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THE RIGIDITY OF THE RULE AGAINST HEARSAY

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The article by Governor Baldwin in the December (1911) YALE LAW JOURNAL on *"The Artificiality of Our Law of Evidence"* is an important contribution to the body of public and professional opinion which demands a reconsideration and substantial reformation of our Law of Evidence.

Governor Baldwin has been for forty-two years a teacher of law in Yale University; and for eighteen years in judicial service as associate justice and chief justice of the Supreme Court of Connecticut. He is therefore unusually competent to appreciate the subject both from an academic and from a practical standpoint.

Indeed, the fact which he mentions in the article, that "the courts of Connecticut, in recent years, have gone farther than those of most of our states, in the admission both of hearsay and remote evidence, and leave it more to the discretion of the trial judge", may well be due to Judge Baldwin's own academic study of the law, and to the fact that his predecessor as chief justice was Professor of the Law of Evidence, and one of his associate justices was and is Professor of the Law of Pleading, in this law school.

The study of the law for the purpose of teaching its principles and rules to an eager-minded and critical body of university students necessarily leads to a somewhat deeper search into the

philosophy, history, and logical soundness, of the detailed rules of law than a judge is likely to give who has learned his law mostly in the hurly-burly of practice, and is obliged to apply it under the pressure of the court room.

The Anglo-American Law of Evidence was undergoing a process of development and crystallization during the eighteenth and the early decades of the nineteenth century. In the great period of law reform just before and just after 1850 it underwent a striking and almost revolutionary change by the abolition of the disability of parties, persons in interest, persons convicted of crime, and atheists, to testify. Since then it has remained substantially unchanged.

But in 1889 Professor James Bradley Thayer began publishing the results of his searching investigation into the history and theory of the law of evidence in a series of articles in the Harvard Law Review, which were afterward developed into his *"Preliminary Treatise on Evidence at the Common Law,"* and the results of which were made available for class-room use in his case book.

This academic work of Professor Thayer laid the foundation for the *magnum opus* of Professor Wigmore, in which Thayer's critical and rationalizing point of view has been made accessible, and indeed almost forced, by the very indispensableness of his work to an active practitioner, upon the attention of lawyers and judges.

Another professed follower of Professor Thayer is just now publishing another monumental treatise, in which the necessity of making more flexible the rules of evidence, and of increasing the discretionary power of the trial judge, is the dominating idea.[1]

The influence of Professor Thayer's powerful exposition of his ideas may be seen in such cases as *Vincent v. Mutual Reserve Fund Life Association,* 77 Conn., 281, 58 Atl., 963, in which the Supreme Court of Connecticut overruled a well established line of decisions, expressly yielding to the force of his argument. It is interesting to compare with this decision that of *Re Cowdrey,* 77 Vt., 359, 60 Atl., 141, in which the Supreme Court of Vermont recognize the force of Professor Thayer's reasoning on the same

[1] *The Modern Law of Evidence,* by Charles Frederic Chamberlayne. In four volumes; two already published. Albany, Bender & Company, 1911.

subject, but hold that their own line of contrary decisions is too firmly established to be now overthrown except by legislation, and also *Holt v. The United States,* 218 U. S., 245, and *Agnew v. The United States,* 165 U. S., 36, in which the Supreme Court of the United States have practically abandoned their position taken in *Coffin v. The United States,* 156 U. S., 432, which Professor Thayer had so strongly condemned in his *"Preliminary Treatise",* pages 337, 551-576. The thorough study of the rules of evidence, and of their rationality or irrationality, which Professor Thayer and his followers have made, have pretty completely overthrown the idea that they constitute a finished and perfect system, —the finest product of the human intellect.

I wish here to discuss particularly the rigid rule of law by which hearsay must be excluded unless it comes within some exception already established in the precedents.

It seems pretty evident that just as, in the middle of the last century, the rule of absolute exclusion of such witnesses as were subject to some bias or discredit was changed to a mere liberty of showing the discrediting facts to affect the weight of their testimony, the time is now approaching when the absolute exclusion of hearsay testimony must be relaxed, and the trial judge be given power to let such evidence go to the jury, when it is "the best evidence of which the case in its nature is capable."

