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THE HEARSAY RULE, THE ST. GEORGE PLAYS AND THE ROAD TO THE YEAR TWENTY-FIFTY

Frank E. Booker* and Richard Morton**

I. Concept Obliteration Through Value Excision: Reflections on a Fascinating Fossil

The most popular, by far, of the traditional English mummers' plays was called the St. George Play. The play was performed in Medieval times in forms now lost to us but which scholars of that field tell us had as their kernel the serious presentation of the story of St. George. The play and its dialogue were purely traditional, handed down from father to son, from one player to the next. Regular performances of the play continued until at least 1839 in the case of the Oxfordshire version. By that time the play had proliferated into at least twenty-seven separate versions.

The Oxfordshire St. George Play was recorded in writing from the lips of one of the players, then an old man, in 1853 by a Rev. Dr. Frederick George Lee. Dr. Lee was an educated gentleman born and bred in the area. He had grown up with the tradition, had seen the play performed as a boy, and had found it then delightful and impressive. When he wrote it down as a man, however, he could only say: "I do not profess to be able to explain the text of the play, nor can I quite admire all its points. Its coarseness, too is not to my taste. Least of all can I comprehend its purport."

In this version the Dramatis Personae are:

- King Alfred
- King Alfred's Queen
- King William
- Old King Cole (with a wooden leg)
- Giant Blunderbore
- Little Jack
- Old Father Christmas
- St. George of England
- The Old Dragon
- The Merry Andrew
- Old Doctor Ball
- Morres-Men.

By the time Dr. Lee wrote the play down, St. George had only four speaking lines of incredible triviality left. He was permitted to strike the dragon once, largely as a stage cue. It was said later in the play that he had wounded the dragon.

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1 THE SECOND SHEPHERDS' PLAY, EVERYMAN AND OTHER EARLY PLAYS 115-17 (C. Child ed. 1910) [hereinafter cited as Child].
2 Id. at 116.
3 Id. at 115.
4 Id. at 117.
5 Id. at 118.
6 I am St. George of Merry England, Bring in the morres-men, bring in our band. These are our tricks. Ho! men, ho! These are our sticks — whack men so! Id. at 119.
7 Child 119.
dragon, but the dragon is actually killed by poison in the form of a large pill forced down its throat by Dr. Ball, who is in fact the leading character in the play. Giant Blunderbore and Old Father Christmas are also far more important figures than St. George. Even so, St. George has fared better in the Oxfordshire play than in many of the other versions. In some he has lost even his identity, and "would be quite unrecognizable were it not for the parallel afforded by other versions."  

We are, of course, not discussing the St. George Plays for their own sake. We, like Dr. Lee, cannot comprehend their purport. Professor Child characterized the modern versions as "[d]egenerate and intrinsically trivial" since "the serious presentation of the story of St. George, forming the kernel of the play, has . . . long since merged in rustic burlesque and foolery . . . ." Despite the incredibly poor quality of the play as we have received it just before the custom of its performance died out, we know that it was performed in earlier forms and versions at baronial halls, churches, and the houses of gentle-folk for many, many generations.  

Assuming a modicum of rationality on the part of our ancestors, the play, at least in its earlier versions, must have had some meaning for the people who caused it to be regularly performed during the Christmas season. Its appeal must have been general to make it the most popular of the mummers' plays. It certainly must have been generally understood.

Our ancestors greatly admired the St. George Play, and we cannot. This is not because our ancestors were stupid or intellectually alien to us. It is because an element of fundamental importance has been crowded out of the St. George Plays in their progress through the mills of time and tradition in the mouths of the mummers. The original versions, as unknown to us as the original story of St. George himself, must have been powerful to impart the popularity and impetus that carried this play down through its final period of total triviality. What has been crowded out of the St. George Plays in favor of interesting trivialities like Blunderbore and King Cole are the values represented in the life and acts of St. George, as dramatically conceived and presented.

Crowding St. George out of the St. George Plays was certainly not a sinister attempt to abolish St. George. He was conceded an independent existence and importance elsewhere. He survives to this day as England's patron saint, although he is no longer the hero of its most popular play. The effect on the St. George

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8 Id. at 120.  
9 Id. at 118. If a St. George Play with no St. George sounds impossibly quaint to the modern reader, pray let him consider the Student Non-Violent Coordinating Committee, which in its present form is neither a committee, nor of students, nor limited to non-violence, nor engaged in coordinating anything in particular.  
10 Id. at 117.  
11 Id.  
12 Id. at 115-16. See also W. Bridges-Adams, supra note 6, at 89.  
13 GEORGE, ST., martyr (feast, April 23). In the Canon of Pope Gelasius (d. 496) St. George is mentioned in a list of those "whose names are justly revered among men, but whose acts are known only to God." The only historical element in the intricate tradition that has grown around his name is his martyrdom. 6 New Catholic Encyclopedia 354 (1967). Accord, 10 Encyclopedia Britannica 206 (1968): "Nothing is known of his life."
Play was more profound — it died, though, of course, that was not the intent of the exclusionary mummers.

Without the element of fundamental value represented by the kernel St. George’s story supplied, the play evolved into twenty-seven equally pointless and obscure versions. It became not only confused and trivial, but literally meaningless. We, like Dr. Lee, must sigh: “Least of all can I comprehend its purport.”

The forces which cause the removal of a central value or fundamental meaning beneath a label to produce confusion, multiple versions of the concept represented by the label, obscurity of meaning, and finally, meaninglessness and death of the concept (at least under that label form) are not limited to the St. George plays but are of general application. The modern, well-educated man is likely to discount the possibility of such forces shaping his thought. We are a little close to the canvas to see how civil rights becomes Black Power by removing the values of love and nonviolence. Perhaps we may more easily see this process at a distance. Most of us carry in our heads the picture of a hunch-backed villain labeled Richard III. We are unaware that the Tudors grafted that hump on his back some eighty years after they killed him to seize the throne. Modern historians have been unable to make us give up the hump, let alone reassess objectively the King’s character. This is only one example of how one powerful family, the Tudors, changed one concept. Whatever Richard III was, we do not know him. Examples of this kind could be multiplied.

This general process of concept obliteration through value excision is discussed by George Orwell in his novel, Nineteen Eighty-Four. In the society he depicts, this process has been deliberately harnessed by the state and ruling party to eliminate any possibility of unorthodox or dissenting thought. The alteration of the English language as we know it into the official party language, “Newspeak,” was basically a process of reducing normal English to a very limited vocabulary, and then ruthlessly eliminating from the words retained all elements of meaning which expressed values disapproved by the party. An enthusiastic party philologist engaged in this work, Syme, points out to the hero, Winston Smith, that by the year 2050, when the work was to be complete, not a single human being would remain alive who could understand the conversation they were then carrying on.17 Those who think this process fanciful or

14 Child 117.
15 What would be left of \textit{Everyman} if some ingenious and authoritative innovator had demoted Everyman himself to a minor walk-on, or eliminated him altogether, to punch up the play? Certain things happened to the Crusades when the Crusaders decided that their business was in Constantinople, or in Europe persecuting Jews, or in Alexandria or Damascus, rather than at the Holy Sepulchre in Jerusalem. See generally 6 \textit{Encyclopedia Britannica} 828-35 (1968). Something rather inevitable happened to the Templars when they began to seek tax exemptions rather than the right to live in poverty and defend pilgrims to the Holy Land. The importance of the act of those Crusaders who moved the cross from their front to their back is understood by all who hear the story.
17 G. Orwell, \textit{Nineteen Eighty-Four} 47 (New American Library ed. 1961). These interesting games with words and symbols are not limited to past history, science fiction, or literary utopias. Recently young people opposed to the conflict in Vietnam have been wearing the ancient Egyptian \textit{ankh} and describing it as a “peace cross.” No reference to Christ was intended or understood, nor indeed any Egyptian reference. The word “cross” was used in the sense of “symbolic mark” and stripped of all other meanings. In super-markets, which were called grocery stores in the childhood of the authors, soap box sizes range from
impossible should read the St. George Play and tell us "its purport."

The Hearsay rule has accidentally and unintentionally been started on this same road. A fundamental value has been arbitrarily read out of the concept.\textsuperscript{18} Multiple versions, confusion and obscurity have developed. Serious attacks have begun to be made on the rule itself. It is not too late to put this fundamental value back into the Hearsay rule, before it becomes another St. George Play, and the year 2050 comes to claim it.

II. The Trouble With Hearsay

One of the troubles with hearsay is simply confusion. In part, this confusion results from the fact that the terms "hearsay" and "the Hearsay rule" may under current usage refer to at least three separate things. These semantic brambles are not the heart of the matter, but the confusion they have engendered is serious enough for us to pause and clear them away before attacking the main problem.

First, a person referring to "the Hearsay rule" may simply intend to specify the general rule against admitting hearsay evidence. As Judge Cooley put it, "In general, such evidence is inadmissible, but there are exceptions to the rule excluding it . . . ."\textsuperscript{19} This usage is quite common, and uncontroversial.\textsuperscript{20} It is correct in the strictest denotative sense as well, and has not been the cause of any serious confusion or controversy. It is confusion as to other aspects of the rule that is causing it presently to come under attack. A good example is Judge Talbot Smith's recent hyperbolic denunciation of the Hearsay rule as "a nonexistent Eudoxian universe."\textsuperscript{21} The "Hearsay rule" Judge Smith was attacking was actually the body of exceptions to the Hearsay rule.

This is the second usage one encounters. Any reference to "hearsay" or any given discussion of "the Hearsay rule" may in fact turn out to be a reference to these exceptions, variously enumerated from four to forty-eight.\textsuperscript{22} In fact, it is to this body of exceptions that much of the criticism of the Hearsay rule...
the quality of these exceptions as a body of law in their own right, Professor Morgan’s appraisal was that they are a conglomeration of inconsistencies due to the application of competing theories haphazardly applied. Historical accidents play their part also. . . [All these rulings] make no sense to either laymen or lawyers; and no amount of discourse about the frailties of jurors or the virtues of cross-examination can give them the appearance of rationality.23

Although others have been less biting in their analysis of these exceptions viewed as a whole, no serious writer has gone further than to indulge in a grumbling defense of the exceptions as subject to some sort of polarization along defensible axes almost entirely unthought of when the exceptions were first laid down.24 In their unequal and inconsistent effects, the exceptions bring to mind Aristotle’s discussion of injustice.25 Conceding that one serious trouble with hearsay lies in these deformed exceptions, which are clearly in need of careful reform, it is suggested that the exceptions are neither the source of serious confusion nor the most serious current trouble with hearsay.

Teaching experience is generally consistent with this hypothesis. Students are quick to grasp the exceptions with all their flaws, but mastering the concept of hearsay, and acquiring the skill to identify it reliably in the many contexts in which it may arise, are a matter of much earnest toil and effort, and all too often, of indifferent success. It is not uncommon for a student to emerge from a course in evidence well drilled in the exceptions, but distressingly vague as to hearsay itself.26 Naturally enough, a similar condition may be observed among practitioners.27 Neither the practitioner nor the student has serious difficulty

Evidence §§235-326 (1957) (48 exceptions, by our best count); 1 S. Greenleaf, Evidence 175 (14th ed. 1883) (5 exceptions); H. Kelley, Criminal Law and Practice 227-32 (3rd ed. 1913) (4 or, perhaps, 5 exceptions); R. Kennedy, Trial Evidence 76-126 (1906) (13 exceptions); Morgan, Foreword to Model Code at 38 (18 exceptions); J. Wigmore, Evidence §1426 (3d ed. 1940) (14 exceptions) [this third edition of Professor Wigmore’s treatise will hereinafter be cited as Wigmore]; J. Wigmore, Code of Evidence §§151-70 (3d ed. 1942) (20 exceptions); Uniform Rules of Evidence 63 (31 exceptions). Some well known works contain no specific listing, e.g., J. Thayer, Evidence 518-23 (1889). Very probably materials exist employing fewer or more numerous categories to express the exceptions; the foregoing are simply representative. The disparity in numbers arises not so much from differences as to what belongs among the exceptions as it does from differences as to the most advantageous way to slice up the material included in the exceptions.

23 Morgan, supra note 22, at 46-47.
24 We refer, of course, to the chapter in Dean Wigmore’s monumental treatise called “Exceptions to the Hearsay Rule: Introductory,” 5 Wigmore §§1420-27. Note particularly §1420, and the inclusion in §1425 of the doleful category, “d. Arbitrary limitations and modifications not resting on any principle whatever.” The overall tone of the chapter may be characterized as praising with faint damns.

There is also the problem in this regard that some of the “exceptions”, such as dying declarations, are older than the rule itself. See J. Thayer, supra note 22, at 519-20.


26 The exceptions are in practice usually taught by the approach which has been described in the field of history as the theory that “history consists of just one damn thing after another.” The exceptions in fact readily yield themselves to this approach. Students often identify the less blatant forms of hearsay by examining them from the vantage point of the most nearly applicable exceptions—a process similar to a bird flying backward, and equally productive of error, but, alas, not uncommon.

27 If this point be doubted, ask the next five practitioners you meet for a concise definition of hearsay.
understanding and applying the admittedly arbitrary, inconsistent, and imperfect exceptions. Despite their manifest flaws, only a small element of confusion attaches to the exceptions, resulting from failure to differentiate between the concept of hearsay and the quality of the exceptions.  

In searching for the basic trouble with hearsay, it would be a mistake to concentrate on the obvious and often discussed shortcomings of the exceptions. There has been considerable progress during the last thirty years in reforming the exceptions, a progress that continues to the present time and will undoubtedly accelerate. Confrontation and cross-examination have increasingly become matters of constitutional right. The exceptions, affecting these rights as they do, have become increasingly subject to refining and reforming attack as matters of constitutional law. The patent imperfections of the exceptions would not have drawn the attacks upon the concept of a hearsay exclusion unless the values of hearsay exclusion were themselves doubted. In confirmation of this, the doubts as to the value of excluding hearsay generally have increased during the same time period in which the greatest progress has been made in improving and reforming the exceptions, despite that improvement and reform.

Far more than these exceptions was behind Judge Wisdom’s delightfully understated observation that the “law governing hearsay is somewhat less than pellucid.” Students, practitioners and critics alike have found the concept of hearsay deeper and more confused than the exceptions. To risk stating the obvious: there is more to the rule than its exceptions.

This brings us to the third current usage of “hearsay” or “the Hearsay rule.” Like the critics of the rule, its champions have also seen another meaning. Dean Wigmore was not thinking of Judge Cooley’s simple rule, nor of the exceptions, when he called the Hearsay rule “that most characteristic rule of

28 See, e.g., note 21 supra and accompanying text.
30 One example of the improvement is California’s new Evidence Code, which became effective on January 1, 1967. See Recommendations of the California Law Revision Commission Proposing an Evidence Code, 29B CAL. EVID. at XXIII-IV (West 1966). The past thirty years have also seen the Evidence Act of 1938 in Great Britain, the ALI Model Code, Wigmore’s Model Code, and the Uniform Rules—all containing noteworthy efforts toward improvement of the exceptions, unprecedented in earlier periods.
31 Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 391 (5th Cir. 1961).
32 See text accompanying note 19 supra.
the Anglo-American law of evidence, — a rule which may be esteemed, next to jury-trial, the greatest contribution of that eminently practical legal system to the world's jurisprudence of procedure." The simple statement of exclusion unless excepted, and the exceptions themselves, are clearly not the subject for anybody's panegyric. Yet John Marshall spoke of the rule as one matured by the wisdom of the ages, revered for antiquity and the good sense in which it was founded. Like Wigmore, he had something grander before the mind's eye. Thayer ascribed an equal importance to it, as have Horwitz and Gard in more modern standard treatises. Sir William Holdsworth agreed with Dean Wigmore's evaluation of the hearsay rule without reservation. Authorities could be multiplied to this effect, for even those who regard the Hearsay rule as harmful or seriously defective attribute an equal magnitude of importance to it.

