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CHANGES IN THE EXCEPTIONS TO THE HEARSAY RULE

By E. W. Hinton*

It is not the purpose of the writer to attempt to discuss all, or even a considerable part, of the changes that have taken place in the law of evidence during the last twenty-five years, the period in which the influence of Dean Wigmore's work has become most apparent. Such an undertaking would involve a study far beyond the limits of a law review article, since a great number of changes have occurred in almost every phase of the subject. The object of this paper is simply to note a few rather significant changes, chiefly in the field of the hearsay rule and its exceptions, which indicate a new and different attitude on the part of a number of the courts, and which may be traced to Dean Wigmore's criticism of ancient dogma. A brief outline of the general development of the law of evidence may be helpful to an understanding of its later progress.

Prior to the early part of the seventeen hundreds there are comparatively few reported decisions on questions of the admissibility of evidence, though it is possible to trace the beginnings of some rules and doctrines to a considerably earlier period. The scarcity of reported cases is not surprising because there was little reason to be over particular about the quality of the evidence introduced at the trial, so long as the jury were permitted to decide the issue without evidence in court, or against the evidence, on the basis of their assumed general knowledge and information, no matter how or where it may have been acquired. If some hearsay was excluded during this period, a great deal was admitted apparently without question.

The ancient power of the jury to act on their own knowledge survived in theory and probably in practice until well into the seventeen hundreds.

During the greater part of the sixteen hundreds it was apparent that the writ of attaint as a remedy for a false verdict had become ineffective. In this transition period its penalties were too severe for practical enforcement against worthy citizens who might have been misled into honest mistakes by unreliable evidence produced by the parties.

The jury were free from the terror of the attaint, and some

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other remedy was needed to protect litigants from the irresponsible exercise of arbitrary power. The power of the court to grant new trials for misconduct\(^1\) of the jury suggested a possible solution of the difficulty. About the middle of the sixteen hundreds an application for a new trial because the verdict was against the evidence failed.\(^2\) The old theory was too strong. It was not for the court to decide that the verdict was false or erroneous. That was a matter to be tried on a writ of attainct.\(^3\) Apparently the first\(^4\) reported case of a new trial granted because of an erroneous verdict occurred in 1665, but ten years later the power of the court to grant a new trial on this ground was denied.\(^5\) This reaction was probably due to the decision in *Bushell's case*\(^6\) in 1670, fully recognizing the ancient power of the jury. There, the judge had fined the members of the jury for contempt in finding contrary to his direction. But on *habeas corpus* the wilful jurors were discharged because the judge was bound to direct hypothetically and the jury could determine the facts on their own knowledge. This power of the jury to act on their own knowledge, and any power in the court to review their action, were obviously inconsistent. The practice of granting new trials for verdicts against the evidence did not become well established until after the end of the sixteen hundreds.

Early\(^7\) in the seventeen hundreds the new doctrine, that verdicts must be supported by the evidence, gained recognition. By the middle of the century the power of the court to direct a verdict for lack of evidence was accepted without question.\(^8\)

But the jury still had a free hand in weighing the evidence. As Justice Buller stated it forty years later: "Whether there be any evidence is a question for the judge, whether sufficient evidence is for the jury."

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2. Slade's Case, Sty. 138 (1648).
3. Nearly a hundred and fifty years later the opinion of Lord Chief Justice Eyre in Gibson v. Hunter, 2 H. Bla. 189, speaks of the judges having in some sort substituted themselves for a jury of attainct on motions for new trials.
4. Anon. 1 Keb. 864 (1665). The case of Wood v. Gunston, Sty. 466 (1655), has been referred to frequently as the earliest instance of a new trial because of an erroneous verdict. But this case involved an excessive verdict, which was not a ground for a writ of attainct, and the court concluded that the jurors must have been prejudiced.
7. It is difficult, if not impossible, to determine just when the judges began to direct verdicts, because the reports do not clearly disclose where the mere advice or exhortation of the judge that the jury "ought" to find thus and so hardened into the peremptory "must." This statement appears in Bushell's Case, *ibid:* "Often upon the judge's opinion of the evidence given in court the plaintiff becomes non suit, when if the matter had been left to the jury, they might well have found for the plaintiff."
Since the jury were confined to the evidence produced in court, it was vitally important that it should be reasonably reliable. The attention of the courts was accordingly directed to the exclusion of evidence that was thought to be too unreliable or too likely to produce prejudice or confusion. Beginning with the middle of the seventeen hundreds there has been a steadily increasing number of decisions on questions of evidence. By the end of the century the rules governing the competency of witnesses had become well defined, though their practical operation left much to be desired. The interest disqualification, no doubt, excluded many unreliable witnesses and also a great many whom there was little reason to distrust. It did not exclude a witness because of bias so long as he had no legal interest. The general exclusion of hearsay was firmly established though the courts did not always recognize hearsay when it was presented. Some obvious cases of hearsay were admitted for exceptional reasons and frankly treated as exceptions. A great deal of hearsay was admitted without a clear appreciation of its true character. As thus developed, there was much in the law that was based on sound reason and experience, and much that was accidental and irrational or at least arbitrary. As decisions multiplied the subject was becoming unwieldy in a mass of details impossible to remember.

Broadly the law of evidence was chaotic and unorganized in the middle of the eighteen hundreds when Greenleaf published the first comprehensive text on the subject and attempted to reduce it to an orderly system. Greenleaf was neither analytical nor critical. He accepted the decisions as he found them, or at least as he understood them, and stated the results to the best of his ability. This text had a tremendous influence on the legal profession and the courts. It operated to crystalize the law into a multitude of hard and fast rules, and probably retarded its development. During the last half of the eighteen hundreds and the first decade of the nineteen hundreds, the principal changes resulted, either from legislation, such as the statutes removing in whole or in part the common law disqualifications of witnesses because of interest, lack of religious belief and conviction of crime, or from accident and inadvertence.

This may be illustrated by the undefined extensions of exceptions to the hearsay rule under the cover of that perplexing and misunderstood phrase, "part of the res gestae." While the last half of the nineteenth century produced many sound and discriminat-
ing opinions on questions of evidence, there were few conscious attempts to reexamine accepted doctrines and extend or modify them on rational rather than technical grounds.

The more important general rules rested on some sound basis but their exact scope and application often involved useless distinctions, inconsistencies and some absurdities. No one questions the soundness of the general requirement that a writing, if available, be produced to prove its own contents, because an unnecessary risk of error is thus eliminated. But the requirement in some instances was carried to questionable extremes, or relaxed without adequate reasons.

It is easy to justify the general exclusion of hearsay because of the risk of error in placing reliance on statements that may be false or misleading. The statement of a witness on the stand may be false or misleading also, but in that case the right of cross-examination furnishes the best safeguard that has been devised, though its effectiveness has probably been exaggerated. There is no corresponding safeguard against error in the case of most hearsay statements. The complete exclusion of hearsay would produce too great hardship in too many cases, and accordingly the need of some relaxation of the prohibition has always been recognized. But the development of exceptions was largely a matter of accident. The scope of the exceptions was more a matter of precedent than any conscious balancing of the advantages and disadvantages. The general attitude of the courts is indicated by the following passage from the opinion of Lord Blackburn in a famous case:

"It is not disputed that the general rule of the English law is that hearsay evidence is not receivable. . . . But to that a great many exceptions have been introduced. I do not say that if we were but beginning to make the law, we should be able to say exactly why so much should be admitted and no more; probably it would be difficult to say that in all cases; but the exceptions have been established and exist, and we have to see whether this case comes within any one of those. . . . But I base my judgment upon this, that no case has gone so far as to say that such a document could be received; and clearly, unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible."

