gurney, J., as to the ability of a farmer's son and a laborer to remember after 38 years the particulars of a trifling game of cards. 2 V.R. 320-21, with other illustrations appended. Starkie, in argument, seems to stress risks of uncertain memory. 5 Cl. & Fin. at 684-87, 7 Eng. Rep. at 564-65. In a recent notorious English criminal case defense counsel skillfully developed the peril of forgetfulness by witnesses who were only slightly if at all infected by a tendency toward insincerity (at least in the early stages of their testimony) and quite certainly had carefully perceived the matters in question when those matters occurred. BEDFORD, *THE TRIAL OF DR. ADAMS*, 19, 194, 199, 224 (1959) (alleged slow murder of patient by physician; nurses' testimony as to custody of drugs and variety and quantity of dosage checked to considerable extent against their own contemporaneous records, the veracity of which had strong testimonial and circumstantial support).

feel pressure to achieve full recall of accurate memory.⁵⁰ If the case is well prepared, counsel will question him in advance and do all they can to arouse responsible recollection.⁵¹ In addition to, or in default of, these preparatory steps, trial lawyers have worked out an effective technique for stimulating memory during interrogation.⁵²

In lamentable contrast, the great majority of hearsay utterances sought to be proved have not thus been carefully checked and bolstered.⁵³ Their latent weaknesses, which often would be easily accessible by properly directed cross-examination, are only fitfully disclosed.⁵⁴

But again it is essential to abandon general talk for specific scrutiny. Having in mind the broad and obvious symptoms bearing upon the kind of intellectual weakness attributed to the testator Marsden, there was slight risk that passage of time would have destroyed or even substantially blurred in the minds of the letter writers the memory of those observations relevant to validity of the will. Thus there was sound common sense in declining to harp upon the memory factor, which could not under the actual circumstances have contributed any substantial justification for exclusion of the letters.

(7) A final comment is called for with respect to risk of misinterpretation.⁵⁵ This, as has been said, is not very threatening under most circumstances where evidence is offered to prove ordinary verbal declarations.⁵⁶ With substitution of inferences for assertions, though, real interpretative difficulties often arise. Here, however, the Tatham-Marsden will case gives but little aid because on the whole the lawyers and judges who dealt with it considered that the three embattled letters should be treated as conveying, intentionally or uninten-

50. This stimulating pressure fell far short of meeting the needs of the situation in the *Bedford* case mentioned by the last sentence of the preceding note. What the nurses really needed was full access to their contemporaneous records in preparing to testify. See the reference given by note 9 *supra*. But they had no knowledge that the records had been preserved.

51. This of course has a useful bearing upon lucidity of narration.

52. See again the reference given by note 9 *supra*.

53. There are exceptions. *E.g.*, depositions *in perpetuam memoriam*, which may well enough be deemed hearsay evidence if sought to be used against persons not duly notified of their taking. 5 WIGMORE, EVIDENCE § 1378(1) (3d ed. 1940). Then, too, a witness unavailable at trial may have been put with honest care through a complete informal quizzing at the hands of counsel or the police. But the transcript of such testimonial evidence is regarded with holy horror. See the shocked alarm of Mr. Justice Douglas in *Palmer v. Hoffman*, 318 U.S. 109, 113 (1943), that "any law office in the land" might embody witness statements in receivable business entries. It is hard to win belief in the honor of the legal profession.

54. Cross-examination may be highly effective in uncovering shortcomings of memory as well as of perception. Morgan, *Hearsay Dangers*, 62 HARV. L. REV. 177, 188 (1948).

55. Cf. consideration of juvenile testimonial weaknesses on pp. 743-44 *supra*.

56. See pp. 748-49 *supra*.

tionally, honesty or deceitfully, a view that the addressee had the rather modest degree of knowledge and judgment required for testamentary competency. Hence, for enlargement, this comment is carried over to the next part of the discussion.

III. HEARSAY DEFINITION: MODERN CASES AND PROPOSALS FOR CONSIDERATION

A. Ambiguity of Inference

Probably the stock case of ambiguous human behavior at or beyond the outer edge of the hearsay area involves something in the nature of flight after occurrence of a crime, sought to be proved as justifying an inference that the person who fled was solely to blame and offered on behalf of *another person* accused of guilt.⁵⁷ Such evidence raises some risk on the score of sincerity, which will be taken up after the present problem of proper interpretation has been treated. What the trier of facts is invited to seek in the immediate connection must of course be the *motive* for flight—whether sense of guilt as to some other matter, pure panic, urgent need to escape interference with performance of some essential and innocent task, or any of innumerable other reasons within the realm of possibility. The ambiguity of inference raises a problem definitely analogous to that of properly interpreting obscure or equivocal testimonial language.⁵⁸ It brings into play a considerable though scattered body of case law demanding that the desired conclusion—here, as stated, with respect to motive—be either “a natural or plausible one among the various conceivable ones” or, more stringently, the “more (most?) plausible or more (most?) natural out of the various ones that are conceivable.”⁵⁹

57. It scarcely needs statement that evidence of such flight when offered *against the fleeing person himself* may be used as an implied admission. *Tasco v. State*, 165 A.2d 456 (Md. 1960), discusses the cogency of this sort of admission.

58. Morgan, *Hearsay Dangers*, 62 HARV. L. REV. 177, 187-88, 197-99 (1948), deals with the matter of interpreting testimonial *and other* language; here it can usually be assumed that the declarant means to assert *some* proposition of fact, and thus is quite surely caught in the hearsay net. In Alabama there has been a substantial series of flight cases. Several throw up their hands over the interpretative difficulty and exclude the evidence. *Owensby v. State*, 82 Ala. 63, 64-65, 2 So. 764, 765 (1886); *Levison v. State*, 54 Ala. 520, 523, 527 (1875); *Smith v. State*, 9 Ala. 990, 995-96 (1846) (*dicta*, since matter at issue was assertedly self-incriminating statements by a person other than defendant). See additional Alabama citations in note 61 *infra*.