This would only be to return to the early course of development. Professor Greenleaf, whose classical treatise began publication in 1842, attempted to establish the "Best Evidence Rule" as the basic principle of the law of evidence. In this he was following the lead of distinguished English judges.[2] But the crystallizing tendency of the law soon made the Best Evidence doctrine a plausible explanation of some rules which had already become established, but denied to present-day judges any power to extend that doctrine by the formulation of new rules.

When the judges of a century ago declared that, if the witness who knew the facts in controversy was dead, insane, or beyond the reach of process at the time of the trial, they would admit evidence of his Testimony on a Former Trial between the same Parties, his Dying Declarations upon the trial of one charged with killing him, his Declarations against Interest, his Entries in Due

[2] See chapter xi, page 484, of the *"Preliminary Treatise";* and pages 778, 784-6, of Thayer's *Cases in Evidence.*

Course of Employment, his Declarations as to Pedigree facts in the family, or Public Facts affecting the community to which he belonged, and so on, they applied the general doctrine of admitting the best available evidence to the particular cases of difficulty which came before them, and made in each case an exception to the general exclusion of hearsay.

But for sixty years past our judges have been obliged to say, "There are six (or eight or ten, according to the classification employed) exceptions to the rule against hearsay, and no more. If your case does not come within one of these, we cannot admit the evidence."

Why should not the judges of 1911 have as much power to establish exceptions to the hearsay rule as had their predecessors of 1811?

The far greater learning of modern judges, the far higher intelligence of modern juries, the far greater complexity of facts involved in modern litigation, all call for the expansion of the power of the trial judge to admit exceptional evidence in exceptional cases, and the abolition, or restriction to narrow limits, of absolute and rigid rules of exclusion of evidence.

The Anglo-American law of evidence, which for the most part is, as Professor Thayer pointed out, a body of rules for the exclusion of evidence which in its nature is relevant, can hardly be accounted for or understood except as a result of the ancient conception of the nature and duty of the jury.

That body of men was in the days when the English common law was being formed a company of neighbors, whose duty it was to inform the judge as to the fact in controversy by their own knowledge, or by the information which they had received from their forefathers or from the common opinion of the vicinage. Witnesses outside the jury were at first called only to assist the jury by giving them information to supplement that of the jurors themselves. It was a most interesting process by which, in course of time (and not of very ancient time, for the new conception of the jury was not clearly stated until 1815; *Thayer's Preliminary Treatise,* page 170), the duty of the jury has become exactly the contrary of what it formerly was. Then the jury were to decide the case wholly or chiefly by their own personal knowledge, and to that end must be selected from the immediate neighborhood, and their lack of knowledge of the matter in controversy was a disqualification; now they must decide the case solely on the

evidence given in court, it is usual to exclude any jurors who are neighbors to either or both of the parties, and the fact that a proposed juror has any preconceived opinion as to the merits of the case constitutes an absolute disqualification except in very exceptional cases.

When the jury themselves were supposed to have a thorough knowledge of the case, or, if they had not, were expected to inform themselves by inquiries in their respective neighborhoods, it was natural that witnesses, called to assist and inform the jury, should not be permitted to testify, if their own relation to the case was such that their statements were less reliable than the knowledge of the jury themselves. Unless witnesses of the most reliable and disinterested character were available, the case had better be left without witnesses to the jury, who reflected the general opinion of the neighborhood. So neither the parties themselves, their wives, nor anyone having an interest in the result of the suit, was permitted to testify. This disqualification was firmly established by 1600 A. D.

So also, if the best available witnesses had knowledge of the matter only by hearsay or general reputation, it was better to rely on the knowledge of the jurors, who were men of character and under oath, and who could themselves supply the light to be obtained from hearsay and reputation.