The result reached in the particular case was doubtless sound, but the lack of precedent was the controlling factor.

Lord Blackburn's statement is almost an echo of Lord Kenyon's opinion in a case decided some eighty years earlier: "It is my wish and my comfort to stand super antiquas vias; I cannot legis-

late, but by my industry I can discover what our predecessors have
done, and I will tread in their footsteps."

So long as the judges were impressed with the idea that the
precedents represented the wisdom of the ages, which was not to be
questioned, there was room for nice discriminations, but little scope
for rational development.

In a lecture\textsuperscript{4} before the Yale Law School in 1896, the late Pro-
fessor James Bradley Thayer, after discussing the development of
the law of evidence, thus summarized the main defects as he saw
them:

"The chief defects in this body of law, as it now stands, are that
motley and indiscriminated character of its contents which has already been
commented on; the ambiguity of its terminology; the multiplicity and rigor
of its rules and exceptions to rules; the difficulty of grasping these and
perceiving their true place and relation in the system, and determining, in
the decision of new questions, whether to give scope and extension to the
rational principles that lie at the bottom of all modern theories of evidence,
or to those checks and qualifications of these principles which have grown
out of the machinery through which our system is applied, namely, the jury.
These defects discourage and make difficult any thorough and scientific
knowledge of this part of the law and its peculiarities."

In the course of the same lecture\textsuperscript{5} Professor Thayer observed:

"I have said that our law of evidence is ripe for the hand of the
jurist. I do not mean for the hand of the codifier; it is not; but for a
treatment which, beginning with a full historical examination of the sub-
ject, and continuing with a criticism of the cases, shall end with a restate-
ment of the existing law and with suggestions for the course of its future
development. Such an undertaking, worthily executed, if it should com-
mend itself to the bench, would need only a slight co-operation from the
legislature to give to the law of evidence a consistency, simplicity and
capacity for growth which would make it a far worthier instrument of
justice than it is."

Fortunately a jurist was ready for the great undertaking. Dean
Wigmore's profound scholarship peculiarly fitted him for the almost
impossible task of legal research and constructive criticism, without
which substantial improvement would have been impossible.

In 1899, a year after the publication of Professor Thayer's his-
torical studies of the development of the jury trial, Dean Wigmore
published his first contribution to the subject as a new edition of
Greenleaf, in which the text was substantially rewritten. This was
followed five years later by his monumental work which followed
the Thayer formula in every particular, the historical basis of each

\textsuperscript{4} Thayer, \textit{Preliminary Treatise on Evidence} (1898) p. 527.
\textsuperscript{5} \textit{Id.} at 511.
rule and doctrine, and a critical examination of the cases in the light of logic and psychology, but always with a clear perception of the fact that the evidence was to be considered by an untrained body of laymen with limited capacity for close analysis or nice discriminations.

If he sometimes appears to overestimate the intelligence of the average jury the natural conservatism of the courts may be relied on to check extreme liberality. The natural distrust which the courts have for the jury is exemplified by the recent opinion of *Shepard v. United States* which disposed of an ingenious theory of admissibility on the following grounds: "It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds."

Some time was bound to elapse before the courts and the profession could become familiar with new terminology and adjust themselves to a new way of thinking.

Dean Wigmore’s treatise has been of particular value in clarifying the exact scope of what are now classified as exceptions to the hearsay rule. Probably no phase of the law of evidence has presented more difficulties and more inconsistencies than this field. The prevailing attitude of the courts was strikingly indicated in the passage quoted from Lord Blackburn’s opinion. If a given item of evidence was recognized as hearsay, it had to be excluded unless it clearly fell within the scope of some recognized exception. But what was the scope of the exception? That was a matter settled by precedent and frequently by some accidental or casual circumstance involved in an early case rather than the fundamental reason for the exception. If it had been held that the death of the witness authorized the admission of a certain type of hearsay statement, it did not by any means follow that the unavailability of the witness from some other cause would suffice. A precedent had to be found for such a cause of unavailability.

**Reported Testimony**

In both civil and criminal cases the death of the witness was recognized everywhere as a sufficient reason for admitting proof of

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17. *Supra* note 12.
18. It is not proposed to raise the question as to whether reported testimony is really hearsay, receivable under certain conditions as an exception to the rule. It has commonly been so classified. Dean Wigmore makes a strong case for excluding it from the hearsay class because it has been subjected to the tests of oath and cross-examination, the two main requirements. At least
his former testimony,\textsuperscript{19} provided the other requirements were satisfied, but not much question was raised as to insanity which would disqualify the witness. In civil cases other causes of unavailability were recognized, such as absence from the jurisdiction. Since a deposition might be used in such cases,\textsuperscript{20} it was not a great extension to admit proof of former testimony. But in criminal cases there was a strong disinclination to recognize other causes of unavailability as legally sufficient. The absence of a foreign witness from the jurisdiction was not sufficient in England.\textsuperscript{21} In Illinois, absence from the jurisdiction was not a sufficient ground of unavailability to admit the evidence.\textsuperscript{22} In Massachusetts, illness of the witness rendering his attendance at the trial impossible was insufficient,\textsuperscript{23} the court observing: "The practice has been to confine such testimony to cases where the witness has died; and the weight of authority elsewhere in criminal proceedings is, we think, that the rule [exception?] should not be extended to cases where the witness is ill at the time of the trial."

To be sure in the early nineties there were some opinions in criminal cases recognizing other causes of unavailability, but the general tendency of the courts was to limit the use of former testimony to the recognized cases where the witness had died or become insane or was permanently incapacitated by prolonged illness. The basis of the exception or relaxation of the rule was lost sight of in there is a substantial difference between the statements of a witness made in the presence of the tribunal now trying the case, and the statements of a witness made in some other tribunal or on a former trial, and now proved to the present tribunal by some other means. In the first case, the proof of the making of the statements is real, i.e., the judge and the jury hear them made. In the second case, the proof of the statements is testimonial, i.e., the testimony of the person who reports them, or the official certificate (hearsay statement) of the officer who wrote them down. In the first case the sole question is as to the credit to be given to the statements which the tribunal itself has heard. In the second case there is a preliminary question, the accuracy of the testimony of the reporting witness.

At law, the courts quite naturally preferred the personal presence of the witness, and required it if obtainable. The admission of reported testimony was exceptional, and subject to strict requirements. In short the courts of law have always dealt with reported testimony as if it were hearsay, and hence a consideration of recent developments in regard to this topic is fairly within the announced scope of this paper.