59. The wording quoted in the text is from 1 WIGMORE, EVIDENCE §§ 32, 38 (3d ed. 1940). Modern cases, not overwhelmingly numerous, incline toward the more stringent of Wigmore's two formulae. *Brennan v. State*, 151 Md. 265, 268-69, 134 Atl. 148, 149-50, 48 A.L.R. 342, 345 (1926) (bastardy; sending baby carriage to home of expectant mother, where *another* child had

This instantly suggests a problem of apportioning functions between judge and jury. Assume a jurisdiction employing the second test—that it, “more plausible or more natural.” Imagine next in that jurisdiction a criminal trial containing evidence that X was present at the scene and instant of a crime. The defendant *D* calls a witness to testify that, immediately after occurrence of the crime, X ran away and nobody can now find him. The prosecutor *P* objects to admission of this testimony, suggesting that X has been suspected of a whole string of other crimes on which he cannot bear police inquiry. Should the trial judge require *D*, as a prerequisite to admission of the testimony, to convince *him* that X’s more likely motive for disappearance was a sense of guilt of the instant crime?⁶⁰ Or should the judge go only so far as to demand that *D*, by following through his original offer, plus perhaps further corroborative detail,⁶¹ build up sufficient strength of inference so that the *jurors* might reasonably find his proposed conclusion as to X’s motive not only acceptable, but more acceptable than *P*’s opposing conclusion? Upon general principles, the second formula just offered is correct. *P*’s objection is made on the ground of irrelevancy,⁶² and standard treat-

recently been born); *Milch v. Boston Consol. Gas Co.*, 167 N.E.2d 845, 847 (Mass. 1960) (mere guess or conjecture of expert with basic facts pointing no more toward his conclusion than the contrary); *Standafer v. First Nat’l Bank of Minneapolis*, 236 Minn. 123, 125-26, 52 N.W.2d 718, 720 (1952) (no preponderating inference that heel of shoe torn off by catching in angle iron rather than by striking during fatal fall of wearer); *Pipes v. Missouri Pac. R.R.*, 338 S.W.2d 30, 36-39 (Mo. 1960) (issue as to whether locomotive headlight illuminated; rejection of plaintiff’s negative contention with talk of equally reasonable inferences); *Rickertsen v. Carskadon*, 169 Neb. 744, 749, 100 N.W.2d 852, 856 (1960) (rule stated in general terms allowing admission of remotely relevant evidence); *Engel v. Union Traction Co.*, 203 N.Y. 321, 323-24, 96 N.E. 731-32, Ann. Cas. 1913A, 859 (1911) (discharge of motorman a considerable time after accident not probative of his negligence; too many other equally or more likely causes for discharge); *Jones v. Douglas Aircraft Co.*, 251 N.C. 832, 836-37, 112 S.E.2d 257, 260-61 (1960) (wrongful death of crane operator by electrocution; evidence that assistant foreman responsible for safeguarding area had been stricken and taken to hospital soon after learning of accident; cause of hospitalization wholly speculative, and if treated as admission of negligence not receivable against assistant foreman’s principal); *Toler v. Commonwealth*, 188 Va. 774, 778-80, 51 S.E.2d 210, 211-13 (1949) (theft of money; same sum and denominations found on defendant; more natural and probable test satisfied on all facts).

60. Even without the competing inference which *P* suggests, the judge might consider the showing too weak to uphold *D*’s contention that X rather than he was the proper culprit. See note 57 *supra*; see also MODEL CODE OF EVIDENCE rule 303 (1942), and UNIFORM RULE OF EVIDENCE 45.

61. Some indications of effective corroborative detail appear in: *Lowrey v. State*, 26 Ala. App. 159, 161, 155 So. 313, 315 (1934); *Davis v. State*, 8 Ala. App. 211, 213, 62 So. 382, 383 (1913); *Deloach v. State*, 151 Miss. 85, 90-91, 117 So. 361, 362 (1928). *Ward v. State*, 15 Ala. App. 174, 72 So. 754 (1916), talks about “part of the *res gestae*” in a way which may imply that brigading of flight evidence with corroborative evidence can make applicable a hearsay exception. See also the suicide cases in note 85 *infra*.

62. Situations may be imagined in which either of two, or even any of several, competing conclusions would be relevant. *E.g.*, vary the hypothetical

ment of objections so grounded is to let the jury resolve the doubt if a reasonable decision might be made either way.⁶³ There is much simple common sense to this treatment. Disputes about relevancy tend to feed into ultimate issues of the case instead of diverging into the confused technical by-paths often pursued by disputes about evidential competency.⁶⁴

Everybody, also, must constantly exercise his wits in determinations as to intelligibility and proper interpretation of human actions. More often than not, we all manage this sort of problem quite well when action takes the form of declaratory speech or writing.⁶⁵ While its handling much more frequently demands conscious deliberation when the problem is presented by choice of inferences which spring unintended from non-verbal human behavior, results in that connection may be of even superior reliability, since here we can escape such confusion as resides in individualized vocabularies and foreign tongues. Manifestation through gesture, whether calculated or not, is a kind of *lingua franca*.

By and large, then, the area under discussion does not demand specialized intelligence or learning, and may properly be left to the mine run of jurors.⁶⁶ This line of reasoning plays down as a cause for exclusion the purely communicative factor of weakness in all testimonial evidence. In the immediate connection, it means that doubt—even quite serious doubt—as to the propriety of inferring from non-assertive human conduct a certain motive, or some other

case of the text by assuming X to have been an old and firm friend of D; if D committed the crime, X saw him do it; X may have taken to concealment because he did not wish to testify against his long-time friend. Objection by P now becomes somewhat less likely; the episode may turn into grist for his mill. This variation of hypothesis is also likely to suggest that X's fight may have been dumb-show acting to divert suspicion from D. As to that angle of possibilities, see p. 766 *infra*.

63. This touches upon a group of problems much explored of late years, but still far from solved. A convenient general reference is FRYER, *SELECTED WRITINGS ON THE LAW OF EVIDENCE AND TRIAL* 124 (1957).

64. Contrary to the views of Coleridge and Vaughan, JJ., quoted above at p. 753 and in note 31, current tendencies are more and more toward apologizing for every departure from the liberal principle that relevancy and substantiality when combined make a ticket of admissibility for evidence. Cf. note 105 *infra*.

65. In dealing with such manifestations from the point of view of hearsay, little is likely to be said respecting doubtfulness of interpretation; the damning quality is quite certain to be dubious sincerity.