Which Hearsay rule were these men speaking of? Certainly not the simple command to exclude unless excepted, and certainly not the body of exceptions. Instead, it is the "rule," or more properly the definition or formula, developed at common law, by which the classes of evidence comprising the category known as hearsay are isolated, identified and excluded. It is plain that the heart of the matter was the halting and painful process of deciding case by case whether particular categories of evidence are or are not hearsay. This course of decisions has its false starts, misdirections, and temporary failures. Sometimes its path is marked with monuments as grim as Raleigh's grave. At the end of that course of decisions a beneficial principle of the first magnitude, which endures to the present day, had been set into the very foundations of the modern period of common law in which the trial of cases depends primarily upon the testimony of witnesses.

33 Wigmore, The History of the Hearsay Rule, 17 HARV. L. REV. 437, 458 (1904). This was a judgment which Professor Wigmore adhered to in the first and second editions of his work, A Treatise on the Anglo-American System of Evidence in Trials at Common Law.

Sir William Holdsworth greatly admired Professor Wigmore, comparing him favorably with Bracton. Holdsworth, Wigmore as a Legal Historian, 29 ILL. L. REV. 448, 455 (1934). He characterized Wigmore's treatise as "a monument of immense industry, and immense learning, of acute reasoning, and of acute historical insight," and said,

How excellent it is on the historical side I can testify from my own personal experience. It would have been impossible for me to have described the origins of the English law of evidence with any sort of completeness without its help. Id. at 453.

Holdsworth adopted Wigmore's quoted evaluation of the hearsay rule, 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 214 n.5 (1926), as well as Wigmore's view of the development, history, and nature of the rule, without reservation, in his own lengthy work. Id. at 214-19. Dean Wigmore alludes to that evaluation of the Hearsay rule, and to that view of its development, history, and nature, in the next (third) edition of his treatise as if it were independent authority. See 5 Wigmore 9 n.1.

34 Mima Queen v. Hepburn, 11 U.S. (7 Cranch) 183, 186 (1813).

35 "There is a great head of the law of evidence, comprising, indeed, with its exceptions, much the largest part of all that truly belongs there, forbidding the introduction of hearsay." J. THAYER, supra note 22, at 518.

36 He characterized it as one of the most important of the rules. See B. JONES, EVIDENCE § 297, at 630 (Horwitz ed. 1913).

37 Judge Gard went a step further and found the rule so fundamental and well established that the citation of any specific authority to support it was unwarranted. B. JONES, EVIDENCE § 268, at 516 (S. Gard ed. 1958).

38 See note 33 supra.

39 Smith, supra note 21, at 235. See also Morgan, supra note 22, at 36-50 (1942).

40 See 9 W. HOLDSWORTH, supra note 27, at 216. See also 2 STATE TRIALS (T. Howell ed. 1816) [hereinafter cited as How. ST. Tr. (date of case)]; C. Bowen, THE LION AND THE THRONE 190-224 (1957).
It is the quality of the policy judgments embodied in the mass of individual
decisions and authorities, from which was distilled by familiar processes the
formula for hearsay, that excited the admiration and respect of Wigmore. It
is this decision as to the essential nature of hearsay which is the crucial opera-
tive part of the development of the Hearsay rule. The idea of exclusion, and
the label hearsay, are in themselves neutral. The quality of the rule depends
upon what is put under the label. It is the rule which tells us what hearsay is
that permits us to identify it and keep it out of our courts, and thus secure the
benefits of "the Hearsay rule." This, then, is the Great Hearsay Rule. This
also is the end of the semantic brambles we set ourselves to cut through as a
preliminary task. But this is the beginning, rather than the end, of our real
problems, for this point, at which we reach the true Hearsay rule, is also the
point where everything goes wrong.

III. The Great Hearsay Rule

The rules of evidence have many solid virtues, but a practical mastery of
them is not generally a matter to tax the capacities of a philosopher. Why should
this one rule, of such major practical importance, be of such elusive subtlety?
If diligent students of sound intelligence have such difficulty mastering it, how
less likely are litigants to understand how their causes are determined and their
freedoms decided?

We do not suggest, of course, that the importance of a rule of law
depends upon the ease with which law students grasp it. We do sug-
gest, however, that the fact that well prepared, dedicated young men are
able to routinely master the inconsistent exceptions, while the rule itself often
baffles their efforts, is consistent with our theory that the thinking of the mature
segment of the bar is even more confused and confusing on the subject of hear-
say proper than on the subject of its exceptions. Such confusion surrounding
so basic a concept is a legitimate cause for serious concern.

The experienced lawyer or judge may well be inclined to regard this last
suggestion as unfounded and extravagant. After all, surely everybody knows
what hearsay is. Perhaps so, but for a fundamental practical rule which "every-
body knows," our expressed thoughts have been far from clear. The definition
of hearsay, we have seen, is The Great Hearsay Rule. But writers generally disagree
about that definition. The divergences between published definitions are wide.
This has not provoked disputes because the definitions are so cryptic that they are
sufficiently ambiguous to prevent disputes. This same cryptic ambiguity prevents
them, however, from being profitably usable by the beginner. The common pattern
is for the author to state his general and cryptic definition, and then spend con-
siderable time explaining it by example and otherwise. These are not unneces-
sary pains, for the meaning of the definition appears only after it is explained
and examples given. The typical definition of hearsay resembles more the riddle

\[\text{October, 1968}\]
of the sphinx than it does a fundamental rule intended for everyday application in practical, working courts.

Such assertions as these should certainly not be left unsupported. Let us examine, then, as briefly as we can consistent with fairness, the standard definitions and treatments of hearsay offered by the standard sources and leading writers of our profession today.

We are not seeking to make artificial difficulty by relying upon works which are primarily theoretical and little used by the practicing attorney. One work widely relied on by the profession is *Corpus Juris Secundum*. This well-known encyclopedia treats hearsay as the first subdivision of the topic "Unsworn Statements," an approach not found in any other work. To quote directly,

**UNSWORN STATEMENTS**

**A. HEARSAY**

§ 192. Definition

Evidence is hearsay when its probative force depends on the competency and credibility of some person other than the witness.

Evidence is called hearsay when its probative force depends, in whole or in part, on the competency and credibility of some person other than the witness by whom it is sought to produce it; it is primarily testimony which consists in a narration by one person of matters told him by another. A clear example of hearsay evidence appears where a witness testifies to the declaration of another person for the purpose of proving the facts asserted by declarant. [Footnotes omitted.]

In case the reader does not find this sufficient to equip him to identify hearsay, one footnote to this section quotes twelve other definitions, refers to thirty-five illustrative and explanatory cases, and notes the existence of yet other definitions. Lest the reader be taken unaware, there is a cross-reference in the note cautioning him that hearsay in criminal prosecutions has merited its own twelve sections in another volume. This count does not include the additions in the pocket part, nor the ample additional resources of the earlier *Corpus Juris* to which the note directs the enquiring reader.

In case the reader does not yet have enough, section 193 opens with still another definition in discussing the general exclusionary rule. In all, (excluding the problems of hearsay in criminal prosecutions), *Corpus Juris Secundum* expends 229 sections, covering 520 pages and uncounted notes, in a turgid struggle with some of the problems of hearsay. Fittingly enough, the editors take as one of the early lead lines Judge Wisdom’s *bon mot* quoted earlier in this article.

No criticism of *Corpus Juris Secundum* is intended. In fact, by being faithful to the editorial principles of general inclusiveness of all the law, the editors show us a valuable lesson in the section treating hearsay. In their attempt to be as clear and practical as possible while yet inclusive, their text is an accu-

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43 *Id.* at 519 n.1.
44 *Id.*
45 *Id.* §§ 192-421. This comprises about half of one entire volume of the set.
47 See 1 C.J.S. v-vii (1936), where the editors succinctly set forth the distinctive principles upon which the work was constructed and edited.
rate report of the confused thinking of our profession about the Great Hearsay Rule.

The other major encyclopedic set in use today, *American Jurisprudence 2d*, is edited upon a different principle, and is intended to be more selective, analytical and discriminating, and therefore less inclusive, than *Corpus Juris Secundum*. The treatment of hearsay in this work differs from that in *Corpus Juris Secundum* only as one would expect from the difference in editing principles involved. The definitions are briefer, and more theoretical, intellectual material is included. The result is an even more confusing treatment of the nature of hearsay.

HEARSAY EVIDENCE

A. In General

§ 493. Generally; exclusionary rule.

It is a general rule, which is subject to many exceptions, that hearsay evidence is incompetent and inadmissible to establish a fact. 'Hearsay' has been defined as evidence which derives its value, not solely from the credit to be given to the witness upon the stand, but in part from the veracity and competency of some other person. [Footnotes omitted.]49

Another sixteen lines of limitations, qualifications and explanations with copious citations complete the section. Again, further aid is offered in the form of another definition:

Rule 501 of the Model Code of Evidence of the American Law Institute provides that "[a] hearsay statement is a statement of which evidence is offered as tending to prove the truth of the matter intended to be asserted or assumed to be so intended except a statement made by a witness in the process of testifying at the present trial or contained in a deposition or other record of testimony taken and recorded pursuant to law for use at the present trial."50

In all, *American Jurisprudence 2d* devotes some 275 sections, covering 286 pages, to the struggle with hearsay and some of its major exceptions.51

Professor McCormick, in his well-known textbook on evidence, warns in a discussion of hearsay that "[t]oo much should not be expected of a definition."52 While the painful accuracy of Professor McCormick's remark is well illustrated by the materials cited above, we must bear in mind that the definition of hearsay is the Great Hearsay Rule, as we have demonstrated in the forepart of this article. Perhaps we should not expect too much of a definition, but are we not entitled to expect more of clarity and agreement, and less of confusion and conflict, in the "most characteristic rule of the Anglo-American law of evidence,—a rule which may be esteemed, next to jury-trial, the greatest contribution of that eminently practical legal system to the world's jurisprudence of procedure"?53

50 Id. at 551 n.20.
52 McCormick 459.
53 Wigmore, supra note 33, at 458.
It may occur to the reader that the legal encyclopedias, while they are both fine works of their kind and according to their respective editorial principles, are sometimes not the place to find the best or clearest short statement of an important rule of law. The authors certainly admit the validity of this observation. The encyclopedias were examined to support the assertion that the thinking of the legal profession about hearsay is seriously confused. These encyclopedias are intended to be as clear and practical as possible. They are designed primarily for the everyday use of working courts and lawyers. They show us the thinking of the working bar on this point, and are certainly immune from any suspicion of trying to create confusion, obscurity, or ever-refined intellectual difficulties where none in fact exist. It might be better to look to more scholarly sources for clearer and more consistent statements on the nature of hearsay.

For this purpose, there is scarcely a better place to start than Professor McCormick's hornbook. A hornbook, black letter and all, is an excellent transition from the encyclopedic to the scholarly. After many disclaimers and caveats, Professor McCormick gives this definition:

Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. [Footnote omitted.]

Professor McCormick then follows with twenty-one pages of thoughtful exposition. In all, his treatment of hearsay covers eleven chapters containing eighty-two sections. The entire work consists of but thirty-seven chapters. Thus, over a quarter of these are devoted to hearsay problems.

Another good transitional work, from the practitioner's side of the fence, is Conrad's *Modern Trial Evidence*. He does not think hearsay difficult to understand, but spends nearly 300 pages of his treatise attempting to explain it.

Perhaps those still unwilling to acknowledge the existence of real confusion on this point will say that for real understanding and clarity, we must go to the primarily theoretical writers on evidence, to sources still more scholarly and intellectual, and less practical than those so far investigated. The editors of *American Jurisprudence 2d*, as seen earlier, had recourse to this expedient, relying upon the American Law Institute's *Model Code of Evidence* which admittedly would, if anyone were to adopt it, "greatly liberalize the common law" as to the exclusion of hearsay. The contrast between the encyclopedic text definition and the *Model Code* definition given in the footnote would have been greater had the editors quoted the entire six sections of the *Model Code* definition instead of only one. The *Model Code* definition covers twenty-six

54 McCormick 460.
55 Id. at 455-634.
56 "The concept of hearsay is not difficult to comprehend." 1 E. Conrad, Modern Trial Evidence § 264, at 221 (1956).
57 Id. §§ 261-622.
59 Model Code rule 501, Introductory Note, at 224.
60 See text accompanying notes 49 & 50 supra.
lines of black letter type, materially divergent from other definitions, and followed by the further explanation of a lengthy comment. Surely, the destruction of the Exclusionary Rule proposed in the Model Code contributed heavily to its universal rejection. In the more modern Uniform Rules of Evidence, the American Law Institute has reconsidered this extreme position and returned to the Exclusionary Rule. The modern American Law Institute definition of hearsay, embodied in the Uniform Rules, is

Rule 63. Hearsay Evidence Excluded—Exceptions.—Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible....

This rule is to be read in conjunction with Rule 62, which gives seven further subsidiary definitions and runs to some thirty-nine lines, including such items as the fact that “statement” means not only oral or written expressions but includes nonverbal conduct intended as a substitute for words, and a half page of explanatory comment. Rule 63 itself trails an entire page of comment.

While Aristotle's discussion of injustice adequately generalizes the principal defects of the exceptions, the concept of hearsay itself has become subject to the more sophisticated definition of injustice stated by Edmund Burke. Burke's definition involves the more difficult problem of a confused concept, rather than simple mechanics as in the case of the exceptions.

A frequently consulted standard work on the law of evidence is Jones on Evidence, currently in its fifth edition. It gives the following primary definition of hearsay:

by “hearsay” is meant that kind of evidence which does not derive its value solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness has received his information. [Footnote omitted.]

The editor then quotes Wigmore's definition, and says that the above quoted definition explains the basis for Wigmore's definition, with which it is not in conflict. There is a good deal of merit to this comment, and it was an unfortunate loss that the editors of Corpus Juris Secundum and American Jurisprudence 2d trimmed off the last eight words of Jones' definition.