\textsuperscript{19} Mayor of Doncaster v. Day, 3 Taunt. 262 (1810); Rex v. Smith, Russ. & R. 339 (1817); State v. McO'Blenis, 24 Mo. 402 (1857).
\textsuperscript{20} Cazenove v. Vaughan, 1 M. & S. 4 (1813).
\textsuperscript{21} Reg. v. Austen, 7 Cox Cr. Cas. 55 (1856).
\textsuperscript{22} People v. Holman, 313 Ill. 33, 144 N. E. 313 (1924). In this case in which the defendant sought to use the former testimony of a witness who had left the state and been absent some time, the court implies that the evidence might have been admissible if the court had proved that it was impossible to induce the witness to return. Unfortunately the defendant had merely written several letters, and that was not enough.
\textsuperscript{23} Comm. v. McKenna, 158 Mass. 207, 33 N. E. 389 (1893). See also Spencer v. State, 132 Wis. 509, 112 N. W. 462 (1903).
the quest for precedent. As a matter of sound reason the particular cause of the witness' absence was important only as it bore on the practical impossibility of securing his attendance, which was preferable to a report of his testimony. But as between absolute loss of the evidence and a report of the former testimony, there could be but one rational choice. The change of attitude on the part of the courts in the last fifteen years is marked.

In a recent Michigan case\textsuperscript{24} where a witness had disappeared and extraordinary efforts to locate her had failed, the court declared that it was just as impossible for the prosecution to produce the witness as if she were ill, insane or dead and no more could be required. In a late case\textsuperscript{25} in Massachusetts, where the witness had disappeared and was not found after an extensive search, the court after a review of many earlier cases declared: "The ground for the admission of testimony given at a previous trial by a witness since deceased or become lunatic is that necessity requires it to the end that justice may be done. The necessity is just as urgent if the witness cannot be found or is without the jurisdiction. Under modern conditions, absence from the reach of legal process is easy as compared with earlier days. Changed conditions afford no warrant for straining the constitution.\textsuperscript{26} But they require that the common law within the limits of the constitution shall adapt\textsuperscript{27} its principles to meet present needs."

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26. The reference is to the provision preserving the defendant's right to meet the witnesses face to face.
27. The ability of the courts to break away from precedent and adapt common law rules of evidence to changed conditions and ideas is strikingly illustrated by the recent case of Funk v. United States, 290 U. S. 371, 54 S. Ct. 212 (1933). In 1851, the court had decided in United States v. Reid, 53 U. S. 361, that the Judiciary Act of 1789 impliedly adopted the common law rules of evidence then prevailing in the several states as applicable to criminal prosecutions in the federal courts. The Court also decided in Logan v. United States, 144 U. S. 263, 12 S. Ct. 617 (1892) that such rules were not affected by later state legislation. It was too clear for argument that in 1789 neither a defendant nor a spouse of a defendant were competent witnesses. As late as 1920 it was decided without discussion that the wife of a defendant was incompetent to testify on his behalf (Jin Fuey Moy v. United States, 254 U. S. 189, 41 S. Ct. 98). Long before, an Act of Congress had removed the defendant's disqualification, but did not include the spouse of a defendant. In the Funk case the court was struck with the inconsistency of admitting the person most interested to testify on his own behalf while excluding his wife who was less directly concerned, and accordingly held her competent. In 1852, when a similar question arose in England in a civil case (Stapleton v. Crofts, 18 A. & E. [N. s.] 367) the reasoning of the court was purely legalistic. Prior to the statute both husband and wife were incompetent; the statute removed the disqualification of parties to the action. But the wife of a party was not a party, and therefore did not come within the saving grace of the Act. Besides, the court thought that marital peace and harmony might somehow be endangered if a spouse who was not a party were permitted to testify on behalf of the other spouse who was a party.
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This phase of the problem is now on a sound rational basis—the practical impossibility of producing the witness for a second oral examination. There are good reasons for preferring the presence of the witness to a report of his testimony. Even the best stenographers are not perfect recording machines, and some errors are inevitable; the stenographer's punctuation in transcribing may change the meaning; a word which sounds much like another may be accidentally substituted.\(^{28}\) The appearance and demeanor of the witness may detract from the credit given to his testimony. In view of the developments at the former trial or later information a more effective cross-examination may be possible or the necessary foundation laid for proof of contradictory statements.\(^{29}\) These possible advantages are substantial, and in view of the constitutional guaranty a defendant in a criminal case should not be deprived of them without real necessity.

Where the absence of the witness is due to a temporary cause such as a business trip beyond the jurisdiction or a temporary illness, there is normally a strong probability that his attendance can be had at a later date, and a postponement of the trial may be thought preferable to depriving the defendant of whatever benefit there may be in meeting the witness face to face and again cross-examining. A non-resident witness may be far or near. It may be a comparatively easy matter to secure the attendance in Chicago of a witness who resides in Gary or Milwaukee. Efforts to secure the attendance of a non-resident witness may well be required where there is reason to believe that serious efforts would prove effective. It is quite another matter where the witness resides in another jurisdiction remote from the place of trial.

In these modern times witnesses for the prosecution have a way of disappearing or getting out of the jurisdiction. It is usually impossible to prove that the defendant is responsible for their absence so as to admit their former testimony on that ground.\(^{30}\) In such cases attempts to locate the witness or induce him to return for the trial are generally futile. Any overstrict requirements as to the efforts to obtain the personal attendance of the witness can only lead to useless refinements\(^{31}\) and a waste of energy and money.

\(^{28}\) A few months ago the writer delivered a lecture which was reported by a competent court reporter. In the transcript of this lecture, "chose in action" was transformed into "chosen action."

\(^{29}\) Conrad v. Griffey, 57 U. S. 38 (1853), excluding proof of contradictory statements by a deponent to discredit his testimony taken in a deposition, because the cross-examination had not called the attention of the witness to such statements.

\(^{30}\) Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244 (1878).

\(^{31}\) See People v. Holman, supra note 22, that writing of several letters to a witness absent from the jurisdiction for an indefinite stay was insufficient
It may be hoped that the enlightenment which enabled the courts to grasp the principle of unavailability, of which the death or insanity of the witness are but instances, will enable them to apply it with discretion free from technical requirements.

**Statements against Interest**

From a very early period statements by a person against his pecuniary or property interest, i.e., in the sense that if not true they would be prejudicial as admissions to charge him with unfounded liabilities or defeat his just claims, have been received in actions between third persons to prove the facts so stated in cases where death had rendered the declarant unavailable. Similar statements were not receivable where the declarant could be produced as a witness.

The requirement of unavailability might well be strictly enforced, because this variety of hearsay, while it has more than ordinary claims to credit because of the improbability that a man would knowingly make an untrue statement prejudicial to his own interest,

to show the impossibility of securing his attendance. How many letters were required? Or was it necessary to send some one to interview a witness who did not answer letters? Levi v. State, 182 Ind. 188, 105 N. E. 898 (1914), that diligent efforts should have been made to secure the attendance of a non-resident witness, or to take his deposition, which was authorized by statute. The reasons for preferring a deposition to a report of former testimony, are rather slight in most cases. Something of the opposite extreme appears in State v. Budge, 127 Me. 234, 142 Atl. 857 (1928), where the court seems to lay it down as a rule of law that if the witness has left the jurisdiction for an indefinite stay, his former testimony is thereby rendered admissible. The report does not indicate where the witness was, and the result may have been well enough. But it is undesirable that such a problem should be settled by fixed rule. Absence from the jurisdiction for an indefinite stay does not prove that it is practically impossible, or even difficult, to secure the attendance of the witness, where there are no other reasons for the conclusion that a seasonable request for his return would prove unavailing.