66. This is not meant as a license to run wild. Considerations embodied in MODEL CODE OF EVIDENCE rule 303 (1942), and UNIFORM RULE OF EVIDENCE 45, must receive judicial enforcement. Cf. related problems in connection with witnesses offered at trial. 2 WIGMORE, *EVIDENCE* §§ 495 n. 1 (insanity), 506 n. 3 (infancy) (3d ed. 1940); also material collected in MORGAN, MAGUIRE & WEINSTEIN, *EVIDENCE* 191-97 (4th ed. 1957). While the cases regularly mention ability to communicate as a necessary characteristic in witnesses, the general impression conveyed is that only extreme deficiency in this respect should disqualify.

relevant meaning,⁶⁷ ceases to be an uncompromising stone-wall barrier to admissibility.⁶⁸

B. Adequate Perception

A familiar and commendable feature of our scheme for testimonial evidence is the broad requirement that a witness must have personally perceived the events or conditions to which he testifies. He may not assume or guess. Usually he may not testify second-hand on the basis of recitals by others who did perceive what happened or existed—this obviously puts in colloquial form the essence of the rule against hearsay. The same holds true, of course, for declarants who do not take the stand, as was asserted and reasserted in the course of the Marsden will case.⁶⁹

These assertions have already been criticized as irrelevant, because circumstances made clear beyond reasonable doubt that the three declarants whose letters were discussed *did* have the requisite personal perception.⁷⁰ But litigated situations constantly arise which are not nearly so clear on this point, and for such situations provision probably must be made in any acceptable redefinition of hearsay. Treatment of the factor of perception is largely inferential in the hearsay provisions of the Model Code and the Uniform Rules,⁷¹ which may very well be read as calling for exclusion on this ground only if the trial judge finds that no trier of fact could reasonably believe that the declarant had perceived the matter which is the subject of the declaration.⁷² Such a reading results from carrying over into the rules about hearsay the criterion respecting personal

67. *E.g.*, inaction as tending to prove that a bill or notice was not received, or a sensation was not experienced. Falknor, *Silence*, 89 U. PA. L. REV. 192 (1940), approaches this sort of evidence with experienced caution. *Silver v. New York Cent. R.R.*, 329 Mass. 14, 19-21, 105 N.E.2d 923, 925-27 (1952), as to which see note 77 *infra*, also exercises caution.

68. The stone wall changes to a more flexible obstacle even though the judge, not the jury, be required to make the finding as to "more plausible or more natural."

69. This point is rarely emphasized in discussion of the hearsay rule at large, because not even the most unquestionable personal perception would suffice to boost the general run of verbal extrajudicial declarations over the exclusionary barrier; but the importance of direct perception by declarants is clear with respect to most hearsay exceptions.

70. See pp. 756-57 *supra*.

71. It should be remembered that both these proposals make express assertion the essential primary badge of hearsay, thus emphasizing the factor of sincerity and, in statement at least, minimizing the factors of perception and memory. MODEL CODE OF EVIDENCE rules 501, 502 (1942); UNIFORM RULES OF EVIDENCE 62, 63, the latter giving somewhat greater mention of the perception factor.

72. This is the form of words indicated by the Model Code, rules 104, 501; special attention should be paid to subdivision (3) of the latter rule and the last paragraph of *Comment a* thereon (*cf. Illustration 3* under rule 501). The corresponding portions of the Uniform Rules are Rules 19, 62, and 63 (opening clause), where the subject matter is somewhat rearranged.

perception provided for testimony from a witness on the stand. It probably presents too lax a standard for the immediate purpose.

Since hearsay on the whole is an inferior vehicle of communication, persuasive argument can be offered for affirmative proof or perception by persons whose behavior gives rise to the sort of problem here considered. Also, with the purpose of protecting jurors from the misleading potentialities of purely conjectural evidence, interlocutory findings by the trial judge may properly be prerequisites for admission. It seems sufficiently cautious, however, to require normally only a judicial finding—embodied, if practicable, in pretrial proceedings⁷³—that the individual with respect to whose behavior evidence is offered had *adequate opportunity* for personal perception of the matters which the behavior tends to establish as having occurred or existed.⁷⁴ Up to this point, the burden of preliminary proof will naturally be on the proponent of the evidence. At some stage, though, his primary obligation should end. If, for instance, the objecting party challenges the normal consequences of opportunity by asserting neglect to observe or lack of qualification to observe understandingly, it is suggested that the burden at least of going forward with the unusual new issue can properly fall on the objector.

C. Adequate Memory

The factor of memory easily links up with that of personal perception. Fairly often in the present connection it presents no more than negligible difficulty. This seemed to be true with respect to the three letters from John Marsden's correspondents.⁷⁵ The same view holds in the familiar cases of prosecution for illegal gambling and the like, where police raiders testify to the content of incoming telephone calls proposing wagers, and this is deemed proper evidence to establish violation of the gaming laws.⁷⁶ In a habitual gambler, memory is

73. It is desirable that parties litigant should know in advance what evidence will be acceptable.

74. The rigor of this requirement naturally varies with the nature of the facts sought to be established. McCormick, *Borderland*, 39 YALE L.J. 489, 497 (1930). If the fact is a generalized condition, obvious and brief (e.g., undue chilliness in a railroad car—the *Silver* case in note 67 *supra*), or extending consistently over a protracted period, such as the mental deficiency of John Marsden, adequate opportunity is easily demonstrable. If in contrast there is put at issue a detailed complex of specific and varying facts involving action by several people, as in the treatment of Dr. Adams' patient during her last long illness (note 49 *supra*), the preliminary showing of adequate opportunity may become much more exacting.

75. See pp. 758-59 *supra*.

76. On this matter there is a considerable body of case law, quite consistent in result but not always in reasoning. Contrast, for instance, the logic of *Chacon v. State*, 102 So. 2d 578, 591-92 (Fla. 1958), together with *State v. Tolisano*, 136 Conn. 210, 213-15, 70 A.2d 118, 119-20, 13 A.L.R.2d 1405, 1408-09 (1949), which the first case cites, as against that of *State v.*

highly reliable and constantly refreshed as to the places where and telephone numbers through which he can risk his money. So, too, in the typical flight-and-concealment-after-crime case; granting adequate initial perception of the occurrence, memory is unlikely to fail. Still more emphatically, where it was sought to prove by evidence of lack of complaint from passengers in a Pullman car that the car was not allowed to become unduly cold, no memory problem whatever existed; the indicative behavior exactly synchronized with sensation.⁷⁷

But in a multitude of situations, including such matters as the witness-statements which the nurses of Dr. Adams' dying patient gave the prosecution long after the events had taken place,⁷⁸ memory offers a really serious potential weakness tending to undermine the validity of inferences as well as that of explicit declarations.⁷⁹ The appropriate definitional safeguard naturally parallels that suggested above with respect to perception, and form of wording may be derived from Model Code and Uniform Rules.⁸⁰

D. Sincerity

Throughout the preceding discussion runs a tacit concession that any evidence of extrajudicial human action or inaction offered for a purpose necessitating reliance upon the sincerity of the particular human being must be classified as hearsay. The foregoing statement is of course an alternative way of wording the familiar "offered to prove the truth of the matter stated"⁸¹ formula. No difficulty exists in recognition of particular instances fitting the exclusionary formula so long as the manifestation takes the form of ordinary verbal assertion. More or less difficulty does result whenever the immediate significance of the manifestation, verbal or otherwise, must be got at by inference. The question is, of course, whether the author of the

Domino, 234 La. 950, 959, 102 So. 2d 227, 230 (1958). Adequate memory on the part of the would-be bettors is cheerfully taken for granted. Cf. 767 *infra*.

