

1957

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Recommended Citation

Reed, John W. "What Is This Thing Called Hearsay?" Mich. St. B. J. 36 (1957): 17-24.

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What Is This Thing Called Hearsay

By JOHN W. REED



This article is based on an address delivered at the 1956 Advocacy Institute at the University of Michigan. A re-examination of elementary principles, the discussion proceeds on the express assumption that much of the uncertainty and confusion in use of the hearsay rule is unnecessary because it is due to failure to recall and employ these principles.

The hearsay rule, elementary as it is, merits periodic re-examination by judges and practicing lawyers lest first principles be lost from view. Application of the rule without conscious regard to its purpose is likely to produce enough aberrant results to make one feel unsure of his grasp of the whole of this important subject. That the hearsay problem is important and pervasive all would concede. Although it may be an excess of enthusiasm to say with James Bradley Thayer that this "great head of the law of evidence . . . [comprises] . . . , with its exceptions, much the largest part of all that truly belongs there," it is nevertheless true that the possibility of hearsay lurks in every law suit.

Despite the pervasive presence of hearsay problems, it seems clear that in a considerable number of instances which can be said to involve hearsay, trial counsel fail to note the exclusion

possibility. This is not to say that in general more and more evidence should be excluded; probably the exclusionary rules of evidence are applied somewhat too vigorously already. But if there is a (rational) reason for excluding hearsay evidence, it may be as applicable to the obscure and irregular instances as to the obvious cases.

Further, some lawyers do not state the hearsay objection adequately even when recognizing the presence of the forbidden testimony. Apparently they fail because they do not understand the true basis of the hearsay rule. Objections like this are common: "The statement was not made in my client's presence and is not binding on him." "The evidence is self-serving." These do not properly present the hearsay objection. The fact that a statement was not made

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in the opponent's presence is not controlling; neither is its self-serving nature. Out-of-court declarations may be admissible even though self-serving and out of the hearing of the opponent: e.g., spontaneous exclamations, declarations of present state of mind or emotion, and—even more familiar—business entries. Indeed, to urge these objections is to urge no objections at all. They suggest that the objector does not really understand the hearsay rule. One could argue that in some circumstances the meaning of such an objection (self-serving; out of hearing of opponent) can be inferred—that it is a shorthand expression of a hearsay objection *plus* a claim of inapplicability of a particular exception (not yet urged by the proponent). For example, if the question clearly called for hearsay and the only possible exception would be an admission, the fact that the statement was self-serving would nip the exception in the bud. So also if the declaration were offered as the foundation for an admission by silence (an adoptive admission), the fact that the statement was not heard by the opponent would excuse his silence and so render the exception inapplicable. But in each instance there is no objection to the fact that the question calls for hearsay, unless somehow it be implied. And implied objections are not carried in the briefcase of the wise and able lawyer. The fact cannot be blinked that no hearsay objection has been expressed—an omission which may mislead a trial court and be fatal on appeal.

A Tentative Definition

Now, what is the hearsay rule? Or, more accurately, what is hearsay? A definition is hard to formulate. At least, a really helpful definition is hard to formulate. If it is broad enough to cover all cases, then it is so general as to be virtually meaningless in some of the harder cases. And simplification in this area is falsification. But difficult or not, we had better try, so that we may have something of a common starting point.

Let's try this definition—for the moment, at least:

Hearsay evidence is evidence of a statement made other than by a witness while testifying at the hearing which is offered to prove the truth of the matter stated. [This, essentially, is Rule 63 of the Uniform Rules of Evidence.]

Such a statement (i.e., one not made on the witness stand), being offered to prove the truth of the matter therein, rests for its value on the credibility of the assenter, who is not now testifying. There are many questions about this definition, but the two big ones, closely related, are these:

- 1) What do we mean by a "statement"?
- 2) When is a statement being offered to prove the truth of the matter stated?

The answers to these questions can best be discovered by a brief examination of what are commonly supposed to be the bases of our hostility to hearsay evidence.

Defects of Hearsay: Two False, One True

1) The first defect of hearsay evidence is said to be that it is likely to be inaccurate since it is second-hand or worse! The possible error in transmission of the original declarant's story through intermediaries makes us reluctant to accept it as a basis of decision. In this view, the hearsay rule is something like a "best evidence rule," where, indeed, Thayer classified it.

This basis for the rule is commonly discounted by noting that a declaration carefully reduced to writing and carefully preserved and presented to the court is no less hearsay than the most carelessly reported oral declaration. Therefore, the possibility of inaccuracy is not itself a sufficient explanation of the hearsay objection.