32. It is sometimes said that the fact stated must be against the interest of the declarant. But this does not appear to be a satisfactory test. When a man states that he owes a debt or that he has incurred some other liability, or that his title is limited or defective, it is doubtful true that the fact stated, as well as the statement of the fact, is against his interest. But when a man collects an account and gives a receipt, it can hardly be thought that the fact that he has been paid what was due him is against his interest in any realistic sense. At times many creditors would regard the fact as decidedly to their advantage. Yet receipted accounts, where the creditor has died, have always been received under this exception. Warren v. Greenville, 2 Strange 1129 (1740); Higham v. Ridgway, 10 East 109 (1808). A man who has rented a building which he prefers at a rental which is satisfactory to him would hardly think that the fact that he was the tenant of such building was against his interest. But in such cases the statement would be prejudicial if the fact stated were not true. Where the fact stated is against interest, the statement, if untrue, would also clearly be against interest.


lacks the more satisfactory test of oath and cross-examination which obtains in the cases of reported testimony. There may be little cause to doubt the sincerity of the declarant, but his memory might be at fault. Under what was perhaps an accidental extension, statements against interest came to be admitted not only to prove the fact which was against the declarant's interest, but also to prove other matters contained in the statement. This extension greatly increased the need for cross-examination, if possible. In all of the older cases in which such statements and entries had been admitted the declarant was dead. Accordingly the idea became fixed that the death of the declarant was an indispensable condition to the admission of his statement. This idea was expounded as late as 1933 in a suit on a burglary insurance policy, where the burglar had made a written confession and had been convicted and thereby dis-

35. In Warren v. Greenville, supra note 32, which is one of the earliest reported cases, a receipted account of a deceased attorney for drawing a conveyance was admitted to prove that such instrument had been prepared. For this purpose the evidence had high probative value. It was highly improbable that the attorney would have receipted the bill if he had not been paid; and it was equally improbable that the client would have paid the bill if the deed had not been drawn. It should be noted, however, that this last step involves a second collision with the hearsay principle. Payment of the bill by the client leads to a purely circumstantial inference that he believed that the services, with which he was charged, had been rendered, because persons do not ordinarily pay bills unless they believe them to be correct. But the inference from his belief that the services had been rendered to the fact that they had actually been rendered involves his knowledge or information and the accuracy of his memory. In general the hearsay rule requires oath and cross-examination to test the soundness of the belief. Wright v. Tatham, 7 A. & E. 313 (1837); Appeal of Vivian, 74 Conn. 257, 50 Atl. 797 (1901). The second collision with this principle may be justified on substantially the same basis as the first. The client was in a position to know, and self interest would naturally keep him from paying the bill unless he knew that the services had been rendered. In later cases, such as Higham v. Ridgway, supra note 32, and Doe v. Robson, supra note 33, receipted accounts of deceased professional men were admitted to prove when the services were rendered. Good reason to believe that the services were in fact rendered and paid for gave little or no reason for believing that the precise time of their rendition was correctly entered on the debit side of the account. The truth of that statement depended on the accuracy of the bookkeeping.

In the Higham case it is not very likely that the husband would have refused to pay the doctor's bill for attending his wife in childbirth some months before, because the date of the visit may have been incorrectly entered, or that the client in the Doe case would have haggled at paying his attorney for drawing a lease for him because of some error in the date entered on the bill, even if he had noticed it. In general, people are not that particular when settling with trusted professional advisors. One may surmise that the judges were probably subconsciously impressed with the general accuracy of such book entries, and felt that it was safe to admit the paid account, though they could not fit it into the precedents then existing for shop-book entries.

These cases were precedents for admitting statements against interest to prove matters that were not particularly against the interest of the declarant.


37. Tom Love Grocery Co. v. Maryland Casualty Co., 166 Tenn. 275, 61 S. W. (2d) 672 (1933).
qualified as a witness. In holding that it was error to admit the confession to prove the burglary, the Supreme Court of Tennessee observed: "The weight of authority is against the unreasonable extension of the exception to the rule, and most of the cases hold that it is only where the declarant is dead that his declaration against interest will be received." It is obvious that the death of the burglar would have added nothing to the credibility of his confession. If the burglar had died his confession would have been admitted because of the impossibility of obtaining his testimony, and the high probative value of his statement would make it a satisfactory substitute for the unattainable testimony. The conviction of the burglar did not discredit his confession, but it was just as effective as death in preventing any examination of him as a witness.

But at least one court in the fairly recent case of Weber v. C. R. I. & P. Ry. grasped the principle of unavailability justifying the admissions of statements against interest. In that case a railroad company, sued for injuries resulting from a wreck, sought to prove that the wreck was caused by the criminal act of a third person. The criminal had confessed and been convicted. Pending a new trial he was adjudged insane. The court assumed that the adjudication of insanity rendered him incompetent as a witness, and ruled that it was error to exclude his confession. It may be that the court should have required further proof as to his mental condition, for insanity per se does not disqualify. And if not disqualified to testify there was no reason for admitting his statement. But if he was disqualified he was just as unavailable as a deceased person.

The principle of unavailability is obviously the same here as in the cases of reported testimony, but the application may well be more strict because the guaranty of truth by reason of the declarant's interest not to falsify is not a complete substitute for cross-examination. In the case of reported testimony absence of the witness from the jurisdiction and his refusal to return may satisfy the unavailability requirement. In the case of the absent declarant a deposition would be preferable. In one case we are merely dispensing with the personal presence of the witness; in the other we are dispensing with cross-examination.

The Weber case is significant because it opens the way for a

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38. Whether a statement admitting pure criminal liability falls within the exception will be noticed later. This point was not raised in the principal case. The burglar's liability for the civil trespass would probably have satisfied the court on that score. See cases cited in note 45, infra.

39. 175 Iowa 358, 151 N. W. 852 (1916).

determination of the question of unavailability on a rational basis instead of by rule of thumb. Where the unavailability requirement has been satisfied the rational basis of admissibility is an interest in the declarant which would naturally prevent him from making false statements prejudicial to that interest. Statements against a money or property interest generally have that effect, but there are other types of interests which, according to general observation and experience, are just as effective deterrents of false prejudicial statements. On this phase of the problem the courts have been rather inconsistent. If a statement met a rule of thumb test of being against a money or property interest, it was admitted as a matter of course, though it might take an ingenious argument to discover the interest and although the declarant would hardly think of the interest. Thus, a statement by a parent that certain previous transfers of property to his children were gifts, was held admissible as a statement against his property interest because under the doctrine of bringing advancements into hotchpot, the children would be bound to account for advancements on a final distribution of his estate but would not be liable to account for gifts. In other words, under a technical legal doctrine, of which the donor was most likely unaware, he had a sort of string on "advancements" which he did not have on gifts, and this might be thought of as a property interest, the statement being prejudicial to it. On the other hand where an agent in charge of a branch office had written to his principal stating that certain goods had been delivered to such office, the statement was inadmissible. The agent had no interest in the goods and was not stating anything in disparagement of an apparent title. The court

41. The process here bears a curious resemblance to the test of interest to disqualify a witness. The foundation of the common law disqualification was that interest created a bias which rendered the witness too untrustworthy. The interest would be likely to influence the witness to make false statements in his own favor. Originally the courts seem to have looked broadly at the relation of the witness to the litigation to determine whether he had such an interest in the question as would naturally create bias, Reeves v. Simmonds, 2 Mod. 290 (1714). A little later the disqualifying cause of bias became restricted to some legal interest, and the courts became involved in intricate problems in the law of property or the law of judgments and the like to determine whether the witness had a legal interest. An interesting modern example is furnished by the case of Laka v. Krystek, 261 N. Y. 126, 184 N. E. 732 (1933) where the competency of a wife to testify on behalf of her husband in an action against him by an administrator depended on whether she would be legally affected by the result, and the court was accordingly forced to explore several different fields. It can hardly be supposed that an ordinary lay witness would know whether he had a legal interest or not in such a case. An interest of which he was not aware could not produce bias; but if he mistakenly believed that he had an interest he would be just as biased as if his belief were well founded.