In the field of evidence, all roads lead to Wigmore and his great treatise. This has been true for nearly sixty-five years. It would seem that if there is a

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62 Uniform Rules of Evidence rule 63.
63 Id.
64 See note 25 supra and accompanying text.
65 "Cannot I say... of human laws, that where mystery begins, justice ends?" 1 E. Burke, The Works of Edmund Burke 56 (7th ed. 1881).
67 Id. See text accompanying notes 42 & 49 supra.
solution to this confusion and conflict it will be found in the works of this great man. Wigmore gives us the following definition:

§ 1364. History of the Rule. Under the name of Hearsay rule, then, will here be understood that rule which prohibits the use of a person's assertion, as equivalent to testimony to the fact asserted, unless the asserter is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it.68

Dean Wigmore restated his hearsay rule in 1942 as definitively as possible in his own Model Code.69

Is this the place where one may find a common resolution of divergent views, a statement presenting a true and central picture of what others had seen and stated partially and imperfectly? Unfortunately, such a synthesis, showing the place of each of the ideas examined in the grand mosaic, is not what Wigmore gives. Instead, he gives a narrow theory, restricted entirely and rigorously to a view of the Hearsay rule as articulating the right to cross-examine adverse witnesses.70 Further, he says that other reasons or definitions of the

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68 5 Wigmore § 1364, at 9.
69 HEARSAY RULE IN GENERAL
RULE 147. General Principle. Every human assertion, offered testimonially (Rule 28, Art. 1, ante, § 201), i.e. as evidence of the truth of the fact asserted, must be subjected to two tests:—(W. § 1362)
(1) The person making the assertion must be subjected to cross-examination by the opponent, i.e. must make it under such circumstances that the opponent has an adequate opportunity, if desired, to test the truth of the assertion by questions which the person is compellable to answer;
(2) The person making the assertion must be confronted with the opponent and the tribunal, i.e. must be in their presence when making the assertion and giving his answers.

Art. 1. Cross-examination essential, but not Confrontation. The opportunity of Cross-examination is indispensable, and is governed by Rule 148 (post, § 1318).

The Confrontation is designed primarily to secure the opportunity of cross-examination. Its subsidiary purpose, to secure an opportunity of observing the demeanor of the witness while testifying, may be dispensed with if not feasible, and is governed by Rule 149 (post, § 1343).—(W. § 1355)

Art. 2. Exclusion of Extra-judicial Assertions (Hearsay). General Principle. Par. (a). An extra-judicial assertion, i.e. uttered otherwise than as provided in Rules 148 (Cross-examination) and 149 (Confrontation), is not admissible for the purpose of giving credit to it as testimony to the fact asserted in it, whether it be
(1) oral or written,
(2) sworn or unsworn;
Par. (b). Unless it falls within one of the Exceptions provided in Rules 150-170 (post, §§ 1370-1763).
Par. (c). But an utterance not offered as a testimonial assertion, i.e. offered for some other purpose than to be credited as evidence of the fact asserted in it, is not forbidden by the present rule; the various classes of utterances thus falling without the scope of the rule are enumerated in Rule 171 (post, § 1765).

TOPIC I:

THE RIGHT TO AN OPPORTUNITY OF CROSS-EXAMINATION OF AN OPPONENT'S WITNESS

RULE 148. General Principle. Every testimonial assertion must be so presented that the opposing party has an opportunity to test its credit by cross-examination of the person making the assertion; . . . . J. Wigmore, Code of Evidence rules 147-48 (3rd ed. 1942).

70 Wigmore, of course, was intent on establishing a basis for the hearsay exceptions as one coherent, rational whole. His aim was to make a convincing argument for the proposition that lack of cross-examination was the fundamental cause of the exclusion of hearsay and then to demonstrate how the exceptions rationally overcame
Hearsay rule have been unorthodox, occasional, without emphasis, and spurious. He condemns in short order every suggestion of a theory broader than his own. In confidently branding as spurious and dismissing the thinking of Story, Marshall, and Greenleaf, Professor Wigmore relies partially upon the authority of Professor Holdsworth, which we have already examined. Wigmore's theory of hearsay is the dominant, orthodox one today, but it is in sharp conflict with the thinking of most serious students of the problem who preceded him.

From this examination of the standard authorities, it is clear that while "everybody knows" what hearsay is, the definitions are grossly divergent, cryptic, and require extensive explanation and example. While there is nothing here that cannot be overcome and understood with prolonged guru-like concentration, those who have attained competence in this way should not insist that this difficulty be maintained, if it be needless.

One curiosity about all this is that the hearsay concept, while clouded in confusion and very difficult in study, has not led to anything like the amount of specific error the confusion concerning *res gestae* produced in its time. The fundamental character of the values embodied in the Hearsay rule, along with the considerable practical skill of our trial lawyers and judges, have prevented constant error and injustice. The proper trial handling of hearsay is usually based on a developed experience factor or feel for error. Like the villager who dowses for water for his area of the countryside, they are surprisingly accurate, but neither they nor he can satisfactorily articulate, so that another not experienced in the art can understand, what makes the indicative wand dip.

The fact that an approximation of justice occurs in specific cases in practice is not a reason to reject as unnecessary the clarification of the confusion surrounding this concept. An approximation of justice cannot and should not be a goal of trial. Criticism of the idea that something is gained by excluding hearsay continues to increase. This criticism is largely an outgrowth of confusion about the fundamental values of hearsay exclusion, and about the Hearsay rule itself.

Judge Smith says that the idea behind the Hearsay rule is valid enough but never gives any indication what that idea is. He is sufficiently disillusioned with the Hearsay rule, as he understands it, to advocate its abolition or severe curtailment in favor of a system of trusting the trial judge to assess reliability. But at another place in his article, he indicates his belief that testimony of an observer to the effect that confined chickens released from D's house marched straight to C's house, entered the coop and took up roosts there, involves hearsay, because

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71 See note 33 supra.
72 The story is told in 6 Wigmore § 1757. See also J. McKelvey, Evidence § 280 (5th ed. 1944).
73 Smith, supra note 21, at 235.
74 Id. at 235-37. This is similar to Professor Cross's suggestion of a trial judge administered "omnibus exception." Cross, supra note 30, at 83.
the chickens were not sworn.\textsuperscript{75} The author says the admission of this testimony is a triumph of common-sense over the Hearsay rule.\textsuperscript{76} Actually, of course, circumstantial evidence deriving its reliability from the nearly infallible source of generally known animal habit is all that was involved. There was no hearsay problem.

Bloodhound tracking cases will come to mind,\textsuperscript{77} and the electric speed-watch and radar speed devices.\textsuperscript{78} The only hearsay problem in such instances is that the author thought it was a hearsay problem. The definition of hearsay, the Great Hearsay Rule, has become so confused in the thinking of our profession that it is being seriously attacked as presenting impediments that it does not present, and embodying concepts and difficulties which it does not embody. At the same time, certain values that it does include are overlooked. Unless the confusion is cleared up, attacks like this are likely to succeed, and we shall lose by default and without defense the great and beneficial protections which lie largely forgotten or overlooked beneath the surface of the Hearsay rule.\textsuperscript{79}

The confusion attending the concept of hearsay is reminiscent of the multitude of individually insignificant decisions which surrounded the fact-opinion dichotomy like a cloud of gnats in the Everglades prior to the analysis of that rule as one of preference rather than of absolute exclusion.\textsuperscript{80} Perhaps our refuge in this maelstrom of confusion is to return to Dean Wigmore’s analysis, and place our faith there. Though it may appeal to the baffled fundamentalist, that solution remains intrinsically inadequate. In Wigmore’s definition the only essential value served by the Hearsay rule is the right of cross-examination. Not only does Wigmore say this is the only reason for the Hearsay rule, but he also condemns in uncharacteristically pejorative terms great scholars, great lawyers, and great judges who had seen more behind the Hearsay rule than he felt logically belonged there.\textsuperscript{81} So successful has Wigmore’s assault been, we have nearly forgotten the values that Story, Marshall, and Greenleaf thought were a reason for the rule.

IV. A Forgotten Value of the Hearsay Rule

The purpose of Newspeak was not only to provide a medium of expression for the world-view and mental habits proper to the devotees of Ingsoc, but to make all other modes of thought impossible. It was intended that when Newspeak had been adopted once and for all and Oldspeak

\textsuperscript{75} State v. Wagner, 222 N.W. 407 (Iowa 1928). We have followed Judge Smith as to the facts of the case on the theory that he is entitled to the benefits of his own statement of facts for the purpose of his example. The facts of the actual Wagner case are somewhat different.

\textsuperscript{76} Smith, \textit{supra} note 21, at 235.


\textsuperscript{78} \textit{E.g.}, Webster Groves v. Quick, 323 S.W.2d 386 (Mo. App. 1959). Authorities are collected in Falknor, \textit{Evidence}, 35 N.Y.U.L. Rev. 348, 387 n.242 (1960). There is a fruitful treatment of this and similar problems in J. "McGumE, J. \textit{WEINSTEIN, J. CH.ADBOURN, & J. MANSFIELD, CASES AND MATERIALS ON EVIDENCE} 380-83 (5th ed. 1965). For some genuine hearsay possibilities in such cases, as well as an often overlooked arrest problem, see J. \textit{RICHARDSON, MODERN SCIENTIFIC EVMENCE} \S 9.14, at 282 (1961).

\textsuperscript{79} See text accompanying notes 185-210 \textit{infra}.

\textsuperscript{80} \textit{McCORMICK} \S\S 11-12.

\textsuperscript{81} 5 \textit{Wigmore} \S 1263, at 8-9.
forgotten, a heretical thought—that is, a thought diverging from the principles of Ingsoc—should be literally unthinkable, at least so far as thought is dependent on words. Its vocabulary was so constructed as to give exact and often very subtle expression to every meaning that a Party member could properly wish to express, while excluding all other meanings and also the possibility of arriving at them by indirect methods. This was done partly by the invention of new words, but chiefly by eliminating undesirable words and by stripping such words as remained of unorthodox meanings, and so far as possible of all secondary meanings whatever. To give a single example. The word *free* still existed in Newspeak, but it could only be used in such statements as “This dog is free from lice” or “This field is free from weeds.” It could not be used in its old sense of “politically free” or “intellectually free,” since political and intellectual freedom no longer existed even as concepts, and were therefore of necessity nameless.

From the foregoing account it will be seen that in Newspeak the expression of unorthodox opinions, above a very low level, was well-nigh impossible. . . One could, in fact, only use Newspeak for unorthodox purposes by illegitimately translating some of the words back into Oldspeak. For example, *All mans are equal* was a possible Newspeak sentence, but only in the same sense in which *All men are redhaired* is a possible Oldspeak sentence. It did not contain a grammatical error, but it expressed a palpable untruth, i.e., that all men are of equal size, weight, or strength. The concept of political equality no longer existed, and this secondary meaning had accordingly been purged out of the word *equal*. In 1984, when Oldspeak was still the normal means of communication, the danger theoretically existed that in using Newspeak words one might remember their original meanings. In practice it was not difficult for any person well grounded in *doublethink* to avoid doing this, but within a couple of generations even the possibility of such a lapse would have vanished. A person growing up with Newspeak as his sole language would no more know that *equal* had once had the secondary meaning of “politically equal” or that *free* had once meant “intellectually free,” than for instance, a person who had never heard of chess would be aware of the secondary meanings attaching to *queen* and *rook*.82

About sixty-five years ago, Dean Wigmore began to tell the legal profession that the right of cross-examination is the heart of the Hearsay rule, that the reason for the Hearsay rule is to protect this right, and this is the “orthodox” and only true theory of the Hearsay rule.83 It follows from this analysis that the only essential values protected by the Hearsay rule are those connected with the right to cross-examine an adverse witness.

It is not necessary to dilate the overshadowing predominance Wigmore’s works deservedly enjoy in the field of evidence. Combining upon almost every point fine scholarship, outstanding writing and the bulk of an avalanche of research voluminously set forth, the treatise has been well nigh irresistible. Wigmore *said* that only cross-examination lay beneath the surface of the Hearsay rule, and he has made this the orthodox view. Hardly anyone reads the older books

83 2 Wigmore, Evidence §§ 1360-63 (1904).
and authorities on evidence, and the final court of appeal among the modern ones is generally Wigmore himself. Wigmore _locutus est, est!_

Conrad's deskbook is typical of modern writing on this point in formally adhering to the Wigmore orthodoxy, but including subsidiary comments indicating the author's uneasiness that other values have been excluded. The _Uniform Rules_ say they follow Wigmore, and his analysis of hearsay is undoubtedly the strongest influence in their treatment. But again there creeps in an expression of doubt as to whether, under certain circumstances, hearsay has any value at all, an observation quite inconsistent with Wigmore's analysis. This suggests the existence of values in the exclusion of hearsay other than those which he acknowledged. Even the great rebel from Wigmorean orthodoxy, Professor Morgan, accepted Wigmore's orthodoxy on this point, though he left us a single, significant indication of a different view. In discussing the basis for the Hearsay rule, he said:

Reduced to its lowest terms, the truth is that the opponent of a party presenting a witness has a right that the trier shall not secure information from a witness who is not under oath and subject to cross-examination.

McCormick acknowledges the primacy of the right of cross-examination as the reason for the Hearsay rule, thus coming within the ambit of Wigmorean orthodoxy, but again, his writings hesitate at the edges of a broader theory before turning back to the Wigmore position.

Maguire's reaction is interesting. In writing a short text on evidence, he recoils from the idea of even defining hearsay, but is expressly unwilling to accept the orthodox Wigmore theory that cross-examination is the central and only

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84 That hearsay evidence is unreliable or does not have sufficient probative force, does not permit the jury to pass upon the credibility of a declarant, does not afford the valuable right of cross-examination of a witness, deprives an accused in a criminal case of the right to be confronted by witnesses, and is not based on the personal knowledge of the witness are the principal reasons for the exclusion of such evidence, with perhaps the greatest emphasis on lack of an opportunity to cross-examine the declarant to test his knowledge, opportunity for observation, and credibility. It can be seen that essentially the hearsay exclusionary principle is founded on the necessity of the opportunity for cross-examination. It is thus a basic, not a technical, rule of evidence. [Footnotes omitted.] 1 E. CONRAD, MODERN TRIAL EVIDENCE § 261, at 219-20 (1956).

85 The Commissioner's Note to Rule 63 of the _Uniform Rules of Evidence_ states:

This rule follows Wigmore in defining hearsay as an extra-judicial statement which is offered to prove the truth of the matter stated. ... The Model Code theory is that since hearsay is evidence and has some probative value it should be admissible if relevant and if it is the best evidence available. That policy is rejected by the Conference of Commissioners on Uniform State Laws. The traditional policy is adhered to, namely that the probative value of hearsay is not a mere matter of weight for the trier of fact but that its having any value at all depends primarily upon the circumstances under which the statement was made. _Uniform Rules of Evidence_ rule 63, Comment.

86 For a discussion of this point, see text accompanying note 169 infra.


88 McCormick 460.

89 Everybody has heard of this rule and realizes that in court hearsay is most disparagingly regarded. Oddly enough, mighty few people, laymen or lawyers, can give a definition of hearsay which will stand up under testing. If we tried to fashion a bomb-proof definition we should end with something — in Kipling's phrase — filthily technical. Suppose we leave that for the classroom. ... J. MAGUIRE, EVIDENCE, COMMON SENSE, AND COMMON LAW 11 (1947).
reason for the rule. Lamentably Maguire did not go further and fully explain his own choice of views.