77. This is the *Silver* case, cited in note 67 *supra*. The informed reader will observe the interesting relationship of this problem to the hearsay exception for declarations of concurrent physical sensation.

78. As already remarked in note 50, the nurses who testified in this trial had before taking the stand no access to their records currently made while they were on the case, and on cross-examination these records proved disconcerting. The illustration is not chosen because such statements as the text assumes were actually sought to be used as evidence during the trial, but rather because of trial lawyers' necessary habitual reliance upon this kind of delayed record of previous perceptions.

79. See p. 749 *supra*.

80. Treatment in both the Model Code and the Uniform Rules is as an exception to the hearsay rule rather than as part of its definition. MODEL CODE OF EVIDENCE rule 504 (1942); UNIFORM RULE OF EVIDENCE 63(4) (c) (1953).

81. UNIFORM RULE OF EVIDENCE 63 (1953); MODEL CODE OF EVIDENCE rules 501, 502 (1942), put the same proposition in a systematic but more diffuse way.

manifestation intended the inference to be drawn.⁸²

It seems to the present writer that too little attention has here been paid to the problem of burden of proof. Assuming as the sound broad principle that relevant evidence is acceptable unless barred by some technical rule of incompetency or privilege, the proper normal course must be to put on objecting parties the burden of establishing, in debatable cases, the intention stated by the last sentence of the preceding paragraph. To return to the stock example: Defendant *D*, prosecuted for a crime obviously committed by only one person, asserts innocence and offers evidence that *X*, on hand at the right place and time to be guilty, fled and hid after the crime. The prosecutor *P* objects to this evidence, claiming that *X* was intentionally seeking by his action to attach suspicion and pursuit to himself. The prosecutor should have the burden of establishing that claim.⁸³

But it is far from clear that actual court practice embodies this procedural rule. Unreasoned talk of parallelism between such evasive behavior and an outright confession by the absentee can be found.⁸⁴ Fear is implied that admission of evidence of another's flight would encourage falsely trumped up semblances of guilt. Only in quite extreme instances has this or comparable evidence been given anything like a cordial reception.⁸⁵

Some rather obvious considerations cast doubt on this restrictive attitude. To begin with, while the flight-after-crime situation has been featured for illustrative purposes, it or analogous situations are not likely to be those ordinarily encountered. Most easily conceivable

82. The text may impose too rigorous a test. How if the manifestation implies an unuttered determination of fact or opinion? See Morgan, *Hearsay Dangers*, 62 HARV. L. REV. 177, 214, 215 (1948), and p. 772 *infra*. The point is tantalizingly debatable. For specific illustrations, each requiring scrutiny to determine on which side of the line it falls, see *id.* at 190-91; McCormick, *Borderland*, 39 YALE L.J. 489, 495 n. 17 (1930); Falknor, *Silence*, 89 U. PA. L. REV. 192, 196 n. 15 (1940).

83. Of course other grounds for the objection, notably feebleness or ambiguity of inference (see note 60 *supra*), are often available and exploited.

84. McCormick, *Borderland*, 39 YALE L.J. 489, 494 nn. 14, 15 (1930); Falknor, *Silence*, 89 U. PA. L. REV. 192, 195 n. 13 (1940).

85. *People v. Dewachter*, 353 Ill. 266, 269-70, 187 N.E. 472, 474 (1933) (embezzlement; trial judge excluded evidence that documents seemingly hidden to conceal the embezzlement were found in safe deposit box of another person who had committed suicide when discovery of crime threatened, this person being \$10,000 short in his accounts; reversed; the evidence had a very clear bearing upon the issue involved); *Brennan v. State*, 151 Md. 265, 272, 134 Atl. 148, 151, 48 A.L.R. 342, 347 (1926) (bastardy; suicide of another man, married and on terms of friendship with mother's family, after being informed of child's birth; suicide a "spontaneous and uninfluenced act," which majority use to justify introduction of evidence of declarations of culpability made by the dead man). Cf. *Jones v. Douglas Aircraft Co.*, 251 N.C. 832, 836-37, 112 S.E.2d 257, 260-61 (1960), talking in terms of ambiguity of inference and hearsay about evidence of sudden illness of responsible assistant foreman soon after learning that fatal accident had occurred; here the problem was liability of assistant foreman's employer.

sets of fact raising the issue as to whether non-verbal behavior was staged with deliberate intent to convey assertive propositions by dumb show lack the complication of possible underworld deceptive practice. Even where underworld risks lurk, why should it be hopelessly assumed that ability of opposing counsel and common sense perceptiveness of jurors will lack adequate power to expose and appraise them? Getting full information to the triers of fact usually has value outweighing rather remote chances of their being hoodwinked.

Another observation seems pertinent. Absolutism in applying the hearsay rule has been unduly encouraged by the double assumption that all hearsay is somehow very bad—*vide* Coleridge and Vaughan as quoted above⁸⁶—and that the hearsay label can be applied with easy, confident assurance. The second half of the assumption has tended to deprive trial judges of preliminary fact-finding authority in determining whether hearsay actually *does* confront them. In plenty of familiar situations they ought to have such authority, and should exercise it on the basis of practical likelihoods.

The police officer told to take incoming telephone calls in the course of a raid on a suspected gambling joint hears coming in over the wires a dozen instructions, employing appropriate betting jargon, to place wagers on this, that, or another quadruped. He thinks he is collecting good non-hearsay evidence, and so fortunately do the courts. But it is conceivable that the voices he heard were those of twelve Sunday school superintendents, informed of the raid and consciously seeking to express the proposition: "This telephone is regularly used for gambling purposes." In fact, of course, the odds are ten thousand to one that the telephone speakers had no intention whatever of expressing any such thing, but only a desire to give betting instructions. The courts have quite properly refused the short end of the wager,⁸⁷ and in other cases as well where there is a more even balance between assertion and non-assertion trial judges should become accustomed to making determinations of preliminary fact bearing upon admissibility.