42. Gunn v. Thurston, 130 Mo. 339, 32 S. W. 654 (1895).
43. Smith v. Blakey, supra note 36.
thought it was not against his money interest because the delivery of the goods into his care did not subject him to any pecuniary liability. Even so, when the agent wrote the letter it is not likely that he was thinking about legal liability, but it would very naturally occur to him if there was any doubt about the goods having been delivered that it would be highly inadvisable to make a false report to his principal that he had received them. In a popular sense it would be decidedly against his interest to send in a false report that the goods were on hand. It may be that the difficulty of estimating the probable effect of a non-legal interest in producing a true statement furnishes a sufficient reason for confining admissibility to statements against some legal interest. At any rate that problem deserves independent consideration. The courts have usually been rather liberal in finding a sufficient money or property interest to satisfy the exception, but an interest in life or liberty as affected by the criminal law did not fit the precedents. All of the older cases in which any question was raised involved the admissibility of statements against a money or property interest.

In the *Sussex Peerage* case,\(^4^4\) in order to prove that a marriage had taken place abroad, proof was offered of a statement by a man, since deceased, that he had performed the ceremony. It was argued that the statement was against his interest because the fact would subject him to a penalty under the Royal Marriage Act. The advisory opinions of the judges agreed that the statement was inadmissible. The reasons given in nearly all of the opinions were that no case had gone so far, i.e., no precedent for it and it would be dangerous to extend the exception to this sort of an interest. None of the opinions pointed out the danger to be apprehended. Lord Campbell gave what appears to be a substantial reason for the rejection of the evidence in question in that case, namely, that it could not be assumed that the declarant realized that the Royal Marriage Act applied to matters that took place outside of England, and unless he did the fact stated would have no psychological effect. If a man does not know that he is making a statement against interest, the basis of admissibility is wanting. At any rate the *Sussex Peerage* case was generally accepted as settling the question, and numerous attempts to introduce statements of criminal liability failed unless such statement showed a civil liability also.\(^4^5\)

\(^4^4\) 11 C. & F. 85 (1844).

\(^4^5\) Truelsch v. Miller, 186 Wis. 239, 202 N. W. 352 (1925) (a letter by a suicide confessing embezzlement); Kittredge v. Grannis, 244 N. Y. 168, 155 N. E. 88 (1926) (book entries showing criminal conversion of securities held by a broker); Weber v. C. R. I. & P. Ry. Co., *supra* note 39 (confession that declarant loosened a rail and thereby caused a train wreck). In these cases the statement proved both criminal and civil liability.
Accordingly the Supreme Court of the United States held a confession of murder by a third person, since deceased, inadmissible to prove that the homicide was committed by him instead of the defendant. Justices Holmes, Lurton and Hughes dissented. One is impressed with the terse statement of Justice Holmes that, "No other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations which would be let in to hang a man." In the cases where confessions of crime have been admitted the fact that there was a civil liability also certainly added little to the probative value of the statement.

According to the accepted theory a confession of the commission of a misdemeanor punishable by a fine would be clearly against pecuniary interest and therefore ought to be admitted, while a confession of a non-tortious felony would not be. Further comment is superfluous. In 1923 the Supreme Court of Appeals of Virginia set forth a new precedent sanctioning the admission of a confession of murder by a person since deceased on the rational basis that the improbability of a false confession of the commission of a capital felony is certainly as great as the improbability of a false admission of a civil liability. If this rational view is accepted, a perplexing question may arise. All of the cases that have come to the writer's notice so far, in which it was sought to use the confession of a deceased criminal, either involved a civil contest between third persons, as in the Weber case, and the case of Tom Love Grocery Co. v. Maryland Casualty Co. or were criminal prosecutions in which the defendant sought to use the confession of a third person to prove the latter's guilt as in the case of Donnelly v. United States. Suppose the prosecution sought to use the confession of a third person, since deceased or disqualified, implicating the defendant—for example, a confession stating that he and the defendant committed the crime. We might be perfectly willing to accept the confession to prove the declarant guilty, but hesitate to accept it to prove the defendant’s guilt. That part of the statement is not against interest, and has little to guarantee its truth. It is familiar law that in general the confession of A is not admissible against B, though they are charged jointly with the commission of an offense. Of course in these cases the declarant was not unavailable.

46. Donnelly v. United States, 228 U. S. 243, 33 S. Ct. 449 (1913), citing a number of the earlier cases.
48. Supra note 39.
49. Supra note 37.
50. Supra note 46.
If the civil rule is applied in its entirety to criminal cases a very questionable result might be reached. It would seem more in accordance with reason to confine the use of statements against interest in all cases to the proof of the fact which was against interest since the probative value of other parts of the statement is conjectural.

**Statements of Pedigree**

It is probable that certain kinds of family hearsay have always been used to prove relationship where that issue was involved. If it became necessary to trace relationship back for any considerable period, resort to some sort of hearsay was an absolute necessity. The personal knowledge of a living witness, from the nature of the subject, cannot reach back very far. The aged grandfather might have personal knowledge of family events since his early childhood, but his personal knowledge would stop at that point. Official records of marriages and births were frequently wanting or inadequate. An ancient register in one part of the kingdom, recording the marriage of John Smith and Mary Jones might be difficult to connect with a register in some other part of the kingdom recording the christening of William Smith, son of John and Mary. This general necessity led to a rule of admissibility broader than the necessity demanded, namely, that statements made *ante litem mortam* by some members of the family, since deceased, were receivable in pedigree cases to prove relationship.  

If the statement was made before any known dispute or controversy on the subject, it was fairly safe to assume that the declarant had no motive to misstate the relationship, and if he was a member of the family, it was also a fairly safe assumption that he had personal knowledge or reliable information from other members of the family. There was little danger of mistake in the family understanding that declarant's "Uncle John" was his father's older brother, and the like. No such assumption could be made in favor of statements by persons not directly connected with the family. Accordingly, the statements were limited to those made by persons proved to be members of the family. All of this is familiar law and needs no elaboration. But who were members of the family within the meaning of this requirement? Without much difficulty the courts agreed that if J could be regarded as a member of the family, his wife or widow was also a member of the family, and so in case of M's husband, if she were a member of the family. The husband or wife of a member might be assumed to know what