The queasiness with which Wigmore's analysis on this point goes down is typified by Professor Wheaton's statement in his excellent examination of hearsay, where he observes:

Of course, one cannot with absolute certainty say what the reasons for the hearsay rule are. Perhaps each of the suggested grounds has played a part in the minds of many judges. The outstanding reason for the rule, however, seems to be the lack of opportunity of the person against whom hearsay is offered to cross-examine the declarant at the trial at which such evidence is presented.

The standard popular works tend to reflect this same uneasy orthodoxy.

This thread of more or less successfully suppressed doubt and disagreement would have been understood by the men who first worked out the Hearsay rule, for Wigmore's "orthodoxy" would have startled them. Wigmore's orthodox theory pulled one of the center pillars out of the structure of hearsay and set it up independently in another place. We have had over sixty years of Wigmore's theory, and such inertia is rather difficult to combat. The average citizen is quite certain St. George was an Englishman and Richard III a hunchback.

During this same sixty-five years of the current orthodox Wigmore period of hearsay, a quiet and orderly revolution, more or less familiar to all of us, has occurred in the field of general procedure. One of the outstanding characteristics of this great procedural leap forward has been the burgeoning and vitalization of multiple and intensely penetrating forms of discovery. Within its scope in most jurisdictions today lies all that is or may lead to relevant evidence, saving from the reach of its illuminating beams only those areas where a successful claim of privilege may be made out by the party or witness resisting the discovery. It is

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90 If opportunity for cross-examination is the factor which changes from hearsay into non-hearsay manifestations of people's belief about controverted matters of fact, we shall encounter hearsay only in situations where it would be useful to cross-examine a person whose belief is being probed. In any situation where cross-examination would be useless, there is no hearsay element, whatever other objection may apply to the evidence. Id. at 17.


92 The law governing hearsay has been said to be somewhat less than pellucid. The general rule is that, subject to certain exceptions, hearsay evidence is inadmissible, or incompetent; the courts will not receive the testimony of a witness as to what some other person said, or told him, as evidence of the existence of the fact asserted. The rule of exclusion is the same whether the evidence offered consists of a statement purporting to be based on declarant's own knowledge, but objectionable as unsworn, or of a sworn statement as to matters known to declarant only through hearsay, or of a statement based on hearsay.

Hearsay evidence cannot furnish a basis either for establishing or for refuting an alleged cause of action; and it cannot properly be received as bearing on the credibility of witnesses who have not yet been called to testify. The failure of a party to produce available evidence does not open the door to the introduction of hearsay evidence by his adversary.

Testimony by a witness as to a matter within his knowledge is not hearsay .... 31A C.J.S. Evidence § 193, at 520-30 (1964). Inadmissibility and incompetence are very different ideas, the former appropriate to the Wigmore view, the latter to Marshall or Greenleaf. See also the similar ambivalence in 29 Am. Jur. 2d Evidence §§ 493-94, at 551-53.
familiar learning that this growth of discovery has invaded the area once occupied exclusively by cross-examination. Cross-examination remains important, of course, but it is no longer the sole or even the principal reliance of the trial attorney, in most instances, in discovering and exposing the truth. Its last exclusive preserve, the criminal trial, has been broken into by the more efficient and less dangerous pre-trial discovery, and the incursion increases apace. Cross-examination is no longer what it was when Wigmore, at about the same time that he decreed his orthodox monogamous merger between hearsay and cross-examination, declared it flatly to be "beyond any doubt the greatest legal engine ever invented for the discovery of truth." Certainly he meant to assign the greatest importance to the Hearsay rule in taking the view he did. He could not foresee the revolution in procedure that would divide the formerly exclusive sovereignty of cross-examination. Since Wigmore hung the entire Hearsay rule upon cross-examination values and made this accepted orthodoxy, as these values have been weakened, the Hearsay rule has been weakened too. Certainly Wigmore never intended this accidental and unforeseen effect of his analysis of hearsay. As we have seen, he was an eloquent champion of the rule. The Newspeak effect of his redefinition of hearsay to exclude all save his own self-determined "orthodox" view was only a natural consequence of his general method and style of analysis, his fondness for numerous, elaborate categories, and his generally didactic attitude. He was certainly not engaged in some sinister deliberate distortion. The allusion to Newspeak illustrates the effect of redefining a concept to remove effectively an important secondary meaning, which is what Wigmore did. Wigmore did not seek to obliterate or destroy the value of the secondary meaning, as did the Newspeak philologists. Instead he removed it to a new place and set it up under a new name, consistent with his general fondness for numerous and elaborate categories. Though the removal was far more successful than the transplant, it would be wrong to imply that he meant to destroy the Hearsay rule, or the values he cut out of it analytically and transplanted elsewhere. Nevertheless, the effect, though unintended, is clear when John Marshall's words of praise are put beside Talbot Smith's violent condemnation of the Hearsay rule. As

93 See, e.g., B. Goldman & W. Barthold, Depositions and Other Disclosures 19 (1966); J. Clark, Preparation of Cross-Examination 7-8 (1953); J. Appleman, Cross-Examination 4-11 (1963).
94 See, e.g., Datz, Discovery in Criminal Procedure, 16 U. of Fla. L. Rev. 163 (1963), which points to the need for such discovery, and the new Florida Rules of Criminal Procedure which became effective January 1, 1968, following the lead of the Federal Rules of Criminal Procedure in granting such discovery.
95 1 J. Wigmore, Evidence § 1367, at 1697 (1904).
96 [O]ur lives, our liberty and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered for their antiquity, and the good sense in which they are founded. One of these rules is, that "hearsay" evidence is, in its own nature, inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible. Mima Queen v. Hepburn, 11 U.S. (7 Cranch) 183, 186 (1813).
97 My principal target at this writing is the rule against hearsay, that "old fashioned crazy quilt." . . . The situation respecting the law of hearsay is reminiscent of the law of Eudoxus,
Syme, the philologist in the novel *Nineteen Eighty-Four*, pointed out to Winston Smith in explaining what were in his enthusiastic view the virtues and effects of Newspeak, "Has it ever occurred to you, Winston, that by the year 2050, at the very latest, not a single human being will be alive who could understand such a conversation as we are having now?"

Judge Smith has simply made it to the year twenty-fifty ahead of some of the rest of us, who had better re-examine what meanings the words we use have unless we want to make it there ourselves.

There is no suggestion here that the right of cross-examination is less than fundamental, or that the protection of the value represented by this right and the right itself are not heavily involved as a reason for the Hearsay rule. The trouble with the Wigmore orthodoxy is that while the right to cross-examination is *one* of the bases for the Hearsay rule, it is *not the sole* basis; it is only half the story. The other equally fundamental basis is that firsthand knowledge is a prerequisite to competency. This requirement existed with regard to such witnesses as were used at common law from the earliest times. In the post 1700 era, it had no single agreed name, for it was merged into the Hearsay rule. It had no separate existence from the time of *Charnock's Case* until Wigmore catalogued it on the basis of its earlier roots as separate from the modern Hearsay rule. McCormick called it both "personal knowledge" and "the Rule Requiring First-Hand Knowledge." Wigmore referred to "Testimonial Qualifications." For convenience it is called "The Firsthand Knowledge Rule" here. The Firsthand Knowledge Rule was a part of the Hearsay rule since its inception and remained there until Wigmore separated it. The scars of that excision are plain when a witness A on the stand testifies, "B told me that event X occurred," his testimony may be regarded in two ways: (1) He may be regarded as asserting the event upon his own credit, i.e. as a fact to be believed because he asserts that he knows it. But when it thus appears that his assertion is not based on personal observation of event X, his testimony to that event is rejected, because he is not qualified by proper sources of knowledge to speak to it. This involves a general principle of Testimonial Knowledge, already examined (ante §§657, 665), and does not involve the Hearsay rule proper.

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a Greek philosopher who lived in the fourth century before Christ. He sought to explain, among other things, the retrograde motions of the planets. With great ingenuity he constructed a planetary system with the earth at the center, surrounded by twenty-seven concentric spheres. Each rotated on a different axis, and by properly combining the movements of these spheres he could explain the motion of any heavenly body.

Likewise our magnificently complicated hearsay structure, enlisting not Eudoxus's twenty-seven spheres but rather thirty-two equally ingenious inventions. They are, however, as useless to explain what we are really doing in the realm of hearsay as the twenty-seven spheres were to Eudoxus. True, we can invent new spheres to explain retrograde or eccentric motions of the law of hearsay as the need arises, but some day this kind of creation must reach its limit, and the whole structure will simply collapse from its sheer weight. I think that that day is about upon us.

Any rule, I submit, requiring thirty-two exceptions to explain its operations is not a rule at all but a nonexistent Eudoxian universe. Smith, supra note 21, at 235.

[98] G. ORWELL, supra note 82, at 47.
[99] The Trial of Robert Charnock, 12 How. St. Tr. 1377 (1696).
[100] MCCORMICK 461.
[101] Id.
[102] WIGMORE § 1363, at 9. He also uses the expression "personal knowledge." Id.
(2) But suppose, in order to obviate that objection, that we regard A as not making any assertion about event X (of which he has no personal knowledge), but as testifying to the utterance in his hearing of B's statement as to event X. To this, A is clearly qualified to testify, so that no objection can arise on that score.

The only question, then, can be whether this assertion of B, reported by A, is admissible as evidence of the event X, asserted by B to have occurred.

... ... ...

§1362. Theory of the Hearsay Rule. The fundamental test, shown by experience to be invaluable, is the test of Cross-examination. The rule, to be sure, calls for two elements, cross-examination proper, and Confrontation; but the former is the essential and indispensable feature, the latter is only subordinate and dispensable (post, §1395) ... It is here sufficient to note that the Hearsay rule, as accepted in our law, signifies a rule rejecting assertions, offered testimonially which have not been in some way subjected to the test of Cross-examination.103

Wigmore notes that a violation of The Firsthand Knowledge Rule is clearly present in the above example of hearsay evidence. He then tells us that this "does not involve the Hearsay rule proper." This last assertion conflicts on its face with his chosen example, as it would with any other example he might have chosen. No reason is stated why this terrible weakness in the testimony does not "involve the Hearsay rule proper."

The critical part of the demonstration, part (2), will not bear up under examination. Wigmore says that in order to get around the Firsthand Knowledge Rule, we are to suppose that A is not testifying about event X at all, but only that he heard B say event X happened. At this point the whole demonstration comes unglued, for Wigmore has already specified that the happening or non-happening of event X is the legally significant fact, not whether B did or did not say something. So, if A is not making any assertion about event X happening or not (which Wigmore requires us to suppose as a premise for demonstrating his theory and understanding his example), his testimony can have relevance only to the extent one is willing to overlook the lack of firsthand knowledge. If, on the other hand, B's assertion has legal significance (e.g., it was the alleged slander uttered in a defamation case, or the words of offer or acceptance in a contract case), then the hearsay objection vanishes with the objection to the lack of firsthand knowledge.104 The example will not work without setting up the happening of event X, rather than B's utterance, as the legally significant phenomenon, and it equally will not work with that limitation set up, unless we arbitrarily ignore the firsthand knowledge requirement. Surprisingly, this inconsistency has been generally accepted.105

103 Id. § 1361, at 2-3.
104 There is no multiple admissibility situation in this chosen example.
105 The latest example of the success of Wigmore's attempt to separate firsthand knowledge from hearsay is the unfortunate and unnecessary marring of the new California Evidence Code. The commentators are at some pains to involve the hearsay sections of the code with Wigmore's theory. See 29B Cal. Evi. § 1200, Comment (West 1966). To support this new position they brand as analytically erroneous the view taken in California before the new code, namely, that section 1845 of the Code of Civil Procedure, enacted in 1872, had stated a basic
The evidence of A is hearsay, of course. It is hearsay because it violates both the right to cross-examine and the firsthand knowledge rule. It does not seem valid to separate the firsthand knowledge requirement analytically, for the testimony has relevance only insofar as one is willing to override the firsthand knowledge requirement; without overriding it, the testimony doesn't even bear on the event in issue, event X.

If the testimony is plain hearsay, this is true. For example, event X is the planting of gunpowder under the Parliament building. Witness A testifies that B told him he saw D plant gunpowder in the Parliament cellar. Both cross-examination of B and firsthand knowledge of event X are lacking in this witness.

If the testimony is an exception to the Hearsay rule, this remains true. Witness A testifies to a dying declaration uttered by V. Event X is the murder, of course. Both cross-examination and firsthand knowledge are lacking in the witness, but both are excused by the exception to the Hearsay rule. If both were not excused, the exception to the Hearsay rule would not protect the testimony from the supposedly separate objection for lack of firsthand knowledge. Wigmore's treatise bestrides the work of all other modern writers in the field of evidence. It is hard for us gnomes laboring in the valley below to have a dispute, or even a dialogue with the jolly green giant. And at no point is the giant more didactic than upon the nature of hearsay and the reason for the Hearsay rule.

It is not that Wigmore did not see some difficulty with his theory. His reliance upon the mirror of Holdsworth reflecting Wigmore's theory of hearsay exclusion. The comment rests heavily upon a 1906 California case which repeats the relevance ignoring fallacy of Wigmore's example. Again, following Wigmore, the new Code does not deny the requirement of firsthand knowledge, but concentrates on attempting to amputate it from the hearsay concept. Thus, section 1845 of the Code of Civil Procedure, understood as expressing firsthand knowledge as a part of the hearsay requirement, is repealed, and a new section, stripped of any such association with hearsay, is set up as section 702 of the new evidence code. This seems to pursue a preference for an incorrect theory to the extreme, and seems also to provide a flavor of dividing one's forces in the presence of the enemy.

The new code and comments have, however, already fallen into constitutional difficulty over hearsay, and have come under attack in their maiden voyage through the California Supreme Court. There is a real sting in that court's association of Maguire's phrase "professorial pipe-dream" with its labeling of the reasoning of an important section of the new code and comments as the "academic position" which "[v]irtually every court of the Anglo-American legal system has declined to adopt. . . ." People v. Johnson, 68 Cal. Rptr. 599, 605-06 (1968). Pre-Wigmore writers such as the great Burr Jones pointed out that firsthand knowledge was an essential part of the Hearsay rule, and expressly warned, even at that early date, that tampering too far with the rights protected by the Hearsay rule could offend the Constitution. See, e.g., 2 B. JONES, EVIDENCE § 299, at 674 (1896).

It is possible to pose a situation separating the two aspects of the Hearsay rule, in the instance where a witness with firsthand knowledge gives direct testimony but flees before cross-examination can take place. The direct testimony is at that point hearsay. This shows that denial of the right to cross-examine makes testimony hearsay (and there is no serious dispute over that) but it does not show that only that can make testimony hearsay. Testimony, however thoroughly cross-examined, which reveals itself as not based on firsthand knowledge, was called hearsay and excluded as such by lawyers, judges and writers from the time we began to concern ourselves with hearsay until Wigmore decreed that we should continue to exclude it but begin to call it something else. Despite his command and its formal acceptance as modern orthodoxy, normal usage in books and opinions, and even Wigmore's own usage (e.g., Wigmore § 657) where he was not concentrating on splitting the hearsay concept analytically, continues to this day to describe the defect of lack of firsthand knowledge as "hearsay."

106 See note 33 supra.
authority is totally uncharacteristic. There is a distinctly defensive tone in his section 1363, entitled “Spurious Theories of the Hearsay Rule,” where he sharply attacks the views of all his predecessors.