*E. Statements Validated by Later Opportunity
To Cross-Examine*

A final item contributing to the proper definition of hearsay is the relevant verbal assertion made extrajudicially by an individual physically present and available for cross-examination at trial.⁸⁸ The princi-

86. P. 753 and note 31 *supra*.

87. Note 76 *supra*.

88. The most common and tempting illustration is the pretrial witness statement, now commonly used to impeach a wayward witness and under

pal problem as to admissibility of this item, so far as the hearsay rule is concerned, arises only because opportunity to cross-examine is not concurrent with the making of the assertion.⁸⁹ The Model Code carries careful but brief argument in favor of admissibility; the Uniform Rules summarily dismiss objections.⁹⁰ Both, however, treat the item as constituting an exception to the exclusionary rule. A bolder course is here proposed. Such evidence satisfies the requirements of the hearsay rule. Hence a comprehensive definition should cover its competency.

F. Proposed Definition

The introductory portion of this paper spoke near its conclusion of a functioning definition of hearsay. That terminology needs explanation. It means the kind of definition which (1) states criteria and (2) indicates procedure for their application. Part (2) puts teeth in part (1). This is essential to any working definition embodying a requirement of incidental determinations of litigable fact for ascertaining whether the definition is applicable. A fundamental element of the thesis here presented is that such determinations are demanded not only for utilization of exceptions to the hearsay rule but for determining the coverage of the rule itself.

The following definition with operating directions is intended as a chopping block and nothing more. It takes a team of workers to make a proper definition. Since the processes of common law development are extremely unlikely to produce any such elaborate directional text,⁹¹ the form chosen is that of a court rule. This form can easily be turned into that of one or more statutory sections.

special circumstances to rehabilitate a witness attacked on the ground of recent invention, this latter employment sometimes being treated as allowable in the guise of a hearsay exception. *Burns v. Clayton*, 117 S.E.2d 300, 310 (S.C. 1960), characterizes the employment as falling under a hearsay exception; *Commonwealth v. Wilson*, 394 Pa. 588, 601-05, 148 A.2d 234, 241-43 (1959), *cert. denied*, 361 U.S. 844 (1959), carefully circumscribes application of the evidence to avoid hearsay use. *Cf.* note 53 *supra*.

89. Such criticisms as that written pretrial statements may have undue influence when set against purely oral testimony have nothing to do with hearsay.

90. MODEL CODE OF EVIDENCE rule 503(b) (1942), and *Comment*; UNIFORM RULE OF EVIDENCE 63(1) and *Comment*: "When sentiment is laid aside there is little basis for objection . . ." See *United States v. Rainwater*, 283 F.2d 386 (8th Cir. 1960), for full discussion of the present conventional attitude.

91. Thoroughly implemented practice opinions like *United States v. Riccardi*, 174 F.2d 883 (3d Cir. 1949), *cert. denied*, 337 U.S. 941 (1949) (revival and recollection of memory), are rare as hens' teeth, and even here Kalodner, Cir. J., did not reduce his directions to compact, thumbnail form. The writer feels bound to admit that his own functioning definition is overwordy and filthily technical, but fears that only precise guidance can lead to escape from the present hearsay entanglement. A persistently operating movement toward working simplification might make possible in time the substitution of far less repulsive phrasing.

RULE—Hearsay Evidence in General. Hearsay evidence is defined, and its exclusion and admission shall be enforced, as follows:

(a) Evidence tending to prove a statement of a version of a matter made otherwise than (1) by a witness either while giving testimony at the trial or other hearing during which the question of admissibility is raised, or in the form of a deposition there receivable as equivalent to testimony so given, or (2) by a person present at such trial or hearing and available for cross examination with respect to the statement and the matter, is hearsay evidence so far as offered to prove the truth of the version.

(b) Evidence of conduct (behavior) by any person, although not constituting a statement of the version of a matter it is offered to prove, is hearsay evidence if so offered as to call for reliance upon untested perception or memory by such person. Such reliance is not called for if the judge finds that the conduct (behavior) occurred (1) when the person was currently perceiving the matter, or when he had recently perceived the matter and while his recollection of it was clear, or (2) under such circumstances that the person was subject to the sanctions of cross examination with respect to the conduct (behavior) and the matter. A finding by the judge that the person had adequate opportunity to perceive the matter shall raise a presumption that he did adequately perceive it.

(c) No other evidence than that described as hearsay evidence in parts (a) and (b) of this rule shall be treated as hearsay evidence.

(d) Hearsay evidence shall be subject to exclusion on due objection so far as the judge does not find that it satisfies the requirements of an exception to the exclusionary hearsay rule, the proponent of the evidence having the burden of proof with respect to such satisfaction.

(e) As used in this rule—

(1) "Statement" means, with respect to a version of a matter included therein, any intentional manifestation of that version, whether or not then communicated to any other person, made either (i) verbally or (ii) by non-verbal conduct (behavior) substituted for words. The judge shall determine whether non-verbal conduct (behavior) is an intentional manifestation, the objecting party having the burden of proof.

(2) "Perceive" means to acquire knowledge through one's senses.

(3) "Conduct" ("Behavior") includes both action and inaction.

(f) When evidence of conduct (behavior), not otherwise subject to objection and exclusion under part (d) of this rule, will be relevant to the issues only if a certain inference or certain inferences shall be drawn therefrom, the judge shall not exclude the evidence as irrelevant if he finds that a sufficient showing has been made to warrant a finding that the desired inference or inferences is or are natural or plausible (the most natural or plausible among the various inferences conceivable).