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such member knew about such matters, or to have the general family information. The typical cases in which these pedigree questions arose involved a claim by $C$ to some share or interest in property left by $D$, by reason of his relationship to $D$. The claimant was trying to prove his relationship to $D$, and quite obviously admitted or proved relatives of $D$ were in a position to know the family connections. A multitude of precedents sanctioned the admission of statements by such declarants. A more difficult question arose where $C$ sought to use the statement of some person proved to be related to him, but not proved to be related to $D$. The case of *Monkton v. Atty. Gen'l.* seems to have been the first in which this question was raised. The Chancellor sustained the admissibility of the declaration. But the *Monkton* case has been criticized, and has not been generally accepted in the United States. It seemed to involve the difficulty of lifting yourself by your own boot-straps. Here was a declarant, not proved to be related to the $D$ family, making statements about the relationships of the $D$ family. How were we to know that he was a member of that family and therefore in a position to know what he was talking about? It was said that we were asked to take his word to prove the preliminary fact that made him competent. It must be confessed that some of the arguments for the contrary view are not very convincing. It has been suggested that relationship is mutual. But that does not seem to advance the argument very far. If declarant is related to $C$, $C$ is necessarily related to declarant, and if $C$ is related to $D$, $D$ is necessarily related to $C$. But declarant's relationship to $C$ does not prove declarant related to $D$, and that may be disputed, and may be the very thing sought to be proved. The writer is related on his father's side to $H$, and on his mother's side to $W$, but $H$ and $W$ are in no way related to each other. If the writer sought to establish his relationship to $H$ by the declarations of $W$, and if the principle, on which this exception rests, requires the declarant to be related to $H$, it is obvious that $W$ would not be qualified.

In a case decided in 1914, involving declarations by a deceased relative of the claimant, but not proved or even claimed to be related to the intestate, the New York Court of Appeals accepted the boot-strap argument and held the statements inadmissible. The facts in the case were as follows: $D$ died in New York leaving property; he was admittedly the son of $J$, long since deceased. $C$ claimed to be a son of $J$ by a second marriage, which would make him a half brother of $D$. Statements by $C$'s mother were offered to prove that $J$ was his father. If it had been proved *aliunde* that the mother was

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54. 2 Russ. & M. 147 (1831).
the wife of $J$, she would, of course, have been qualified as a member of the $J$ family, of which $D$ was known to be a member, and her declarations would have been receivable to prove $C$'s relationship. The court thought that it would be dangerous to admit the statements of one who was only proved to be related to $C$, to prove the latter's relationship to $D$, because that would enable a claimant to connect himself with any family he pleased. If the court feared manufactured testimony to prove statements which were in fact never made, the same danger would be inherent wherever hearsay is used. It is doubtful whether, in general, it would be easier to obtain false testimony to prove a statement claimed to have been made by a deceased relative of $C$, than it would be to obtain similar testimony to prove a statement claimed to have been made by a deceased relative of $D$. If the court feared that the statements would be less reliable, the fears seem to be groundless.

Suppose $C$ had died leaving property, and $D$ had survived and were making the claim. In that case all courts would admit the mother's statements to prove $C$'s relationship to $J$, and thereby make out $D$'s claim. There would be no fears that the statement was unreliable. But the accidental fact that $D$ died first cannot affect the probative value of the mother's statement made long before. That must be judged by its natural probability at the time it was made. If its probative value was high enough to justify reliance on it to prove the relationship of $C$ to $J$ when $D$ happens to be the claimant, it is certainly of no less value to prove the same fact when a change in survivorship makes $C$ the claimant. If the mother's statement had been used to prove $C$'s relationship to $J$, where $D$ was the claimant, the fact that she was $C$'s mother would place her in a position to know the relationship, and the fact that the statement was made long before, when there was no question or dispute and no claim to property involved, would give it a high credit rating. The same facts would seem to give it the same credit rating where a subsequent accident makes $C$ the claimant.

The requirement that the statements must have been made at a time when there was no apparent motive to misstate seems to furnish an adequate safeguard against the fears that such statements might be made by relatives of $C$ to lay a foundation for a claim by him at some time in the future in case some supposed relative should die leaving undisposed property. Accordingly, in one of the latest cases the Supreme Court of Connecticut held that it was sufficient that the deceased declarant was proved to be related to the claimant. In some

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of the earlier cases 57 frequently cited, some American courts have accepted this rational view, but such acceptance was not necessary to the decision. Thus, a court of high standing has accepted the probative value of the evidence as a test instead of an arbitrary requirement.

**BUSINESS ENTRIES**

The shop-book rule and its extension to business entries in general is well enough known. The development of the rule led to certain technical requirements that have produced serious inconvenience and expense without substantial benefits.

It is probable that prior to the Act of 7 James I, c. 12 (1609) the small merchant who kept his own books was enabled to use them to prove accounts against customers. While the Statute in terms merely prohibited the use of shop-books to prove accounts more than a year old, the influence of this legislation appears to have resulted in the complete exclusion of such books on behalf of the seller. He was disqualified as a witness because of interest, and his unsworn statements in his own favor could have no better standing than the disqualified author. The entrant, during his life time, might have testified in an action between these parties to the facts recorded in his books, and he might have used the books as an aid to memory. But the early cases dealing with an entry of payment in the attorney’s or physician’s book as a statement against interest make it clear that the courts did not regard the book as admissible on any theory of business entries. Economic necessity forced a relaxation of the rule in the United States. In New England and some of the Atlantic states a limited exception was made to the general incompetency of plaintiff, enabling him to “authenticate” his book. In other states the general accuracy of the book might be proved by satisfied customers. In one way or another the book could be used in most of the states. This phase of the problem is of little importance today and need not be further noticed.

The same economic necessity which forced the American courts to permit the use of the small dealer’s book forced the English courts to make some concessions in favor of books kept by a clerk or other employee. No discrimination appears to have been made between accounts more than a year old and those which did not fall within the terms of the statutory prohibition. Books as such were under a ban. Taylor suggests that the theory adopted was that of refreshing

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The clerk was competent as a witness and might, of course, look at a contemporaneous memorandum to stimulate his memory or adopt it as a record of past recollection if he could remember that it accurately recorded the transaction, though he could not now recall the original details. This theory, while fully recognized by precedent for casual contemporaneous memoranda, could not be applied practically to the routine transactions recorded in shopbooks. After the lapse of any considerable period of time it would be a rare case indeed in which the person making the entry would have his memory stimulated in the least, or even remember making the entry, much less its correctness. The writer has no psychological statistics on this point, but in some years of practice, which not infrequently involved an investigation of transactions recorded in the books of banks and other business concerns, he was never able to get any first hand information. The bookkeeper never had any recollection of the matter. He relied on the books, and was perfectly willing to swear that they were correct. The courts may have clung to the theory, but they were forced to indulge in violent presumptions to support it. Necessity forced the admission of the books when verified by the testimony of the bookkeeper, though it was perfectly apparent that he had no recollection of the matter at all and that at most his verification was simply a conclusion based on his routine business practice.