Wigmore was fond of elaborate outlines similar to the chapter outlines of Blackstone’s Commentaries. He dearly loved to split bodies of law into highly refined component parts. His treatise divides the entire law of evidence into ten volumes, ninety-three chapters, and over 2600 sections. A similar pattern can be seen in his other works.

Such a refined analysis of logical subdivision was in itself a tour de force. While logical dissection is a legitimate method of analysis, it is not a method suitable to every problem. It has the defects of its virtues, and the strengths of its weaknesses. While reduction of the concept of man to a few dollars worth of chemicals is useful for scientific purposes, it is not apt or suited for dealing with human rights. Unfortunately, in his analysis of hearsay, Wigmore not only employs this method but also insists that the view arrived at by this method is the only possible view. He dismisses all other ideas as spurious.

Great as Wigmore was, not all of his ideas and analyses have been unqualified successes. The term “autoptic profference” was never adopted by the profession in place of the more practical terms “real evidence” and “physical evidence,” even though it was one of Dean Wigmore’s favorite inventions. His parable of Titus and Flavius, by which he claimed that evidence obtained in violation of the basic constitutional rights of the accused ought to be admitted, was in fact analytically more exact than the idea of excluding such evidence. Yet it was less apt to control and reform the undesirable practices of illogical human beings than was the theory which prevailed. Indeed, that part of Wigmore’s work has been revised to reduce the Titus and Flavius parable to a footnote in favor of the prevailing United States constitutional law on this point.

Bentham’s analysis of hearsay has been credited with doing some good toward improving the law, but only one author seems to have tried to use seriously that analysis for practical purposes, and his experiment has since been abandoned. A brief look at Bentham’s categories of hearsay may suggest

108 While his Code of Evidence states 3,150 separate rules of evidence, [see Britt, The Rules of Evidence — An Empirical Study in Psychology and Law, 25 CORNELL L.Q. 556, 558 (1940)], Wigmore was so refined in subdivision that he declared in his treatise: “There is but one rule of the Analytic type, — the Hearsay rule; though this rule involves two branches or processes, Cross-examination and Confrontation.” 5 Wigmore § 1360.

109 5 Wigmore § 1363, at 8-9.

110 1 Wigmore § 24, at 396-98. See also 2 J. Wigmore, Cases on the Law of Torts v-xxii (1912).

111 8 J. Wigmore, Evidence v (J. McNaughton rev. 1961); id. § 2184a, at 31 n.1.


114 1 F. Wharton, Evidence in Civil Issues § 170, at 157 (2d ed. 1879); 1 F. Wharton, Evidence in Criminal Issues § 220, at 446 (10th ed. 1912); 1 F. Wharton, Evidence in Criminal Cases § 428, at 671 (11th ed. 1935).


116 1. Supposed oral through oral . . . .
to the reader why this happened. Professor Chadbourn's article has brought back to current attention Bentham's work on hearsay, and has suggested that the Uniform Rules fall short of the insight and wisdom found in Bentham's treatment of the subject. Despite this, no back-to-Bentham movement seems likely in the hearsay area, for Bentham's analysis does not lend itself to practical application. Perhaps Wigmore's over-refined definition, like Bentham's analysis, would have been correctly understood and used in a world of jurisprudential philosophers.

In his analysis of hearsay Dean Wigmore was certainly following his favorite method of dividing a concept into its separate component parts and tracing these as far back as possible. From this point of view Wigmore had a defensible logical and historical reason for separating the Firsthand Knowledge Rule from what he called "the Hearsay rule proper." This reason can best be seen in a direct quotation from his treatise:

The history of the Hearsay rule, as a distinct and living idea, begins only in the 1500s, and it does not gain a complete development and final precision until the early 1700s. Before tracing its history, however, from the time of what may be considered its legal birth, it will be necessary to examine a few salient features of the preceding century, in order to understand the conditions amid which it took its origin.

One distinction, though, must be noticed even before this preliminary survey, — the distinction between requiring an extra-judicial speaker to be called to the stand to testify, and requiring one who is already on the stand to speak from personal knowledge (ante, § 1361, par. 1). The latter requirement had long ago been known in the early modes of trial preceding the jury. In the days when proof by compurgation of oath helpers lived as a separate mode alongside of proof by deed-witnesses and other transaction-witnesses, "the witness was markedly discriminated from the oath-helper; the mark of the witness is knowledge, acquaintance with the fact in issue, and moreover, knowledge resting on his own observation." Such a witness' distinctive function was to speak "de visu suo et auditu." The principle was not fully carried out; for a deed-witness need not have actually seen it executed, and might merely have promised by attestation to appear and vouch in court. But at any rate this principle, so far as it prevailed, concerned a different mode of trial, "trial by witnesses," which jury-trial supplanted. Afterwards, nearly three centuries later, when jury-trial itself had changed, and witnesses (now in the modern sense) became once more a chief source of proof, the old idea reappeared and was prescribed for them; the witness would speak to "what hath fallen under his senses," and this became in the modern law a fundamental principle (ante, § 657). But at the time now to be considered, when jury-trial was coming in (say the

2. Supposed oral through scriptitious.
3. Supposed scriptitious through oral.
4. Supposed scriptitious through scriptitious: in other words transcriptitious . . .

117 Chadbourn, supra note 113, at 950-51.
118 "Contemporary legal scholarship has, therefore, largely abandoned the once prestigious effort to reduce the vast coruscation of traditional legal learning to beautifully terraced unified statements geometrically laid out with no overlapping, erosion or gaps." M. McDougal, STUDIES IN WORLD PUBLIC ORDER 83-84 (1960).
THE HEARSAY RULE

1300's), that principle belonged in what was practically another mode of trial, and did not affect the development. 119

There is no doubt that the Firsthand Knowledge Rule is older than the Hearsay rule proper. It traces back at least to Glanvill. It is older than the right to cross-examine, or even the idea of cross-examination, which, naturally enough, did not develop until testimonial witnesses began to play a major part in the trial of causes. Compurgators were not cross-examined, nor were champions, though champions were required to swear they had firsthand knowledge of the cause. 120

It is difficult to imagine a real role for cross-examination in a trial by ordeal, or by compurgation, or by combat, or by a jury relying primarily on its own knowledge and not upon witnesses at all.

It is self-evident that there could not be much of a body of law of evidence prior to the development of trials relying primarily upon testimonial witnesses before uninformed jurors. Wigmore rightly says that the Hearsay rule proper developed between 1500 and 1700. It could hardly have developed earlier, for this is the same period during which the modern method of trial before an uninformed jury which relied upon testimony by witnesses developed. 121 If this method of trial developed then, there could have been no proper rules of evidence prior to this time. The Hearsay rule is a rule affecting what testimonial witnesses may testify to. How could it predate the general use of testimonial witnesses?

This is Wigmore's general line of reasoning in excluding the firsthand knowledge principle from the Hearsay rule. Since it is clearly identifiable as older, it cannot have been and cannot now be a part of the Hearsay rule proper.

This looks fine, until we recall that the use of testimonial witnesses to dying declarations to convict in homicide cases is also older than the Hearsay rule proper. 122 Hence, by the same inexorable but spurious logic, the dying

119 5 WIGMORE § 1364, at 9-10.
120 Note that the demandant’s champion must be one who is a suitable witness of the facts. The demandant is not allowed to prosecute his appeal in person, because prosecution can only be by a suitable witness who heard and saw the facts. 2 GLANVILL *3. See also 5 GLANVILL *5 (as to witness-champion to prove a villein had been freed); 6 GLANVILL *11 (as to witness-champion who made good a widow’s wager of battle for her dower). Cf. GLANVILL (G. Hall ed., 1965):

The intention was that the combatants should be witnesses of the facts, but the mention of hired champions shows that theory and practice might differ: professional champions became common and the institution of battle disreputable. Id. at 180 (additional notes of the editor).

121 5 WIGMORE § 1364, at 12-13.
122 Geoffrey of Hougham appealed Godard and Humphrey of Witham before the Lincolnshire Eyre for slaying his son, Robert. Three witnesses testified to Robert’s dying declaration inciting the defendants. All this was in the year 1202. 1 SELDEN SOC., SELECT PLEAS OF THE CROWN 11 (1888). This case is noted at J. THAYER, EVIDENCE 519-20 (1898).
123 “[T]he witnesses should say nothing but what they know as certain, i.e., what they see and hear.” J. THAYER, supra note 122, at 100-01 (quoting a statement made by G. J. Thorpe in 1349). Notice the usage in 2 F. POLLOCK & F. MAITLAND, supra note 120, in speaking of the law during the reign of Henry III (1227-1272): “The court might have insisted that each juror whose testimony was received should profess a firsthand knowledge of the facts about which he spoke, for already the elementary truth that ‘hearsay’ is untrustworthy had been apprehended.” 1d. at 622. The authors cite the unsuccessful attempt to appeal one Guy Wake in the year 1202 on the basis of secondhand knowledge in support of their view. See 1 SELDEN SOC., supra note 122, at 12. See also R. BAKER, supra note 70, at 1, 23-24; McCOmICK § 226, at 461; J. THAYER, supra note 122, at 518-19.
declaration, being identifiably older, clearly cannot be an exception to the subsequently emerging Hearsay rule itself. There is a certain amount of plausibility to this, but the truth is plain enough: though identifiably far older, a dying declaration is a clear exception to the Hearsay rule.

Certainly, far before the modern trial where the development of facts depends primarily upon testimonial witnesses before an uninformed and impartial jury, and so far earlier than the modern Hearsay rule, there was a rule that to the extent that witnesses are relied upon or used in court, they must have firsthand knowledge of the events about which they testify. This is a part of the meaning in one sense of the word witness. As the use of witnesses became far more common and extensive, this earlier rule applied with equal force to their expanded role. It merged with and became part of the developing Hearsay rule.

To borrow an analogy from simple science, the fact that an element can be clearly identified is no reason to deny its existence in a subsequently produced compound in which it is involved. One who insisted upon mechanical subdivision as the only valid method of analysis would acknowledge the existence of an element in a mixture, but deny its presence in the more subtle compound. Despite the limited apparent logic of this position, men have had a way of trading in their iron swords for steel ones, and of being able to understand the simultaneous existence of three facts: (1) you can still make and have an iron sword if you wish, and do many sword functions with it; (2) all this can be done better with a steel sword; and (3) a steel sword is made mostly of iron.

Wigmore's commitment to his method of mechanical subdivision and tracing compelled him to classify the Firsthand Knowledge Rule as a separate rule from hearsay. What he neglected with this approach was the catalytic effect of the modern witness trial upon the Firsthand Knowledge Rule in the hands of such legal alchemists as Holt and Coke, working dedicatedly to make revolutionary changes to save the common law, and working specifically upon this rule. Coke's complex contribution to the common law might be well keynoted by his own words: "out of the old fields must spring and grow the new corn.

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124 E.g., Bushell's Case, 124 Eng. Rep. 1006 (1656), stated that the verdict of a jury, and evidence of a witness are very different things, in the truth and falsehood of them: a witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. Id. at 1009.

125 The great hearsay rule only took shape during the seventeenth century, and although in modern discussions of it the ground for exclusion is usually stated to be the risk of inaccuracy, owing to the absence of cross-examination, historically the rule is composed with the requirement that the witness should speak only to things within his own knowledge. G. KEETON, THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE 437 (2d ed. 1949). See also R. BAKER, supra note 70, at 12, 23-24.

126 Chief Justice Holt summed up to the jury on this basis in The Trials of Charnock, King, & Keyes, 12 How. St. Tr. 1377 (1696) as follows:

But then, gentlemen, as to what they say, that the witnesses do testify by hearsay, that is not evidence; but what they know themselves, or heard from the prisoners; and so Mr. Charnock insists upon it, that what Mr. De la Rue says against him, is mostly what captain Porter told him, and therefor cannot make a proof, by two: It is true, and therefore I did omit repeating a great part of what De la Rue said, because as to him it was for the most part hearsay: But whosesoever evidence has been given of any fact done within the witness's own knowledge, or of any consult or discourse of the prisoners themselves, that you are to take notice of as good evidence, and consider of it. Id. at 1454.

127 Preface to 1 Co. REP. at 4 (1619).
just what Coke was doing in the area of hearsay. A historical look at the role of hearsay will help to make the point plain. We begin in 1551, the year before Coke was born, with the trial of Edward, Duke of Somerset, for high treason and felony. The following incisive synopsis of the case is attributed to Rastal:

One Attainder passed in Edward 6th's reign, when, though the party was not heard, the witnesses were heard; but when the duke of Somerset came to be tried both for Treason and Felony, he had not the benefit of the accusers being brought face to face, but was proceeded against upon depositions read in the court; he was acquitted of the Treason, but cast for Felony; and that occasioned the Act which the commons grafted upon a Bill sent down by the lords in the subsequent sessions, viz. 5 and 6 Edw. 6. State Tracts, vol. 2, p. 554. By which Act, no person shall be indicted, arraigned, &c. unless the offender be accused by two lawful accusers; which accusers, at the time of the Arraignment, shall be brought in person before the party so accused.

Other sources tell us that the charges against Somerset were false and maliciously contrived, and that this was generally believed at the time. While Somerset's trial seems to the modern eye no worse than the common run of such proceedings at that time, it struck a deep responsive note of outrage among his contemporaries. The Duke had not been dead much over a year when the next Parlia-

128 1 How. St. Tr. 515 (1551).
129 Id. at 521 n.(g). Nearly 150 years later, in the Proceedings in the House of Commons against Sir John Fenwick upon a Bill of Attainder for High Treason, Bishop Burnet, arguing for concurrence of the Lords in the attainder, commented to the same effect on Edward's case and the statute which it had occasioned:

At the duke of Somerset's trial, which was both for high treason and for felony... depositions were only read against him; but the witnesses were not brought face to face, as he pressed they might be. Upon which it was, that the following parliament, enacted, that the accusers (that is, the witnesses) should be examined face to face, if they were alive. Id. at 538, 752.

130 Id. at 523 n.(k).
131 The account of the Duke's execution in January, 1552, in Howell's edition includes the following, given "upon the credit of a certain noble personage, who not only was there present at the deed doing, but also in manner next unto him upon the scaffold, beholding the order of all things with his eyes...": Id. at 522. The customary gallows speech protesting innocence, loyalty and religious principles was made by Somerset, and reported verbatim. At its conclusion, the "noble personage" reports:

When he had spoken these words, suddenly there was a terrible noise heard: whereupon there came a great fear on all men. This noise was as it had been the noise of some great storm or tempest, which unto some seemed to be heard from above; like as if a great deal of gunpowder being inclosed in an armoury, and having caught fire, had violently broken out. But unto some again, it seemed as though it had been a great multitude of horsemen running together, or coming upon them. Such a noise then was in the ears of all men, albeit they saw nothing. Whereby it happened, that all the people being amazed without any evident cause, without any violence or stroke stricken, or any man seen, they ran away, some into the ditches and puddles, and some into the houses thereabout; other some being afraid with the horror and the noise, fell down grovelling unto the ground with their pole-axes and halberts; and most of them cried out, "Jesus save us, Jesus save us!" Those which tarried still in their places, for fear knew not where they were. And I myself which was then present among the rest, being also afraid in this hurly-burly, stood still altogether amazed, looking when any man would knock me on the head.