Condensed explanation is advisable to disclose the purposes of this working definition and the difficulties which it may not satisfactorily solve:

(a) This portion of the draft combines several excerpts from the Uniform Rules, with some change of wording and substance.⁹² At the very end, "truth of the matter stated," which is the terminology of Rule 63, has been turned into "truth of the version." The change has a double purpose. In the immediate connection, "matter" seems most properly synonymous with "fact" in the sense of *actuality* as distinguished from the other possible meaning of the *formulation*, accurate or inaccurate, sincere or insincere, by any witness or other declarant. The *court-room actuality* will of course be the determinative finding of the trier of fact. Introduction of the term "version" properly indicates controversy as to the characteristics of the "matter" or "fact," and prevents "matter" from slithering back and forth between the first and second meanings. Also the terminology "matter stated" is inapt because definition (e) (1), as explained below, includes the possibilities of manifestation by *inference* or even by *omission*; it is embarrassing to couple the term "stated" with the implications of these words. Such embarrassment indeed extends to the fundamental word "statement" as embodying a characteristic hearsay concept. But it is hard to conjure up a substitute word which will not seem stilted and artificial. Theoretically, "intentional manifestation" might replace "statement," but the resulting definition would become too outlandish for toleration.

(b) In the Uniform Rules, as well as in this paper, "conduct" and "behavior" have been treated as substantially synonymous.⁹³ Part (1) of the second sentence of this portion of the draft follows parts of Uniform Rule 63(4), which deals with its problem in terms of a hearsay exception.⁹⁴ Part (2) of this sentence accepts cross exami-

92. UNIFORM RULE OF EVIDENCE 63, opening lines; same RULE, parts (1) and (3).

93. UNIFORM RULE OF EVIDENCE 1(6).

94. The phrasing is closely analogous to that commonly employed by opinions treating the requirements for admissibility of past perception recorded.

nation as an adequate device for producing information, etc., which will enable the trier of fact to appraise perception and memory. Few cases are likely to arise under this part, because when the sanctions of cross examination apply narrative evidence will almost invariably be in the form of verbal statements, and thus fall under (a) instead of (b). It is, however, possible for a witness on the stand in one trial to make some intentionally significant gesture of contempt, affection, menace, or the like which becomes relevant to the issues of a later trial.

As in (a) of the definition it is here assumed that the concept of cross examination includes the various devices of impeachment. This is comparatively unimportant at the present point, since impeachment will usually be developed, if at all, when *evidence* of the conduct or behavior is *offered* rather than at the normally earlier time of original occurrence.

Under part (2) of the second sentence, the party against whom the evidence is offered may or may not be the person who had opportunity to cross examine when the conduct or behavior occurred. If he is a different person, it becomes debatable whether he should be subjected to the risk of evidence originally developed against only the other's opposition. The case for admitting such evidence under (b) is stronger than under (a), since by hypothesis (b) presents no issue of sincerity, only perception or memory or both being at issue.⁹⁵ In this connection, too, a question lies open as to whether *opportunity* to cross examine should be accepted as a fair equivalent of *actual* cross examination.⁹⁶

In the second sentence it will be observed that the meaning of "matter" *must* be kept synonymous with *actual fact*.

The presumption stated in the last sentence of (b) of course becomes subject to local practice respecting methods and effect of rebuttal.

(c) This is inserted to head off any claim of a vague undefined surplus of hearsay.

(d) A meticulously cautious form of this provision would explain that hearsay exceptions may arise by common law, statute, court

Here, at least as much as with problems of adequate perception, allowance has to be made for differing rigors of the preliminary showing; various aspects of memory are subject to different rates of deterioration. Hutchins & Slesinger, *Some Observations on the Law of Evidence—Memory*, 41 HARV. L. REV. 860, 865-67 (1928).

95. Ordinary reported testimony consisting of statements offered for their assertive value *does* involve the risk of insincerity; this may have a certain tendency to justify its treatment as involving an exception to the hearsay rule.

96. Under the exception for reported testimony, this equivalence is established. Cf. Comment appended to UNIFORM RULE OF EVIDENCE 63(3)(b).

rule, and perhaps otherwise. But this would complicate the sentence, and probably not change its interpretation.

(e) (1) This definition is derived from Uniform Rule 62(1) but with considerable change. The Uniform Rule speaks of "not only an oral or written expression but also non-verbal conduct . . ." the opening words of which inadequately cover the varieties of verbal expression. How about a message wigwagged by signal flags or tapped off on a telegraph key without recording at the receiving end? The broad more generalized form of words here proposed seems safer.

The deaf mute communicating extrajudicially by eloquent gestures of course utters verbal hearsay. A young child utters hearsay (possibly non-verbal) when, being asked if he sees the person at whose hands he suffered mistreatment, he says no words but points responsively to a particular individual.⁹⁷ The gangster utters a kind of hearsay when he ostentatiously performs actions intended to communicate a sense of his own guilt, with the purpose of diverting suspicion from an associate.⁹⁸

Purely internal mental formulation of a version of some matter may sometimes be relevant—*e.g.*, reasonable belief by a trustee as bearing upon the propriety of his behavior in exercising or refraining from exercising a discretionary power. However, litigation of an issue as to such formulation will not involve hearsay evidence emanating from the formulator unless some sort of *manifestation* by him is made a vehicle of proof.⁹⁹ The manifestation, though, need not be immediately communicated to raise an ultimate hearsay problem. He may, for instance, secretly record his belief in a writing which comes to light later.

Marginal modes of manifestation have raised some doubt. Consider as an example the giving of orders or instructions necessarily based upon factual determinations reached by the speaker or writer, but intended only to cause appropriate action by the persons ordered or instructed, and not intended to communicate to them the content of the determinations. Evidence of the orders or instructions offered to establish *inferentially* the determinations and from them existence of the fundamental facts seems to the present author to

97. But see note 19 *supra*.

98. The behavior *may* be sincere and not a lie by dumb show. But the party against whom the evidence is offered can justly claim opportunity to test this issue in standard fashion. Furthermore, adequacy of perception and memory may well be at issue.

99. Woodard v. Mordecai, 234 N.C. 463, 469, 473, 67 S.E.2d 639, 643, 646 (1951), is the source of the illustration in the text; it involved an unsent letter; the manifestation took the form of the writer's successful presentation of the letter in his own favor; grounds for admission are not stated in crystal clear fashion.

have hearsay quality. It is immaterial that the speaker or writer gave no thought to communicating his determinations.¹⁰⁰ This line of analysis can be carried a step further by assuming a negative desire to conceal through *omission* an underlying determination. Suppose a police officer asks *W*, an enemy of *X*, whether a certain typed document was in *W*'s opinion written on *X*'s typewriter. *W*, an expert on identification of typewriting, knows that his truthful and frank answer would be: "The appearance of the document is consistent with its having been so written. But I cannot on the evidence thus far presented to me express a sincere opinion that it was in fact so written." Desiring to inculcate *X* and yielding to his enmity, *W* answers by speaking only the *first* of the two sentences quoted above. At *X*'s trial, acute and honest prosecuting counsel refrain from using *W* as a witness, and equally acute defense counsel offers evidence of *W*'s one sentence statement as tending to prove that attribution of the writing is dubious. Here *W* hoped that the particular inference would pass unperceived by virtue of his deceptively purposeful *omission*; yet he realized its propriety, consciously risked it, and so made an *intentional manifestation* which boomeranged into the *version* desired by *X*'s lawyers. This too, the present writer thinks, should fall within (e) (1). But does it under the submitted wording? Should the definition say explicitly that "manifestation" may be explicit or by inference or omission?