This ancient theory, evolved to avoid an application of the statute which would disrupt all credit, resulted in the theoretical necessity of calling the bookkeeper as a witness. Only a pressing necessity would justify a clear collision with the statutory prohibition. The statute

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60. This appears at times even when regular entries were not involved. Thus in Maughm v. Hubbard, 2 Man. & R. 5 (1828), where it was sought to prove several payments of money to a bankrupt who had signed his initials to certain entries in a "rough" cash book in which payments to him were entered, the witness testified: "I have no recollection that I received the money; I know nothing but by the book; but seeing my initials, I have no doubt that I received the money." In approving the admission of this evidence, Lord Tenterden observed: "I think that amounted to a statement that he knew and recollected, independently of the book, that the money had been paid to him." Occasionally a realistic judge has recognized that this is nothing but camouflage to cover the admission of desirable evidence which actually does not fit an accepted theory. In Anchor Milling Co. v. Walsh, 108 Mo. 277, 18 S. W. 104 (1891), the late Judge Black observed: "Since a party may testify in his own favor, it must be conceded that he, as well as his clerk or bookkeeper, may refresh his memory from entries made by him or under his eye, and then testify with his memory thus refreshed. Now in cases of account composed of many items, all this means nothing more than reading the book in evidence."
was not regarded as in force in the United States. It was rarely referred to in later English cases, and in time was forgotten. But the rule that the bookkeeper must be called as a witness, if available, still prevailed. In case of his death, insanity, or absence and his whereabouts unknown, the necessity justified the admission of the book on some other proof that would warrant the conclusion that it was a reasonably reliable record of the transactions recorded. There can be little doubt that the requirement that the maker of the entries be called to testify, if available, and that necessity alone justified some substitute for his testimony, led to a widely prevalent belief that the book, when verified by the testimony of the bookkeeper, was original and not hearsay evidence. If this were true, there might be some reason for insisting on the production of the original entrant, because the hearsay rule normally excludes an uncross-examined assertion to prove the matter asserted so long as it is practicable to have the declarant make his statement from the witness-

62. Lamb v. Hart, 1 Brev. 105 (S. C. 1802). See also Boyer v. Sweet, 3 Scam. 120 (Ill. 1841), where, in sanctioning the practice of proving the general accuracy of the small dealer's book by other customers, the court disposed of the objection that the adoption of the common law prevented the use of the book on the ground that the adoption extended only to such rules as were suitable to our condition.

63. See 1 Taylor, loc. cit. supra note 58, that the English courts treated the statute of 7 Jac. I, as a dead letter.

64. Cooper v. Marsden, 1 Esp. 1 (1793); Browning v. Flanagin, 22 N. J. Law 567 (1849).


68. In a recent note (1933) 47 Harv. L. Rev. 1044, the writer states: "If testimony is offered from all persons taking part in making an entry, it is admissible as a memorandum of past recollection," for which Madison County Savings Bank v. Phillips, 216 Iowa 1399, 250 N. W. 598 (1933) is cited. There is no doubt about the fact that a regular business entry, when "verified" by the testimony of all persons taking part, is admissible. But it is clearly hearsay, unless the persons "verifying" actually have some present recollection that the entry correctly stated the transaction therein recorded. It is not a record of past recollection as that term is used in reference to casual memoranda, without present recollection to support it. A witness cannot adopt his prior written statement without present recollection of its correctness, Maxwell's Exr. v. Wilkinson, 113 U. S. 656, 5 S. Ct. 691 (1885). See also A. T. Stearns Lumber Co. v. Howlett, 239 Mass. 59, 131 N. E. 217 (1921), where it was sought to have a witness who had forgotten the facts, adopt a transcript of his former testimony. Where the entrant is unavailable, and the book is admitted on other testimony that it was regularly kept, etc., no one doubts that it is hearsay. The situation is exactly the same when the book is admitted on the testimony of the bookkeeper if he has no recollection of the facts or of the correctness of the entries, and in effect simply testifies to the regular practice. It is hearsay, admissible because of business necessity and because its probability of accuracy, when made in the course of business routine, is high enough to make it a reliable substitute for the practically unattainable present recollection of routine matters. In the Madison Savings Bank case, which involved a long account in the operation of a farm during a period of ten years, the witness stated that the book enabled him to recall the transactions recorded; but if his statement meant anything more than that he was thus enabled to remember that some such transactions took place, it would require considerable credulity to accept it.
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stand where it may be tested by cross-examination. But we know as a matter of fact that in all but a negligible number of cases the entrant has no present recollection of the transaction recorded or of the correctness of the record made in the ordinary course of routine. His "verification" that the entries were made at the time, etc., and were correct, is simply his conclusion from his general knowledge of his habit and practice. The book when so verified is just as clearly hearsay as it is when the bookkeeper is unavailable, and the facts which give it high probative value are proved by some other means. Hearsay does not cease to be hearsay because there is good reason for believing it.

If the testimony of the entrant does not and normally cannot be expected to give us any first hand information as to the fact itself in the simple case where he once had personal knowledge of such fact, the probability of first hand information decreases to the vanishing point when the information comes to the bookkeeper through sales slips or memoranda made by others. Each person concerned may testify that his entry or report was correct, but his sworn statement is based on his habit and not on his memory of the particular transaction.

Before admitting business entries to prove the matter therein recorded, it must be proved to the judge that they are reliable. But why should there be any necessity for calling any or all of the persons who were involved in making them? Such persons are in a position to know the habit and business routine under which the entries were made, but ordinarily the same thing is equally well known to others. Aside from the attesting witness rule, the law of evidence has no preference for one witness or another. If A signed a document in the presence of B, we may use either to prove the signature, or, for that matter, we may use C who is acquainted with the signature. If A and B carry on a conversation in the presence of C, we are perfectly free to use either A, B or C to prove their words. If it is claimed that the street cars on a certain line regularly stopped at point X, we are not obliged to call the operatives to prove it; passengers who got on and off at that point for a sufficient number of times are just as acceptable to the court. In general we are not required to call the individual in question in order to prove his habit.

Where a person knows the regular business routine under which transactions are entered on slips or the like for the permanent record of the bookkeeper and knows the general habits of promptness and accuracy in making and recording such entries, his testimony to such facts, as a matter of common sense, furnishes ample ground for accepting the book as a reliable record. The additional testimony of the several persons involved in the entries that they always made cor-
rect reports is merely cumulative and adds no substantial increment of probability to the previous evidence as to the general accuracy of the books or other business entries. The remote possibility that in some case some one of the persons concerned in every day routine transactions might have some recollection of the correctness or incorrectness of some particular entry furnishes a very slender foundation for a troublesome and expensive requirement. For a long time the courts have recognized the need of some relaxation where otherwise there would be great practical inconvenience. Thus, where it was sought to prove that a man had no credit balance in his account at his bank, the ledger was admitted on the testimony of one clerk, though entries by a number of other clerks were therein recorded.\textsuperscript{69} Chief Justice Best gave his reasons with some caution: “The inconvenience of calling all the clerks of the house would be seriously felt, and without the books it would be impossible to prove that the party had no money in the [banking] house. To prove the negative, therefore, the book, to which all referred, was sufficient, although it might not be admissible to prove the affirmative.”

In modern times there are many instances of the use of the books and entries of banks without the testimony of the various clerks and tellers.\textsuperscript{70} The inconvenience of calling all the clerical force of a large bank would furnish a practical reason for a relaxation of the old rule, even if it rested on a more substantial basis.

For a good many years the courts have been accepting the practical inconvenience involved in requiring the testimony of a large number of subordinate employees as a sufficient reason for dispensing with them. Thus, in a case\textsuperscript{71} where the time cards of a large number of workmen were turned in daily to foremen who transmitted them to the office, the court recognized the practical impossibility of calling each workman, and admitted the book in which these items were recorded on the testimony of the bookkeeper and the foreman. By way of excuse for this apparent departure from strict theory the opinion states: “If their [the foremen’s] knowledge of the work done was not as full and complete as the knowledge of the workmen themselves, yet as they superintended the doing of the work, and participated in its performance, their testimony was such satisfactory proof of the correctness of the items as the transactions were reason-

\textsuperscript{69} Furness v. Cope, 5 Bing. 114 (1828).