Mr. Chamberlayne puts the matter thus:

"The rule against hearsay, in its inception at least, constituted a prohibition attaching to a witness rather than to the derivative character of what he said. Under the early procedure a person who could not state something to the jury which he had seen or heard simply did not come within the class of persons designated as witnesses. Neither he who could state only what some one had told him nor the person who could say merely what he inferred were witnesses, as the term was then understood. The witness was required to swear that he would testify to what he had seen and heard *quod vidi et audivi, de visu suo et audito.* The witness must be *voyant et oyant,* by the Norman phrase of the year books. He could not infer, he could not report another's observations. Hearsay and inference were alike excluded. The short reason for this was that it was for the ancient jury, acting still partly upon their own information, to do what reasoning was deemed necessary and to use hearsay reputation, rumor, tradition or whatever else might seem good in their eyes, as the basis of their verdict. Inference and hearsay were denied to the witness because these things were within the exclusive province of the jury. The results of his perception alone the witness could prop-

erly bring to that body as originally constituted. All the rest they themselves were to furnish;—such as general knowledge, hearsay, their own private knowledge, including hearsay and inferences from it, and the reasoning and conclusions involved in comparing and digesting all that they knew or heard from others." *Chamberlayne on Evidence,* Section 486.

It is evident that, while wholesale rules for the exclusion of certain classes of witnesses, and certain kinds of testimony, may have worked fairly well when the jury could fill up all gaps from their own knowledge of the affair, or from the common opinion of the neighborhood, when the character of the jury had changed so that they had no personal knowledge of the matter in controversy, the numerous rules of exclusion rendered it often impossible to produce any admissible testimony whatever to prove an undoubted cause of action. The rule, especially, which prohibited any party or person interested in the result of the suit from testifying made it impossible to prove in court any of the innumerable causes of action which grow out of ordinary transactions between man and man, not put in writing nor had in the presence of witnesses.

This unsatisfactory state of the law was brought to America, and continued to be the universal law until the middle of the nineteenth century.

Then came the great period of law reform in the middle of the nineteenth century. How busily the process of reform legislation was going on will appear from a few dates.

In 1846 the Constitution of New York was adopted which provided for a codification of the entire body of the law. In 1848 the first Code of Civil Procedure was adopted in New York, which, among other reforms, abolished the disqualification of the parties, and of those who had an interest in the suit, to testify. In 1852 and 1854 the reformed Common Law Procedure Acts were passed in England, and in 1852 the Practice Act of Massachusetts. In 1848 the legislature of Connecticut abolished the disqualification of parties interested in a suit, and persons convicted of crime, to testify. In 1846 in Connecticut, and in 1848 in New York, the first general acts for the protection of the property rights of married women were passed.

The same class of legislation was going on in other parts of the Union, and soon after 1850 the rules for the exclusion of interested witneses had become practically obsolete. But no similar

change took place in regard to the similar rules for the exclusion of certain classes of testimony, such as hearsay. The exceptions which had already been formulated by the courts were defined with greater and greater exactness, and the rule of exclusion was iron-clad except in the case of an established exception.

The difficulties caused by the absolute exclusion of hearsay occur very much less often than did the difficulties caused by the exclusion of interested witnesses; but they are no less serious in their effect in the cases in which they do occur. Governor Baldwin says, in the article which suggested the present one: "Let us suppose that a man of the highest standing and character is the only witness of a murder. He writes a statement of the facts to the prosecuting officer. An indictment is found, but before the case comes on for trial, he dies. No country not ruled by Anglo-American law would exclude his written statement. We would; and the murderer, in consequence, would probably go free."

A similar case may be suggested where the rule would work equal unfairness on the other side. Suppose that a man is being tried for murder on circumstantial evidence not absolutely convincing. During the trial a felon in the penitentiary dies. Before his death he calls for the prison chaplain, and confesses to him that he committed the murder in question. The circumstances of his confession are such as to entitle it to credence. Nevertheless it is hearsay; it comes within none of the exceptions to the rule excluding hearsay, and it could not be admitted in behalf of the accused in the murder trial.