(f) This provision borrows Wigmore's wording at the end of the sentence. Technically speaking, it does not belong in a definition of hearsay. It is really a procedural generality whittled down to fit a particular purpose. But that purpose perhaps can only be adequately served by such limited explicitness.

On the whole, what has been accomplished so far in the way of a proposal is not at all spectacular or drastic. The foregoing definition is no more than an effort to state with some precision and detail a view of the proper scope of hearsay which is quite generally entertained. There is, however, always some merit to precision, particularly in a field of probative law so long befogged by memories of *Tatham v. Wright* and by fitful revival of like uncertainties in the minds of perplexed lawyers who perhaps have never carefully studied that remarkable litigation.

IV. HEARSAY EXCEPTIONS

Down to this point, discussion has been bent particularly upon a

100. Where determination is followed, particularly in an emergency, immediately by the order or instruction, analogy to the hearsay exception for spontaneous exclamations or declarations irresistibly suggests itself. Cf. note 82 *supra*.

region which Professor McCormick aptly dubbed the borderland of hearsay—an area still better suited to explorers than to placid homesteaders. Turning inward from the borderland to the more settled and familiar area of unquestionable hearsay, we find the latter speckled with exceptions. Making an overall census of these exceptions, the Uniform Rules report a total count of 30 or thereabouts.¹⁰¹ This number is altogether too high for effectiveness. The best trial lawyer may not remember all possibly relevant exceptions in moments of emergency. Worse than that, the list in the Uniform Rules is a sort of practical idealization, much more nearly systematic and harmonious than the shaping of exceptions, involving a mixture of common law and statute, actually applied in an average court system. It is very hard indeed to hold clearly in mind all their varying prerequisites and limitations, some of the latter being quite arbitrary.¹⁰² Finally, and this is fundamentally serious, few if any lawyers or scholars can succinctly collate the hearsay exceptions in common use, let alone intelligibly state the measure of their aggregate effect upon our law of proof.

Such dubious total adequacy, so coupled with confusing multiplicity, automatically generates suggestions:

(1) Consolidation of exceptions is probably more serviceable than further proliferation. Quite surely the prize modern example in the United States of useful liberalization and simplification through consolidation has been the nation-wide legislative movement toward comprehensive provisions to facilitate admissibility of regular business entries. For this development the work of Professor Morgan's Commonwealth Fund Committee, prosecuted nearly 40 years ago, deserves the utmost credit.¹⁰³ The result has been implementation on a broad front for common sense presentation of reliable, systematic evidence respecting trade, business, and professional transactions. All the merits of several related common-law hearsay exceptions are retained, their kinks and crotchets largely extirpated, and their collective utility greatly broadened.¹⁰⁴

This sort of work may not be confined to legislatures. There is cur-

101. The exact number of subheads in Rule 63 is thirty-one, but it is arguable that one or more of these describe matter properly excluded from a precise definition. On the other hand, there may be some lumping of exceptions under single subheads (e.g., Rule 63(4)).

102. Consider such crabbed oddities as the common law forms of exceptions for dying declarations and declarations against interest.

103. Morgan *et al.*, *THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM*, 52-63 (Commonwealth Fund 1927). The kinship of this to the UNIFORM BUSINESS RECORDS AS EVIDENCE ACT (UBREA), promulgated by the National Commissioners on Uniform State Laws in 1936, is obvious.

104. Such wet blankets as *Palmer v. Hoffman*, 318 U.S. 109 (1943), are fortunately rare.

rently moving forward at the hands of the Supreme Court of New Hampshire a carefully deliberate extension of hearsay admissibility, case by case, shrewdly tied in each instance to the most closely related precedents but relying upon a broad formula of necessity plus apparent trustworthiness.¹⁰⁵ The process just described inevitably works toward breaking down common law partitions between exceptions and therefore toward simplification as well as liberalization.¹⁰⁶

(2) Another current procedural development, which still has a long way to go in the United States, has bearing upon rules permitting freer introduction of hearsay. Particular hearsay categories necessarily contain, if followed instance by instance, some reliable and

105. *Gagnon v. Pronovost*, 97 N.H. 500, 502-03, 92 A.2d 904, 905 (1952) (decident's memorandum book, although not kept in regular course of business); *Perry v. Parker*, 101 N.H. 295, 297, 141 A.2d 883 (1958) (recorded plan of surveyor made between 25 and 30 years previously); *O'Haire v. Breton*, 102 N.H. 448, 159 A.2d 805, 807-08 (1960) (report by engineer, since deceased, on fitness and adequacy of a well; involves expert opinion as well as hearsay). *Perry v. Parker* refers to the standard rationale which Wigmore worked out to give a backbone of common sense to the hearsay exceptions—"the principle of necessity and the principle of circumstantial probability of trustworthiness." 101 N.H. at 297, 141 A.2d at 884. See 5 WIGMORE, EVIDENCE §§ 1421-23, 1427 (3d ed. 1940) (the last reference setting out a much more radical suggestion). This same New Hampshire opinion, quoting in part from McCORMICK, EVIDENCE § 305 (1954), says: "The fundamental inquiry is not the name or number of the exceptions to the hearsay rule . . . but whether 'under the circumstances [the evidence] satisfies the reasons which lie behind the exceptions.'" 101 N.H. at 297, 141 A.2d at 884. (Italics in original text.) Cf. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 522 (1898), deploring the uncertain multiplicity of hearsay exceptions: "A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible." For many further references consult Weinstein, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331, 342-46 (1961). Attention is particularly invited to the enlightened opinion by Judge Wisdom in *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388, 393, 398 (5th Cir. 1961), which has become available in full text only since preparation of the manuscript for this article; the opinion emphasizes relevancy, materiality, necessity and trustworthiness of the hearsay admitted.