\textsuperscript{70} Peoples Bank v. Douglas, 154 Wash. 450, 282 Pac. 838 (1929); Edgerton v. Perkins, 200 N. C. 650, 158 S. E. 197 (1931); People v. Small, 319 Ill. 437, 150 N. E. 435 (1926).

\textsuperscript{71} Chisholm v. Beauman Machine Co., 160 Ill. 101, 43 N. E. 796 (1896). The earlier New York case of Mayor v. Second Ave. Ry. Co., 102 N. Y. 572, 7 N. E. 905 (1886), involving reports of workmen’s time by sub-foreman to a head foreman who made the entries, discloses much the same idea, namely, that the time book, standing on the basis of the entrant’s testimony alone was hearsay, but that it was supplemented by original evidence that the time was correctly reported, etc.
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ably susceptible of.” It may be noted that the court is stressing the unimportant fact that the foremen once had personal knowledge of the work. Whatever personal knowledge they may have had at one time of the work done by various mechanics, it is perfectly manifest that when they testified, they had no knowledge of the correctness of any one of the several thousand time cards that were finally recorded in the book. They did know the routine under which the time slips were made, turned in and recorded, normally resulting in reliable entries.

In a later case the Court of Appeals of Kentucky sanctioned the admission of the books of a department store on the testimony of the bookkeeper alone that his entries were made from sales slips regularly made and turned in by numerous salesmen.

Such extreme cases have ceased to give much trouble. Where it is clearly impracticable to call a multitude of employees, the testimony of the bookkeeper or the testimony of the bookkeeper and a foreman or other intermediary will suffice for the admission of the books. But must necessity or extreme practical inconvenience be relied upon to justify the failure to call the various persons taking part in making the entries? If so there is a vast field of uncertainty. Between the simple case of two or three clerks turning in sales slips to a bookkeeper and the large city bank or department store or industrial plant, in which hundreds of employees are engaged in the daily transactions, there are an indefinite number of business organizations, differing in complexity. In the absence of precedent dealing with a substantially similar situation there is no way of determining in advance whether the requirement that all employees concerned must be called or accounted for will be enforced or relaxed. To be on the safe side, in many cases the attorney must be prepared with an array of witnesses to meet a captious objection. This has been and is to some extent the actual state of the practice. It is not surprising that the business man dislikes the courts and shuns them when possible.

If, however, the real test of the admissibility of regular business entries is the sufficiency of the evidence to establish that they were made under such a business routine as has proved satisfactory and productive of reasonable accuracy, the problem becomes much more simple.

It may be in a given case that no one person has sufficient knowledge of the system and its operation to prove the essential facts which the court must determine. In such a case it will clearly be necessary to call one or more additional witnesses to supply the necessary information. If the person who made the final entries has sufficient knowledge, not of the transactions but of the general accuracy of the items and reports on which his entries are based, noth-

ing more would be required, even though cumulative testimony might be obtained without any great inconvenience.

And if some other officer or employee is in a position to prove the regularity, that also would suffice. This last view is now coming to be accepted without the aid of the statute proposed by Professor Morgan's committee.\textsuperscript{73}

In a case\textsuperscript{74} decided in 1917 the Supreme Court of Appeals of Virginia sustained the admission of the train dispatcher's register of trains on testimony of an employee, simply identifying it as the register kept by the dispatcher from reports made by station agents by telephone and telegraph.

Other courts had admitted train dispatcher's records without proof by the station agents, because it would be practically inconvenient to call them.\textsuperscript{75} But in the principal case it did not appear that the person who made the entries in the dispatcher's register was unavailable or that there would have been any serious difficulty in obtaining his testimony. The court simply took judicial notice or presumed that train dispatcher's registers are reliable, and that proof of identity alone was needed, which could be furnished by any witness knowing the fact. In a later case\textsuperscript{76} the same court sustained the admission of the books of a manufacturing company on the sole testimony of the general manager who "supervised" the bookkeeping and identified the books as the books of the company, regularly kept in its business. It did not appear that there would be any practical difficulty in obtaining the testimony of the bookkeeper that he correctly recorded the items turned in to him. The court thus disposed of the objection to the admission of the books on the testimony of the general manager:

"It would indeed be a reflection upon the law to say that the president and general manager of the business of a corporation, could not identify the books of the corporation, for whose business in its details he was personally responsible as its general manager, and who testified in addition

\textsuperscript{73} "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence, or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind." Morgan, \textit{The Law of Evidence, Some Proposals for Its Reform} (1927) p. xx.

\textsuperscript{74} French v. Virginia Ry. Co., 123 Va. 383, 93 S. E. 585 (1917).


\textsuperscript{76} White Sewing Machine Co. v. Gilmore Furniture Co., 128 Va. 630, 105 S. E. 134 (1920).
that he supervised its book-keeping. The substance of the exception is that Gilmore occupying that relation to these books, could not identify them. Every other fact which is necessary for the introduction of these books appears, or may be inferred. They were the regular books of the corporation, containing the financial record of its business with the entries made contemporaneously with the transactions referred to. They came from the proper custody. There is thus every circumstantial guarantee of their genuineness, with the practical impossibility, on account of the inconvenience, of producing all of the witnesses who might have testified as to isolated transactions involved in the long account covering a period of three or four years."

The reference to the practical inconvenience as dispensing with the various employees concerned in the entries indicated the persistence of an accepted formula.

Other courts are now admitting books and business entries of corporations on the testimony of the officer who had general supervision of the bookkeeping. These cases indicate that the courts are coming to realize that business necessity requires the use of books; that it is impossible to prove by one or many witnesses on personal knowledge of the transactions recorded that such transactions have been correctly recorded, because that is beyond the capacity of human memory in general and especially the memory of persons who have been accustomed to rely on written entries; and that experience has demonstrated that entries made in the daily routine of business, whether based on the data furnished by a few or many employees, are sufficiently reliable to be admitted as evidence of the transactions recorded. And hence the only preliminary proof necessary in point of reason is that they were made in the course of such business routine, for that is what gives the entries their probative value, and not the glib statement of the salesman that he always made correct slips, and of the bookkeeper that he always recorded them correctly. Whence it follows as a matter of common sense that such preliminary proof may be furnished by any person connected with the business who has adequate personal knowledge of such facts.

If time and space were available this article might be extended indefinitely, because Dean Wigmore's logical analysis and searching criticism of unsound and outworn theory have been reflected in the decisions covering the whole field of evidence. James Bradley Thayer's prophesy, that the work of a jurist in this field, if accepted by the courts, would give the law of evidence a consistency and capacity for growth which would make it a worthier instrument of justice, is becoming a reality under our very eyes.

77. Peoples Bank v. Douglas, supra note 70 (tellers' regular notations on deposit slips, identified by cashier who testified to the regular practice); Edgerton v. Perkins, supra note 70 (bank ledger identified by cashier); Hartford Ins. Co. v. Baker, 257 Mjch. 651, 241 N. W. 871 (1932) (an insurance company's account with an agent on the testimony of the company auditor).