A curious decision by the Court of Appeals of New York in 1892[3] showed a narrow field not covered by any of the exceptions relating to shop-books, which made it necessary for the court to exclude evidence that any business man would consider of the highest value and certainty, and thereby made it impossible for the plaintiff to prove his cause of action. The executor of a deceased private banker sued for money advanced to the defendant by his testator. The court held that the bank's account books were not admissible to prove the claim. If the banker had still been alive, he could have testified to the transaction, and "refreshed his memory" by reference to his books. If the business had been done by a clerk, the clerk could have testified in the same manner; if the clerk had been dead, the book entries

[3] *Smith v. Rentz*, 131 N. Y., 169, 30 N. E., 54.

made by him could have been proved as entries made in the due course of employment; if the bank had been an incorporated institution instead of a private bank, all its officers would have been employees, and an entry, even by the president or general manager, would have been admissible as an entry in due course of employment; if the entries had been of sales of merchandise instead of loans of money, they would have been admissible under the "shop-book rule." But the shop-book rule did not apply, because it covers (in New York) only merchandise entries and not those relating to dealings in cash; the rule as to entries in due course of employment did not apply because the bookkeeper was not an employee, but a proprietor; and he could not refresh his memory by examining the books and thereupon give his own testimony, because he was unfortunately dead.

Such a decision in the greatest commercial State in the Union is a discredit to the law; and the argument by which it is attempted to defend the reasonableness of the rule is not much more satisfactory than the decision itself. The Court says: "The same necessity does not exist in respect to cash transactions. They are usually evidenced by notes or writing or vouchers in the hands of the party paying or advancing the money. It would be unwise to extend the operation of the rule admitting the party's books in evidence beyond its present limit, as would be the case, we think, if books containing cash dealings were held to be competent." This statement that cash transactions are usually evidenced by notes or vouchers, and that therefore, there is no necessity to bring the books of a bank within the shop-book rule, is rather amazing, when one considers that the millions of dollars daily deposited in New York banks are all evidenced by entries in books, and in no other way, and that the millions of dollars daily drawn out by checks are also evidenced only by the bank's account books after the paid checks have been returned to the maker at the end of each month or quarter.

In the early days of English law, not only were the jury supposed to be able to decide the facts properly from their own knowledge, but they were supposed to be incompetent to exercise any discrimination in weighing the testimony of witnesses. There was doubtless much ground for this belief when juries were composed of peasants unable to read or write. But an intelligent jury of farmers or business men in one of our American courts are certainly entirely competent to receive hearsay testimony of

a reliable character, in a case where no other evidence is available, and to give due consideration to the circumstances which enhance or diminish its evidential value. In fact, many judges have declared that the jury are more competent to weigh and compare the testimony of laymen of substantially similar education and character to themselves than is the judge, who is somewhat removed from the class of the average witness by his position and training.

If in any State the method of drawing the jury is such that the jurymen are men lacking in fair intelligence and common sense, it would seem to be more desirable to alter the method of selecting the jury than to accommodate the rules of evidence to the capacity of inferior intellects.

In many other respects the practice of our courts has constantly tended to increase the discretion of the trial court.

Thus in cases where evidence is offered of the price paid for one piece of property in order to enable the jury to fix the value of another piece, the prevailing and undoubtedly correct rule is for the trial judge to determine whether the similarity of the two lots in question is such as to make the evidence fairly reliable, and likely to help rather than to mislead the jury. So also in cases of accident by defects in a street or in machinery, the question whether occurrence or non-occurrence of former injuries is admissible is determined by the same test of sufficient similarity of the attending circumstances, which must be applied with broad discretion by the trial judge. So the question of undue remoteness, either on direct or on cross-examination, must be committed almost wholly to the discretion of the judge.

In many other cases, the question whether the proper foundation has been laid for the introduction of the testimony in question is settled by the judge, and his decision is final except in case of gross error.

But the rule excluding hearsay, except as to the recognized exceptions, has hitherto remained absolutely rigid, however clear it may be that justice will be defeated by the rejection of reliable testimony.

Has not the law of the United States reached a point of maturity where this rigid rule should be made flexible, and the judge should be trusted with the same right to make exceptions thereto, which his predecessors of the eighteenth century enjoyed, and the jury be credited with the ability to take into consideration

the discount to be given to certain evidence because it is hearsay, just as they are required every day to discount the value of evidence because the witnesses are biased, are ignorant and stupid, or are apparently untruthful?

It seems to me that the time has come for another reform, less radical than that of the 1840s, but which should at least modify the rigidity of the rule excluding hearsay.

Bristol, Conn. *Epaphroditus Peck.*