In the meantime, whilst these things were thus in doing, the people by chance spied one sir Anthony Brown riding unto the scaffold, which was the occasion of a new noise; for when they saw him coming, they conjectured that which was not true, but notwithstanding which they all wished for, that the king by that messenger had sent his uncle Pardon; and therefore with great rejoicing, and casting up their caps, they cried out, "Pardon is come: God save the king!" Thus this good duke, although he
ment met and enacted the statute described by Rastal and Bishop Burnet.\textsuperscript{132} The state now needed two lawful witnesses, brought face-to-face at trial with the accused, to convict of treason. Faced with the difficulty this statute presented, the government struck upon an expedient\textsuperscript{133} which would permit one accuser who had perceived the defendant's treason (or who would say he had and swear it) to inform a second selected person of what he claimed he had observed. Then both these men would be relied on at the trial, thus meeting the requirement of two witnesses as accusers.

The ink was hardly dry upon the books incorporating the statute passed to protest the practices used to convict Somerset, and to prevent their recurrence, when William Thomas was brought to trial for treason. The case is brutally brief and to the point. As reported by Sir James Dyer, a lawyer of note, soon to become a judge and later Chief Justice of the Court of Common Pleas:

**THOMAS'S CASE**

One witness of his own knowledge, and another by hearsay from him, though at the third or fourth hand, are two sufficient witnesses in high treason.

Also, it was there holden for law, that of two accusors, if one be an accuser of his own knowledge, or of his own hearing, and he relate it to another, the other may well be an accuser: and thus did Sir Nicholas Arnold, who accused William Thomas of words which founded and tended to the death and destruction of the queen, of his own hearing, and at the request of William Thomas, he reported over the said matter to Sir James Crofts; Sir J. C. may be an accuser in this case with Arnold. And Sir James Crofts reports this over to John Fitzwilliams, who was supposed a man fit to have killed the queen, and he reports it over to Sir Thomas Wyat, &c. so each of them may be an accuser. See who may be adjudged a good witness in treason . . . \textsuperscript{134}

When Coke was at the height of his powers as Attorney General in 1603, he prosecuted Raleigh for treason with a savagery remarked and remembered even in a time when cruel unfairness in such proceedings was commonplace. In that prosecution, he insisted, over Raleigh's eloquent objection, upon the application of the strained constructions\textsuperscript{135} typified by *Thomas's Case*.\textsuperscript{136} In his old age, Coke

\begin{itemize}
  \item was destitute of all man's help, yet he saw before his departure, in how great love and favour he was with all men. And truly I do not think, that in so great slaughter of dukes as hath been in England within these few years, there were so many weeping eyes at one time; and not without cause: for all men did see in the decay of this duke, the public ruin of all England, except such as indeed did perceive nothing. \textit{Id.} at 524-25.
\end{itemize}

This account may safely be said to indicate the popularity of Somerset, and the general impression of his innocence then obtaining. Other fascinating details of a similar nature may be found in the reports.

\textsuperscript{132} 5 & 6 Edw. 6, c.11, § 12 (1552) (effective June 1, 1553 by statute itself), mis-reported in \textit{5 Wigmore} § 1364, at 19 as \textit{5 Edw. 6, c.12, § 22} (1553).

\textsuperscript{133} \textit{5 Wigmore} § 1364, at 19-24. Much of the story of the strained construction by which the government evaded this requirement until nearly the end of the seventeenth century is well told in \textit{Wigmore's treatise}.

\textsuperscript{134} 73 Eng. Rep. 218-19 (1553). Notice Dyer's clear usage of hearsay as meaning "lacking firsthand knowledge" in the syllabus.

\textsuperscript{135} \textit{See} \textit{5 Wigmore} § 1364, at 19-24.

\textsuperscript{136} \textit{Attorney [Coke]}. . . The crown shall never stand one year on the head of the king (my master) if a Traitor may not be condemned by Circumstances: for if A. tells...
began the publication of his *Institutes.* It in the Third Institute Coke wrote a new and different doctrine from that he pressed against Raleigh:

> And by 5 E. 6. ca. II. it is provided by the last clause save one, (that none shall be indicted, arraigned, condemned, convicted, or attainted for any of the treasons or offences aforesaid, or for any other treasons that now be, or which shall hereafter be perpetrated, committed, or done, unless the same offender be thereof accused by two lawfull accusers, &c. unless the said party arraigned shall willingly, without violence confesse the same.) . . . Two lawfull accusers in the act of 5 E. 6. are taken for two lawful witnesses, for by two lawfull accusers, and accused by two lawfull witnesses (as it is said 1 E. 6.) is all one: which word (accusers) was used, because two witnesses ought directly to accuse, that is, charge the prisoner, for other accusers have we none in the common law, and therefore lawfull accusers

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**THE HEARSAY RULE**

B. and B. tells C. and C., D. &c. you shall never prove Treason by two Witnesses.

*Raleigh.* Could I stop my Lord Cobham's mouth?

*Ld. Cecil.* Sir Walter Raleigh presseth, that my Lord Cobham should be brought face to face. If he asks things of favour and grace, they must come only from him that can give them. If we sit here as commissioners, how shall we be satisfied whether he ought to be brought, unless we hear the Judges speak?

*L.C.J.* This thing cannot be granted for then a number of Treasons should flourish: the Accuser may be drawn by practise, whilst he is in person.

*Justice Gaundy.* The Statute you speak of concerning two Witnesses in case of Treason, is found to be inconvenient, therefore by another law it was taken away.

*Raleigh.* The common Trial of England is by Jury and Witnesses.

*L.C.J.* No, by Examination: if three conspire a Treason, and they all confess it; here is never a Witness, yet they are condemned.

*Justice Warburton.* I marvel, sir Walter, that you being of such experience and wit, should stand on this point; for so many horse-stealers may escape, if they may not be condemned without witnesses. If one should rush into the king's Privy-Chamber, whilst he is alone, and kill the king (which God forbid) and this man be met coming with his sword drawn all bloody; shall not he be condemned to death? My lord Cobham hath, perhaps, been laboured withal; and to save you, his old friend, it may be that he will deny all that which he hath said.

*Raleigh.* I know not how you conceive the Law.

*L.C.J.* Nay, we do not conceive the Law, but we know the Law.

*Raleigh.* The wisdom of the Law of God is absolute and perfect *Haec fac et vives,* &c. But now by the Wisdom of the State, the Wisdom of the Law is uncertain. Indeed, where the Accuser is not to be had conveniently, I agree with you; but here my Accuser may; he is alive, and in the house.

*Raleigh.* Good my lords, let my Accuser come face to face, and be deposed.

*L.C.J.* You have no law for it: God forbid any man should accuse himself upon his oath!

*Attorney.* The law presumes, a man will not accuse himself to accuse another. You are an odious man: for Cobham thinks his cause the worse that you are in it. Now you shall hear of some stirs to be raised in Scotland.

*Part of Copley's Examination*

> "Also Watson told me, that a special person told him, that Aremberg offered to him 1000 crowns to be in that action; and that Brook said, the stirs in Scotland came out of Raleigh's head."

*Raleigh.* Brook hath been taught his Lesson.

*Ld. Hen. Howard.* This Examination was taken before. Did I teach him his lesson?

*Raleigh.* I protest before God, I meant it not by any privy-counsellor; but because money is scant, he will juggie on both sides.

*Part of Copley's Examination*

> "The way to invade England, were to begin with Stirs in Scotland."

*Raleigh.* I think so still: I have spoken it to divers of the Lords of the Council, by way of discourse and opinion.

*Attorney.* Now let us come to those words of "destroying the king and his cubs."

*Raleigh.* O barbarous! If they, like unnatural villains, should use those words, shall
must be such accusers as law allow. And so was it resolved in the Lo. Lumleys case by the justices: for if accusers should not be so taken, then there must be two accusers, by 5 E. 6. and two witnesses by 1 E. 6. And the strange conceit in 2 Mar. that one may be an accuser by hearsay, was utterly denied by the justices in the Lo. Lumleys case."

The whole development and context, including Coke's marginal note citing Dyer's report of *Thomas's Case*, make it plain that he was using the word hearsay the same way Dyer did, that is, as meaning a lack of firsthand knowledge. The central thing wrong with the second accuser provided by the method approved in *Thomas's Case* was a total lack of firsthand knowledge with respect to the reasonable act of the accused. Coke described this defect as hearsay. His usage was a correct one, despite Wigmore's insistence that only cross-examination, not firsthand knowledge, is involved in hearsay exclusion. To evade this analysis, it is necessary to take the position that the man on the stand under oath testifying is not the witness, but rather someone not present in court at all. Taking the firsthand knowledge element out of the Hearsay rule necce-
sitas this Alice in Wonderland shift in the meaning of the word “witness.”

From the emergence of the Hearsay rule until Wigmore propounded his analysis in 1904, firsthand knowledge was a merged part of the rule. We have seen Dyer use the word “hearsay” to describe testimony not based on firsthand knowledge in 1553. In defending himself in 1603 Raleigh used the word “hearsay” only in objecting to depositions from Watson and Brook which showed on their face a lack of firsthand knowledge, never in connection with his far more frequent objections that the witnesses against him were not produced in court for examination. In his Third Institute, published in 1644, Coke called the use of second hand knowledge witnesses hearsay, and branded the doctrine that would permit it a “strange conceit.” In the midst of the trial of a rather racy 1663 case, the bigamy prosecution of one Mary Moders, known as “the German Princess,” the judge brought a prosecution witness up short with these words: “Where is this man her husband? Hearsays must condemn no man: What do you know of your own knowledge?” Again, in 1681, we see in the trial for high treason of Doctor Plunket, Primate of Ireland, the Lord Chief Justice cross-questioning the prosecution witness closely as to whether he had firsthand knowledge, and directing him: “This you speak of their information. What do you know of your own knowledge?” In 1696 Lord Chief Justice Holt in Charnock’s Case criticized the testimony of certain witnesses as lacking a firsthand knowledge basis. He called this testimony hearsay, and said it was “no evidence.” In 1726 Chief Baron Gilbert, author of the first treatise on common law evidence, considered the firsthand knowledge requirement an integral part of the hearsay concept. The first definitive American pronouncement on the nature of hearsay was given by Chief Justice John Marshall in Mima Queen v. Hepburn. The syllabus of that case, which became the leading American authority and remained so until the Wigmore era, opens thus: “Hearsay evidence is incompetent to establish any specific fact, which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge.”

141 “But ‘glory’ doesn’t mean ‘a nice knock-down argument,’ ” Alice objected. "When I use a word," Humpty Dumpty said, in a rather scornful tone, “it means just what I choose it to mean — neither more nor less.” L. Carroll, Through the Looking-Glass 94 (Random House ed. 1946). Apparently, the word “witness” means whatever the user chooses it to mean.

142 5 WIGMORE, EVIDENCE § 1363 (1904).
144 “Raleigh. I am not named in all this: there is a law of two sorts of Accusers; one of his own knowledge, another by hear-say.” The Trial of Sir Walter Raleigh, 2 How. St. Tr. 1, 20 (1603).
145 COKLE, supra note 138, at *25.
146 The Trial of Mary Moders, 6 How. St. Tr. 273, 276 (1663).
147 The Trial of Dr. Oliver Plunket, 12 How. St. Tr. 447, 455 (1681).
148 The Trial of Robert Charnock, 12 How. St. Tr. 1377, 1454 (1696).
149 The attestation of the witness must be to what he knows, and not to that only which he hath heard, for a mere hearsay is no evidence; for it is his knowledge that must direct the Court and jury on the judgment of the fact, and not his mere credulity, which is very uncertain and various in several persons; for testimony being but an appeal to the knowledge of another, if indeed he doth not know he can be no evidence. C. B. GILBERT, EVIDENCE 152 (1726), quoted in 2 WIGMORE § 657, at 763.
150 11 U.S. (7 Cranch) 183 (1813).
152 Mima Queen v. Hepburn, 11 U.S. (7 Cranch) 183 (1813).
Norris's Peake shows the common understanding of the concept of hearsay on both sides of the Atlantic at that time as including the requirement of firsthand knowledge as well as the opportunity to cross-examine.\textsuperscript{153} Chancellor Kent in his turn found the same weakness in hearsay.\textsuperscript{154} Bentham complained that hearsay was defective for want of cross-examination, but he also saw in it the defect of lack of firsthand knowledge, for he classified it generally as unoriginal\textsuperscript{155} and inferior\textsuperscript{156} evidence. Story's characterization of hearsay as "exceedingly infirm, unsatisfactory and intrinsically weak,"\textsuperscript{157} which Wigmore\textsuperscript{158} and Baker\textsuperscript{159} subsequently criticized as so vague and general as to be meaningless, is only meaningless in terms of Wigmore's theory of hearsay. The weakness which Story saw, as John Marshall had seen before him,\textsuperscript{160} was the absence of firsthand knowledge. Contemporary lawyers would have understood them.

Professor Simon Greenleaf's classic treatise on evidence in the mid-nineteenth century noted that the Hearsay rule protected the right to cross-examine, but found that it equally included the requirement of firsthand knowledge.\textsuperscript{161} The working Bar of the time shared the same understanding of the rule.\textsuperscript{162} Wharton referred to the description of hearsay by Bentham as "unoriginal," and by Best as "second-hand," as correct, and added that "we may fall back . . . upon the general title of hearsay, as designating all testimony from an unoriginal source."\textsuperscript{163}

In March, 1884, the United States Supreme Court heard the appeal of Frederick Hopt, who stood convicted for the second time of murder before the territorial courts of Utah. An important prosecution witness in that case was the surgeon who had made the post mortem examination. The surgeon had testified about examining the body of a man who had met a violent death, but he had not known the decedent. He could only say as to the identity of the body that one Fowler, not produced as a witness, had told him it was the body of John Turner, the man for whose death the prosecution was brought. The prosecution never repaired that link in its case, and the defense threw further independent doubt upon it. In branding the surgeon's testimony "hearsay" on the crucial

\textsuperscript{153} The law never gives credit to the bare assertion of any one, however high his rank or pure his morals, but always requires the sanction of an oath: It further requires his personal attendance in Court, that he may be examined and cross-examined by the different parties; and, therefore, in cases depending on parol evidence, the testimony of persons who are themselves conumant of the facts they relate, must in general be produced; for the relation of one who has no other knowledge of the subject than the information which he has received from others, is not a relation upon oath; and, moreover, the party against whom such evidence should be permitted, would be precluded from his benefit of cross-examination. The few instances in which this general rule has been departed from, and in which hearsay evidence has been admitted, will be found, on examination, to be such as were, in their very nature, incapable of positive and direct proof. \textit{T. Peake, Evidence, 21-}

\textsuperscript{154} Coleman v. Southwick, 9 John. 45, 49-50 (N.Y. 1812).
\textsuperscript{155} 3 J. Bentham, \textit{Rationale of Judicial Evidence} 439 (J. Mill ed. 1827).
\textsuperscript{156} J. Bentham, \textit{Judicial Evidence} xiii (M. Dumont ed. 1825).
\textsuperscript{157} Ellicott v. Pearl, 35 U.S. (10 Pet.) 271, 289 (1836).
\textsuperscript{158} 5 Wigmore \textsuperscript{$\S$} 1563, at 8.
\textsuperscript{159} R. Baker, \textit{ supra note 70, at 20.}
\textsuperscript{160} Mima Queen v. Hepburn, 11 U.S. (7 Cranch) 183 (1813).
\textsuperscript{161} 1 S. Greenleaf, \textit{Evidence} \textsuperscript{$\S$} 98 (1842).
\textsuperscript{162} See Warren v. Nichols, 6 Metc. 261, 264 (Mass. 1843).
\textsuperscript{163} F. Wharton, \textit{Evidence in Civil Issues} \textsuperscript{$\S$} 170, at 171 (1877).
issue of the identity of the body, Justice Harlan, speaking for a unanimous court, quoted John Marshall's words from *Mima Queen*:

The general rule, subject to certain well-established exceptions as old as the rule itself, applicable in civil cases and, therefore, to be rigidly enforced where life or liberty are at stake, was stated in *Queen v. Hepburn* . . . to be, "That hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses, who speak from their own knowledge."  