106. Also it is safer, if slower, than more grandiose judicial efforts. See the majority and minority attitudes—the latter phrased by Vanderbilt, C.J.—in *Robertson v. Hackensack Trust Co.*, 1 N.J. 304, 309-24, 63 A.2d 515, 517-25 (1949) (unsuccessful effort by the forceful Chief Justice in a concurring opinion to persuade his colleagues to liberalize hearsay admissibility with respect to declarations of unavailable persons; only one other member of the court was recruited). The subsequent influence of this effort runs in *diminuendo*. *Dolan v. Chesler*, 5 N.J. Super. 313, 315, 317-19, 68 A.2d 885, 886-87, 888-89 (1949), *petition for certification denied*, 3 N.J. 514, 71 A.2d 238 (1950); *Welch v. Essex County*, 6 N.J. Super. 422, 428, 68 A.2d 787 (1949), *aff'd*, 6 N.J. Super. 184, 70 A.2d 779 (1950); *In re Allen's Estate*, 18 N.J. Super. 63, 65, 86 A.2d 704, 705 (1952) (seeming expression of regret that Vanderbilt lead cannot be followed); *In re Spiegelglass*, 48 N.J. Super. 265, 273, 137 A.2d 440, 444 (1958) (referring to "much cited dissenting [sic] opinion"), *petition for certification denied*, 26 N.J. 302, 139 A.2d 588 (1958); *Band's Refuse Removal, Inc. v. Borough of Fair Lawn*, 62 N.J. Super. 522, 557-61, 163 A.2d 465, 484-86 (1960) (treating the proposal of the Vanderbilt concurring opinion as not law), *petition for certification denied*, 33 N.J. 387, 164 A.2d 849 (1960). But see note 1 *supra* for the present status of hearsay reform in New Jersey.

other quite unreliable items. It is tempting to meet such variability by giving trial judges some range of discretion as to admissibility. But it is uncomfortable to go to trial without knowing whether important evidence will be let in or excluded. If and so far as pretrial investigation extends to competency of questionable evidence, that particular discomfort vanishes.

(3) What may be called revision in a middle dimension, as sketched by the preceding paragraphs, need not rule out either revision in comparatively narrow detail or revision on the grand scale. All three processes are naturally linked. Consider, for instance, the possibilities of an instance of narrow detail beautifully carved out by Professor Falknor. He proposes, at the end of a tightly reasoned critical article, that evidence of silence or other inaction by any person, not constituting a statement (as hitherto defined¹⁰⁷) of the version of a matter it is offered to prove inferentially, but so offered as to call for reliance upon the person's perception or memory, shall not be subject to exclusion because of its hearsay character if (1) the judge finds that the person had perceived the matter and (2) the conduct would have been detrimental to the person unless the inference sought to be drawn from it is correct.¹⁰⁸ The concrete illustration of this abstract phrasing is an offer of evidence that X, a purchaser and user of goods, made no complaint to the seller, the offeror's purpose being to prove that the goods were of adequately satisfactory quality. If adopted, this proposal would add an additional complication—probably worthwhile in and of itself—to the hearsay system, but might well serve as an entering wedge opening the way for a broader exception covering evidence of non-assertive conduct at large.¹⁰⁹ If a small liberalization may help to make another of medium size, an aggregation of medium sized liberalizations manifestly may merge in a grand scale development.

(4) At this point, it is the part of wisdom to stop, look, and listen. Profuse admission of evidence may be evil instead of good, if the evidence is unreliable or unnecessary. Doubt has already been expressed as to existence of a really adequate collation of the effect of the numerous hearsay exceptions already in being. Perhaps the most likely trial areas for the kind of trouble with the hearsay rule, by way either of excessive stringency or undue laxity, which ought to be

107. See p. 769 *supra*.

108. This wording is not that of Professor Falknor himself, but a phrase ventured by the present writer in language which conforms to that offered on pp. 769-70 *supra* for a definition of hearsay. Apology is due if Professor Falknor has been misinterpreted. See Falknor, *Silence*, 89 U. PA. L. Rev. 192 at 216-17 (1940).

109. Such indeed is the exact setting in which Professor Falknor placed it.

alleviated are criminal cases and civil personal injury and wrongful death cases. In many aspects of such litigation it is impossible regularly to assure through effectively applied foresight competent non-hearsay evidence for proper establishment of the actual crucial facts. Were there available a collective statement of judgment by a large group of lawyers thoroughly experienced in the matters indicated¹¹⁰ respecting the extent to which hearsay exceptions now applicable over-correct or under-correct recurrent and unavoidable difficulties of proof, talk about further shaping of the exceptions would get firmer footing.¹¹¹

CONCLUSION

John Marsden was a dull dog at best. He had no power of origination, and very little of response to conversational stimulus, as the painter James Lonsdale found to his own boredom.¹¹² Marsden got along without too much trouble, at least after he grew up and came into money, by due attention to the conventionalities of a country gentleman's life—a great deal of eating and sometimes too much drinking, lavish hospitality, the ceremonial giving of routine toasts, some pretense of riding to hounds, and occasional restrained political activity.

Hence, as previously asserted, it was more than a little anomalous that his death and the consequent efforts to validate his will should have caused a fervid and hugely expensive controversy along the shadowy edges of the good old conventionalized hearsay rule. The case was won and lost, becoming a diminishing episode in legal history. Nothing clearly constructive resulted; the profession received an indeterminate warning of evidential risks, but without systematically striving to define them and appraise their practical consequences slumped back into a Marsden-like lethargy of undiscerning convention.

Since the 1830's a good deal has been done here and there to the hearsay system, much of it unquestionably desirable. But there has never yet been a real overall overhauling. Precise analysts and

110. Who would be sure to have varying views, not only because of individualization of judgment and experience but also because the field splits into various specialities. A lawyer concentrating in workmen's compensation cases might well respond that he did not have to do much wrestling with the hearsay rule, for in the tribunals of primary jurisdiction before which he appears there is almost sure to be relaxation of strict common law evidentiary exclusion.

111. Whether the methods employed by the excellent Committee responsible for the Commonwealth Fund report, *supra* note 103,—mainly questionnaires and correspondence—would now be the best available for compilation of such a statement is an important and interesting point. Modern large organizations of trial lawyers might be willing to help by mass discussion.

112. See note 25 *supra*.

would-be reformers, who have seen a lot of hard work disregarded, might be pardoned for yielding to the calm despair mentioned early by the soul-searching of Tennyson's "In Memoriam." This paper is meant to express the hope that they will regroup their forces and keep on trying.