The Court reversed Hopt's conviction, and at the second point of its syllabus stated: "The rule that hearsay evidence is incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who speak from their own knowledge, reaffirmed."

Kelley's popular text, originally published before Wigmore's treatise, held firm to the traditional ideas through the fourth edition in 1928. The swan song of the classic pre-Wigmore theory can be seen in the 1913 Blue Book edition of *Jones on Evidence*.

Professor Morgan and Dean McCormick both followed Wigmore in separating the Firsthand Knowledge Rule from the body of the Hearsay rule proper, but it is apparent that they did so uneasily, reluctantly, and with unstated reservations. Though Professor Morgan in 1954 grudgingly attorned to the orthodox Wigmore theory that the single basic element of hearsay is the right to cross-examine under oath, in his earlier *Model Code*, which he must have regarded as the major and definitive expression of his views on the subject, he said:

As our system changed in character from investigative to adversary the rule rejecting hearsay and the rule making opportunity for cross-examination a requisite of admissibility developed side by side. This was no mere historical accident.

We agree that this was no accident, as pointed out in our earlier discussion relating the ancient firsthand knowledge rule, the development of trial by witnesses before uninformed juries, the right to cross-examine, and the ultimate development of the Hearsay rule. What is presently more important is that Morgan's statement is meaningless unless it is read as meaning that the "rule rejecting hearsay" and the "rule making an opportunity for cross-examination" were to Professor Morgan's thinking distinguishable. This means that at the

164 Hopt v. Utah, 110 U.S. 262, 266 (1884).
165 *Id.* at 262.
166 H. Kelley, *Criminal Law and Practice* 231 (4th ed. 1928): §274. Hearsay evidence is incompetent to establish any specific fact, which in its nature is susceptible of being proved by witnesses who can speak from their own personal knowledge, and not from information received from others, however worthy of credit those others may be.
167 B. Jones, *supra* note 151, § 297. The theory of the pre-Wigmore era crops up sporadically hereafter, e.g., Kelley *supra* note 166, at 231, but the Blue Book edition of *Jones* was the last of the generally recognized works to hold the classic view.
168 2 E. Morgan, *supra* note 87, at 213. For a further discussion of this point, see text accompanying notes 86 & 87 *supra*.
169 *Model Code* 220.
time he hammered out the *Model Code*, Morgan believed there was a major substance comprising the rule rejecting hearsay that was separate from the requirement of the opportunity to cross-examine, which Wigmore had said was all there was beneath the hearsay label. What could this body of hearsay have been other than the firsthand knowledge requirement? This is Morgan's cryptic reservation concerning the orthodox Wigmore analysis of hearsay.\(^{170}\) It is a pity that he did not continue and explain what he thought the nonaccidental relationships between these rules were.

McCormick in his hornbook follows Wigmore's analysis in separating the firsthand knowledge requirement from the body of the Hearsay rule proper. Like Wigmore, he notes that the rule requiring firsthand knowledge is much older than the hearsay rule.\(^{171}\) Like Wigmore, he does not concern himself with the fact that the rule predates the general witness type trial, to a period when witnesses were relatively rare, and adversary cross-examination unknown. Like Wigmore, he seeks to prove the validity of his distinction by an example. The example, while more specific, is identical in principle with Wigmore's. In McCormick's example the arrival of a westbound train at station X at a given day and hour is specified as the legally significant event. We are asked to suppose that the witness was told of this by his brother who arrived on that train. McCormick follows Wigmore in gliding over the difficulties of the example by saying:

Conversely, if the witness testifies that his brother told him that he came in on the train and it arrived on time, the objection for want of knowledge of when the train arrived is inappropriate, because the witness purports to speak from his own knowledge only of what his brother said, and as to this he presumably had knowledge.\(^{172}\)

This will hang together only by the semantics involved in McCormick's non-use of the word "firsthand" before the word "knowledge," though McCormick began the section by describing the rule as requiring "Firsthand Knowledge," and saying that "This is [sic] rule that a witness is qualified to testify to a fact susceptible of observation, only if it appears that he had a reasonable opportunity to observe the fact."\(^{173}\) It is only the declaration by his brother that the witness has *firsthand* knowledge of; not the arrival of the train at the regular time on a certain day in station X, and, by definition, this is the legally significant fact, not the brother's making a declaration on that or any other subject. Thus, McCormick encounters the same difficulty that Wigmore encountered in separating

\(^{170}\) See text accompanying note 86 supra.

\(^{171}\) There is a rule, more ancient than the hearsay rule, and having some kinship in policy, which is to be distinguished from it. This is [sic] rule that a witness is qualified to testify to a fact susceptible of observation, only if it appears that he had a reasonable opportunity to observe the fact. *McCormick* § 226, at 461.

\(^{172}\) *Id.*

\(^{173}\) *Id.*
the firsthand knowledge requirement from the body of the Hearsay rule. Again, any example selected would necessarily encounter the same difficulty, for the basic position is logically untenable. The witness's testimony can only be relevant to the extent that the firsthand knowledge principle is overridden or ignored.

McCormick was undoubtedly conscious of difficulty here, for in the same section he says that although it is to be distinguished from the Hearsay rule, the firsthand knowledge rule has "some kinship in policy" to it. At the close of this section, he remarks in a footnote that the courts have, as he sees it from the point of view of Wigmorean orthodoxy, "confused with the hearsay objection" the lack of what he calls "knowledge-qualification" in rejecting business records not based on personal knowledge, which were offered under the Uniform Business Records as Evidence Act, as being "pure hearsay." Actually, the courts were not confused. McCormick's observation that the objection should have been lack of knowledge-qualification is based on nothing more than the idea that courts should agree with Wigmore's analysis, as he himself did.

Finally, McCormick closes rather weakly on this point by saying that it is just a matter of form, anyway.

The distinction is one of the form of the testimony, whether the witness purports to give the facts directly upon his own credit (though it may appear later that he was speaking only on the faith of reports from others) or whether he purports to give an account of what another has told him and this is offered to evidence the truth of the other's report.

This would seem to admit that the substantial trouble, or at least a very substantial trouble, in both cases, is that the witness does not know, from firsthand knowledge, what he is talking about. In other words, admission of such testimony would violate the Firsthand Knowledge Rule.

To hang real consequences upon differences as to the form of words uttered as testimony is to go back to the interesting days of the approvers, when great issues depended upon such things. McCormick admitted here that the distinction between the Firsthand Knowledge Rule and the Hearsay rule proper was a matter of form, without substance. He closed by noting rather disconsolately that the courts often decline to follow the theory that the lack of firsthand knowledge is not a part of the hearsay plexus. This is not a matter for discouragement, since it shows that a number of courts have not shared the confusion which affects many writers on this point.

The courts, however, should not be expected to unravel riddles and apparently violate seriously advanced distinctions (though these may later be conceded to be mere form, without substance) in order to exclude testimony

174 Id.
175 Id. at 462 & n.3.
176 Id. at 462.
177 See Rex v. Rudd, 98 Eng. Rep. 1114, 1117 (1775), for an interesting discussion of the fatal consequences for the approver who forgot or varied any slightest detail of form in his testimony before the coroner when he came to repeat it before the court.
178 "Judicial opinions frequently describe as hearsay evidence which on more accurate analysis would indicate that want of knowledge-qualification is the appropriate objection." McCormick § 226, at 462.
which ought to be excluded under the Hearsay rule. The obfuscation of one of the true values of hearsay exclusion by the orthodox Wigmore and McCormick analysis must bear a share of the responsibility for the increasing tempo and severity of attacks upon the Hearsay rule, and the values of excluding hearsay in trials. It would be helpful if there could be a simple restatement of the Hearsay rule proper, which indicated on its face the major values that the rule protects. This is not a matter of changing the existing law, but merely of drawing back together a concept mistakenly bisected. In their present, divided, orthodox form, the Hearsay rule, and the supposedly separate rule requiring firsthand knowledge, are reminiscent, when compared to the unified Hearsay rule Marshall and Greenleaf knew, of the maxim about the sum of the parts falling short of the whole. A possible restatement might read:

HEARSAY IS ANY TESTIMONIAL ASSERTION NOT SUBJECT TO CROSS EXAMINATION, OR NOT BASED ON FIRSTHAND KNOWLEDGE, OR BOTH.

The words are used in their normal workaday sense, and less ambiguously and arbitrarily than in many current orthodox definitions accepted as standard. The definition leaves out problems about human acts having a meaning beyond simple motion, which McCormick indicated as a borderland problem area, and which Falknor shed much light on. These are important problems, but the purpose here is to attack the present central, rather than borderland, problems. Hearsay suffers primarily from a split personality as a result of Wigmore's bisection. The remedy for this is to restate the hearsay concept so as to include once again, as it was included for 300 years, the concept of required firsthand knowledge. The objective is to see the definition of hearsay refer in simple terms to the values that hearsay exclusion is designed to protect, which are the right to cross-examination, and, equally, the requirement that the witness have firsthand knowledge of what he is testifying about. It does not matter much whose definition does this best, if there is agreement that a hearsay definition should do those things.

It might initially appear that documents which courts admit as evidence of the facts recited in them would indicate that the Firsthand Knowledge Rule applies to the absent declarant or recorder, and not to the witness, and that this would be consistent with the examples of Wigmore and McCormick, which in turn would indicate an error in the theory presented here. Certainly, unless the firsthand knowledge requirement centers on the authentication witness rather

179 Id. § 229.
181 It is not particularly important whether the Hearsay rule is stated in the particular words suggested above. The major effort in writing this article has not been upon refining the short definition, but upon working out a theory that firsthand knowledge is an integral part of the Hearsay rule, and should not be artificially segregated out. If that general theory is accepted, better short definitions may be worked out at leisure. But if it is rejected, then the lack of a perfectly polished definition will be a matter of indifference.
182 5 Wigmore § 1361, at 2. See text accompanying notes 105 & 106 supra.
183 McCormick § 226, at 461. See text accompanying notes 173 & 174 supra.
than the absent declarant, documents as evidence would seem inconsistent with this theory. However, this situation presents no problem when it is recalled that the authentication witness must have firsthand knowledge of the authenticating facts, and that thereafter the document must still pass the hearsay test by way of an exception. The important point is that these documents are conceded to be exceptions to the Hearsay rule and its protections, and hence are consistent rather than inconsistent with this theory.

V. The True Values of the Hearsay Rule

The true values of the Hearsay rule are the right to cross-examination and the requirement of firsthand knowledge. Uncross-examined testimony is as potentially deceitful as a television commercial. Compare the smooth plausibility of prepared press releases by politicians, generals and governmental officials with the testimony of the same men under an experienced attorney’s cross-examination before a congressional committee covering the same subject matter, when the facts and truth about that subject matter have subsequently become open to serious question. Our press has given this the name of “The Credibility Gap.” This is the “gap” exposed by cross-examination. This “gap” is not an invention of any particular politician or administration, but is a hallmark of statements made by such public figures upon politically dangerous and controversial subjects. While the general press has begun to develop a slight skill in the cross-examination area, they do not compare with attorneys. Of course, they lack compulsory process, although they do wield the compulsion of public exposure and opinion. While not a monopoly of any particular administration, there has been a much higher incidence of exposures in recent years, and exposures closer in time to the fact distorted in the unilateral statement. The effect of these revelations is considerably dampened by the passage of time which renders alternatives once viable hopelessly irrelevant. The mishandling of the war warnings to Pearl Harbor in 1941 and the subsequent concealment of these facts was of largely academic interest when exposed after the War. Relatively (by comparison) minor peccadillos by the government, exposed nearer in time to the concealed or distorted facts, have produced far greater public reaction.

184 Generally the exceptions also require firsthand knowledge of the recorded event on the part of the recorder.
185 Similarly, the hypothetical expert witness in a sense departs from firsthand knowledge in testifying, but is sui generis in many respects, and in this one, in stating opinions, is an exception to the Hearsay rule.

One of the main divisions of the law of evidence excludes opinion evidence and hearsay. Insofar as witnesses were concerned, both rules had a common origin in the requirement that the secta and pre-appointed witnesses must speak to knowledge derived from the use of their own faculties. . . . From 1580 onwards, the practice grew of summoning witnesses to fact, as distinct from pre-appointed witnesses to deeds, sales, and similar transactions, and the court took an early opportunity of applying to them rules previously applicable to transaction witnesses. Thus the rule excluding opinion evidence was settled in Coke’s time, with a list of well-recognized exceptions admitting the opinions of experts . . . . G. Keeton, Elementary Principles of Jurisprudence 437 (2d ed. 1949). See also Trustees of Placerville Union School Dist. v. Poinski, 70 Cal. Rptr. 73, 78-80 (Cal. App. 1968); Rogers, Expert Testimony v (3d ed. 1941). See generally J. E. Conrad, Modern Trial Evidence § 264 (1956); J. Lawson, Expert and Opinion Evidence 603-16 (2d ed. 1900).
There are undoubtedly considerations of this kind connected with the wall of silence shared by two administrations and both parties over the Bay of Pigs incident. We shall one day know a good deal about it. When we do find out about the Bay of Pigs, or at least some of it, the interest of many will have been seriously diminished by death, and the rest will have new monsters aplenty to grapple with.

Very little could be added to the catalogue of virtues previous writers have ascribed to adversary cross-examination as a tool for bringing forward the true, and for exposing the false. The intense importance of these functions accounts for the nearly pitiless limits to which our law permits legitimate impeaching cross-examination to go. If we do not encounter the “credibility gap” type of falsehood in direct testimony in court as often as we hear it from press releases of politicians, it is because the witness and the lawyer offering him know that the test of immediate cross-examination must be faced, a test which the politician has every reason to believe he will never be compelled to endure, and usually does not undergo.

The values of hearsay exclusion are great and fundamental. Sir Walter Raleigh burned them deeply into the conscience of the common law when he found himself condemned for treason by a witness admittedly lacking any firsthand knowledge of the treasonable act. Denouncing this as hearsay, Raleigh turned upon his judges and said, “If this may be, you will have any man’s life in a week.” Raleigh was right, and they had first his liberty, then his estate, then his honor, then his son’s life, and finally his own life. He stands a martyr to the rights protected by the Hearsay rule. His trial showed us what common law justice could be like without the requirements of cross-examination and firsthand knowledge.

Wigmore said that John Marshall’s condemnation of hearsay evidence for its intrinsic weakness was so vague as to be nearly meaningless, was spurious, and certainly unsound. He also leveled these same criticisms at Mr. Justice Story, who shared Marshall’s view about the unreliability and weakness of hearsay. These strictures are tenable only so long as Wigmore’s analysis of hearsay is accepted as correct. The moment we recognize that hearsay exclusion includes equally the value of requiring the witness to have firsthand knowledge, Marshall and Story’s statements become meaningful. Wigmore neglected

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186 The Trial of Sir Walter Raleigh, 2 How. St. Tr. 1, 20 (1603).
187 The story is told in C. Bowen, THE LION AND THE THRONE 190-224 (1957). It seems plain Raleigh would never have behaved with the desperate irresponsibility he displayed regarding the last expedition except for the compulsion of his imprisonment under this sentence. His execution in 1618 under the 1603 sentence is reported at 2 How. St. Tr. 42-45 (1603).
188 There is no need to become entangled in the question of whether Raleigh may in fact have been party to one of the treasonable plots endemic to the time and place. The evidence and manner of his trial certainly fail to convince of guilt, but the fact of guilt or innocence has become largely irrelevant. The trial did prove something permanently relevant, that where the rights protected by the Hearsay rule are trampled underfoot, the state may indeed have any man’s life in a week. Analyzed in a long-term perspective, the facts of the trial and its manner outrage us, not the possibility of treason against James I, even if that possibility may have been true. Hence the word “martyr” does not imply or depend on Raleigh’s innocence of the charge, or of other misdoings at other periods of his life.
189 5 Wigmore § 1363.
to say that in the case in which Marshall made his famous statement\(^{190}\) there was no cross-examination problem, for before the court and subject to cross-examination were the declarants who said they knew that Mima Queen and her child were free because her ancestor had been a free person. The problem was that that ancestor had lived so long before that no living person could be produced who could swear, "I knew her as a free woman." The witnesses who were produced had only the defect of a lack of firsthand knowledge of the relevant fact, which was the freedom or slavery of Mima Queen's ancestor.\(^{191}\)

Mr. Justice Story identified cross-examination as a major value underlying hearsay exclusion, but saw as an even greater point its "exceedingly infirm, unsatisfactory and intrinsically weak . . . nature and character."\(^{192}\) Again, this is foolishness unless Mr. Justice Story meant to identify the firsthand knowledge requirement as a major element of the Hearsay rule.

Wigmore, with his characteristic pattern of analysis by subdivision, separates in his treatise and characterizes as spurious theories of the Hearsay rule which he calls (1) risk of incorrect transmission, (2) intrinsic weakness, (3) personal knowledge requirement, and (4) anonymous utterance or rumor.\(^{193}\) This intricate subdivision is a familiar device of argumentation whereby an inconvenient obstacle is divided into the smallest possible segments and each is "refuted" separately. Risk of error in transmission, intrinsic weakness, and anonymous utterance or rumor are nothing more than subsidiary fragments of the principal idea, i.e., the requirement of Firsthand Knowledge by the witness on the stand. That was what Greenleaf saw.\(^{194}\) To refute this, Wigmore merely characterizes this idea as "spurious."\(^{195}\) In a social context, a fine lawyer once described the Hearsay rule as preventing courts from relying on gossip. He saw what Marshall, Story, and Greenleaf saw. The trouble with gossip is that it is anonymous rumor, and the trouble with the witness who states it is that he lacks firsthand knowledge. It is a sophism to separate these ideas into different concepts or schools of thought in this context.

Modern critics of the Hearsay rule should ask themselves about the propriety of uprooting the boundary stones of freedom represented by cross-examination and firsthand knowledge in trials, for these are the core of hearsay exclusion. Exceptions to the Hearsay rule, as their reform and revision moves forward, should be examined and formulated in the light of these values to see if the specific inroads proposed by the exceptions are defensible in that light. Those who advise the abandonment of the Hearsay rule because business relies heavily on hearsay for its important decisions never go the additional step of reflecting

\(^{190}\) Mima Queen v. Hepburn, 11 U.S. (7 Cranch) 183 (1813).

\(^{191}\) The single dissenter, Justice Duvall, sought escape from this dilemma in the ancient pedigree exception to the Hearsay rule. He did not disagree that they were dealing with hearsay; only as to the applicability of the exception for pedigree. Id. at 187 (dissenting opinion).


\(^{193}\) 5 WIGMORE § 1363.

\(^{194}\) S. GREENLEAF, EVIDENCE § 98 (1842). He also included, of course, the values of cross-examination, though Wigmore's report of Greenleaf's view gives no indication of this. See 5 WIGMORE § 1363.

\(^{195}\) 5 WIGMORE § 1363, at 9.
on the accuracy batting average of such business decisions. Further, it is not enough for the legal process merely to make a "profit" of more justice than injustice. Business is not the administration of justice, and the administration of justice is not a business. The stakes are different.

One writer recently pointed to reliance in a trial upon a newspaper account of a fire as a good and sensible thing. Those who have had the interesting experience of being a firsthand witness to events reported in the press, and have compared what they saw or heard with what the paper said, may have some reservations about this. When differences of fact become as significant as they are in trials, the typical newspaper story does not commend itself as a source. No sensible person would expect 100 percent accuracy from the regular press. In light of its function, the free press does very well on accuracy. Trials are not 100 percent accurate on fact finding, but the rules of evidence make them more accurate than newspaper accounts. It is not accidental that the expression "trying the case in the newspapers" has the meaning that it does.

The abolition or emasculation of the Hearsay rule would make men's lives, liberty, fortunes, and reputations depend upon the testimony of those who lack firsthand knowledge of the relevant facts they assert. Should men so affected be denied, without most pressing reason, the right to cross-examine those asserting such potentially damaging facts against them? Should men seeking to establish a right or make a recovery be turned back by such evidence?

John Marshall's characterization of hearsay in the Mima Queen case becomes understandable, clear and logical when the missing element is returned to the modern definition of hearsay. Until Wigmore's time, Mima Queen was the leading American authority on hearsay. Marshall wrote well, but not often with this eloquence. Perhaps he was remembering how Aaron Burr had hit upon a piece of casual hearsay to compass Alexander Hamilton's destruction. For whatever reasons, Marshall spoke powerfully. It is not yet twenty-five and if we try, we can still understand him.

Issues of due process emerge like headlands from behind the fog of the Wigmore analysis. The violation of the firsthand knowledge aspects of the Hearsay rule is so fundamental as to be within the "pretense of a trial" condemnation of Brown v. Mississippi. Once hearsay is understood as including the firsthand knowledge element, a question as to whether such evidence has any permissible value is raised. It is no longer just a case of admissibility for what it is worth in the absence of objection; it is a question of whether it is worth anything at all. Marshall and those who followed him were talking about the "incompetency to satisfy the mind of the existence of the fact." Uncross-
examined testimony is certainly adequate to establish a fact and support a verdict, but evidence not based on firsthand knowledge would not seem to be. This defect rises above mere admissibility, or relevancy, to a matter of incompetency. And that in fact was the word Marshall chose to describe the defect.

The orthodox writers since Wigmore have said that most states will permit hearsay unobjected to to support a verdict. While only three or four states say the contrary, this would not seem to settle the matter, for several reasons. First, the point, though often repeated, has actually been infrequently squarely decided. It takes a patently barbarous trial to raise it squarely, so as to include a visible violation of the firsthand knowledge aspect of hearsay. Secondly, it has been repeated in the context of the Wigmore analysis of hearsay as violating only cross-examination values. Thirdly, the deeper objection is one of competency rather than relevancy or admissibility. The absence of objection puts the case within the familiar, sensible principle that if a witness gives what appears to be firsthand knowledge testimony, and no objection is raised as to whether he had the requisite adequate opportunity to observe the facts he is reporting, the presumption is that he had this knowledge qualification. This is a long way from saying that if it clearly appeared that a verdict rested upon the testimony of witnesses who lacked firsthand knowledge, the absence of an objection would save the verdict. The objection to Marshall and Story's characterizations of hearsay has often been that their statements are not logical because hearsay unobjected to will support a verdict, and the absence of objection should not add weight to intrinsically defective evidence. The answer to this is that the absence of the objection simply gives rise to a presumption that this defect does not exist. The presumption is a necessary and beneficial one under general jefallies principles.

Though the point is explainable, it is not so easily excusable. It harks back to the "contest of skill" era of trials. The saying that hearsay unobjected to will support a verdict sprang out of the same majority courts and majority thinking which assured us until 1936 that a beaten confession unobjected to, with a minimal corpus delicti, would support a conviction for murder. There was good authority up until the time that Wigmore's theory assumed ascendency that, at least in criminal cases, hearsay unobjected to would be incompetent to establish an essential fact. Perhaps it is significant that this statement, made in the leading authority of that time, grew out of an era in which the defendant in criminal trials was almost never represented by counsel, while those who resorted to serious civil litigation usually had counsel whether plaintiff or defen-

203 *E.g.*, McCormick § 54, at 126.
205 2 *WIGMORE* § 654, at 758.
206 It is well to remember that a failure to object can result from ignorance as well as from tactical maneuver.
207 Brown v. Mississippi, 161 So. 465 (1935), *rev'd* 297 U.S. 278 (1936): "That procedure was in accord with that applicable to all civil and criminal trials, recognized in all common-law jurisdictions, and did not result in arbitrarily depriving the appellants of any constitutional or common-law right." 161 So. 465, 468. The Court relied heavily on Wigmore in reaching these results. *Id.*.
208 2 *B. JONES*, *supra* note 199, § 297.
dant. However that may be, it is time to re-examine the "hearsay unobjected to" rule, just as the "beaten confession unobjected to" rule was re-examined some thirty-two years ago.

Those who urge us to abandon the Hearsay rule in favor of unstated standards of reliability which look suspiciously like the judges' intuition, who tell us that the courts of the United States may well collapse unless they are permitted to resort to federal judge-evaluated gossip, would do well to stop and ask themselves whether they would be willing to have their right to life, liberty or property, their family rights, or their reputations judged before a court which denied them the right to cross-examination, or which abandoned the requirement that witnesses against them have firsthand knowledge of what they spoke about, or both. It is no good saying that business often makes decisions on hearsay, as do men in ordinary and trivial affairs of everyday life. Men do not go to court for trade decisions or everyday affairs; they go there to contend for the most important things of their lives, the greatest values they know. Raleigh's warning is addressed to those who say we should force men into such an arena unshielded against gossip.

VI. Post Twenty-fifty Possibilities

In the realm of ideas, it is good to examine the alternatives possible if one fails to persuade others to his convictions. The efforts here may fail to interrupt the trip of the hearsay concept to twenty-fifty and beyond. It is entirely possible that the Hearsay rule, at least by that name, will continue to fall from favor as an obstructionist technicality before the assaults of those who do not understand it, or who prefer the interesting variety of the appraisal of separate judges according to unstated standards of reliability. Should that be the case, the service to be performed by this article will be to point out to the lawyer whose client is being ground under by gossip that a court which accepts Mr. Wigmore's analysis of the nature of hearsay must consider separately an attorney's objection to testimony for lack of firsthand knowledge of the facts being reported. Wigmore's analysis has at least the strengths of its weaknesses. Since he removed the Firsthand Knowledge Rule from the Hearsay rule, he also separated it from the attacks on the "Hearsay rule proper."

The working attorney in such a court should object not only on the old-fashioned ground of hearsay, but separately and specifically for deprivation of the right to cross-examination, lack of firsthand knowledge by the witness, and add separately the constitutional grounds coming into increasing prominence. Nobody seems to be suggesting the abandonment of these standards. There is no rule against saving fine old wine in new bottles.

It would be preferable as policy and stronger as a protection of the funda-

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209 E.g., Smith, supra note 21, at 235-37.
210 See text accompanying note 186 supra.
211 See Smith, supra note 21, at 235-37.
213 See People v. Johnson, 68 Cal. Rptr. 599 (1968), and authorities collected therein
ment values involved to return to the true traditional understanding of hearsay that Coke and Marshall shared. All that is said here is that even if there is no return to the old understanding, these values can and will be protected under other labels by alert attorneys, and the rest of the bar and bench will soon learn to do so from them.

VII. Conclusion

Though there is a good deal of subsidiary confusion about hearsay, the real problem and confusion arises from the general acceptance in the last fifty years of Wigmore’s erroneous analysis of the nature of hearsay. In making this analysis, Wigmore departed from the main current of 300 years of development on the point, and arbitrarily split the Hearsay rule into two parts, one of which he called the personal knowledge testimonial qualification, and the other the Hearsay rule proper. The schizophrenic Hearsay rule which emerged was less than its former self.\(^{214}\) It required some fine hair-splitting to understand, and lacked internal consistency. It was more readily open to attack, and more confusing than the earlier hearsay concept. The confusion and attack have both followed in due course the acceptance of the Wigmore analysis as orthodoxy, and are increasing in intensity. The point has been reached where serious suggestions are multiplying to the effect that the Hearsay rule is just an obstructionist technicality which ought to be abandoned in favor of letting hearsay in “for what it is worth.” This, of course, assumes it has worth, and ignores its chief dangers—assumptions that are directly traceable to the Wigmore analysis.

The evidence is overwhelmingly in favor of the position that the values of hearsay exclusion are not limited to cross-examination rights, as Wigmore held, but include as well an equally important element, the firsthand knowledge requirement. The restatement of the Hearsay rule to clearly reflect these elements would diminish the confusion surrounding the concept and promote its continued acceptance as a beneficial rule protecting major fundamental values.

Even if the authors’ view is rejected, and the Hearsay rule is abandoned, the major values may and probably will be saved under other labels. A name or label is the receptacle of ideas. It is possible for the erosion and debasement of the contents of the receptacle to proceed so far that replacement is preferable to repair. A modern playwright who meant to display dramatically the values connected with the life and works of St. George would find the erosion of the traditional English St. George play too great to permit it even to be used as a starting point. He would probably start anew and call his play by an entirely different name. The values of St. George’s life would thus be saved for us,

See also Smith v. Illinois, 390 U.S. 129 (1968). We do not mean to say that no exception may constitutionally be made to the Hearsay rule, of course. We think it is sound to evaluate the exceptions and improve them in the light of the fundamental values of hearsay exclusion, which values do have an inevitable constitutional aspect.

\(^{214}\) “...a nicely balanced rationalisation” is the verdict reached on Wigmore’s theory in R. Baker, supra note 70, at 23. He notes Wigmore’s aim to make a convincing argument that only cross-examination values were involved as fundamental, and rejects this view. His book deserves more attention in this country than it has received.
instead of foundering in the inconsequential rustic burlesque his play eroded into in the hands of the ignorant. But still, something old and precious, a part of a valuable heritage of the people, best saved if it could have been, would have been lost when the St. George play was written off. It would have been better if the amateur mummers had put St. George and his works back into his play before the erosion was irreversible. We are still in a position to put our St. George back into his rightful place of central importance in our hearsay concept.