2) The second defect of hearsay evidence is said to be that it is evidence of a statement not under oath. Wigmore dismisses this defect rather quickly by noting that sworn statements by a declarant are none the less hearsay when offered by another to prove the truth of the statement. One of the hardest lessons for a law student to learn is that an affidavit is hearsay notwithstanding the oath. Professor McCormick argues that the oath requirement should not be lightly dismissed, even though, obviously, it is not the only requirement. But I incline to agree with Dean Wigmore that the oath is virtually without significance here. Perhaps it would be more accurate to say that the oath is but a mechanical manifestation or incident of what, all would agree, is the prime defect of hearsay evidence:

3) The lack of opportunity to cross-examine the declarant whose out-of-court statement is reported by the witness. Our legal literature is filled with encomiums of cross-examination as a device for establishing truth and confounding error. It may be doubted that deliberate falsification is often exposed in actual practice, but it sometimes is. And cross-examination does provide a good opportunity to expose bias and faults in perception and memory of the witness. If the declarant is not on the stand, these shortcomings in his testimonial capacity cannot be well demonstrated, and we are reluctant to listen to the story thus told second-hand. (I say reluctant, rather than unwilling, because we do let in many such statements under the numerous exceptions to the rule. Indeed, many cases are decided primarily on the basis of hearsay evidence so admitted.)

Also under this head comes the oath requirement, because in any case where the declarant is on the stand to make his declaration and to be cross-examined he is under oath. Here too belongs the requirement that the jury be enabled to view the demeanor of the declarant and so to evaluate more accurately the story he tells. If it is not the same thing

as requiring cross-examination, it is first cousin to it, because all of this relates to the credibility evaluation which the jury is to make.

In short, in an adversary system of litigation, where counsel are under no obligation to prove matters which establish the opponent's case, we distrust—and rightly so—any statements which depend for their credit on a person not available for cross-examination. Our distrust is so great that we have set up the hearsay rule to exclude evidence of such statements. The Michigan court has subscribed to this general view that the lack of cross-examination is the basic fault, is the real fault, of hearsay evidence.

If, then, at any point we want to cross-examine a declarant to test the reliability of his declaration and we do not have that opportunity, it follows that evidence of his declaration is hearsay evidence.

Purposes of Cross-Examination

A generalized statement of the purposes of cross-examination is that it may be used to test a witness' *willingness* to tell the truth and his *ability* to tell the truth. "Willingness" means his sincerity, his good faith, his truthfulness. Is he a liar or is he truthful? Does he stick to what he knows, or does he embroider the fact with a bit of fancy? We insist that opposing counsel be given an opportunity to test this characteristic of a person whose statement is offered, and such an opportunity is not available when the declarant, the relator, is not reporting directly. Indirect reporting of his story is hearsay.

In addition to testing "willingness" to tell the truth, one may want to test "ability" to tell the truth. That is to say, much false or misleading testimony comes not from a will to falsify, but rather from inadvertent misstatement, bias, inaccuracy of observation, faintness of recollection, and—occasionally—from limited ability to communicate what he

knows (illustratively, limited or mistaken vocabulary). Again, to probe for the truth among these possibilities for error, cross-examination is needed, and we prefer to exclude the story of one who is not on the stand and subject to cross-examination. (Anticipating what is discussed more fully below, I may warn that there is no unanimity on the question whether a declaration is converted into hearsay by the opponent's frustrated desire to cross-examine not for sincerity or willingness to tell the truth, but for ability, e.g., accuracy of observation, alone. Michigan cases do not furnish a clear answer, although a case of fifty years ago contains language suggesting that hearsay evidence is objectionable because the opponent is denied opportunity to cross-examine both for the "veracity and competency" of the declarant. If in context "competency" can be equated with testimonial "ability," then it may be argued that Michigan would hold a declaration hearsay where the only conceivable reason for cross-examining would be to test the declarant's power to perceive accurately.)

To repeat: If we want to cross-examine the maker of a statement to check the "reliability" of his statement, and we do not have that opportunity, it follows that evidence of the statement is hearsay evidence. If it is to be admitted, it is only because it fits one of the exceptions or because opposing counsel waives his objection to it.

Examples of Non-Hearsay

This simple principle makes it rather easy to identify the common cases of statements that are not hearsay, because if the making of a statement is significant, is material, in the lawsuit without regard to the credibility of the declarant and without regard to the quality of his perception and the like, then a witness may testify to the making of that statement and no hearsay is involved. Three familiar examples illustrate the point:

In a slander suit, plaintiff calls Witness to prove that defendant said, "Plain-

tiff is a thief." This is not hearsay because we have no need to cross-examine defendant. We are not trying to prove the truth of the statement. Indeed, it is necessarily assumed in a slander action that it is false. The statement does not depend for its credit on defendant, the declarant. The question is: Was it said? The sincerity and testimonial ability elements here all relate to Witness, who heard it, who now reports it, and who *is* subject to cross-examination.

A second example is statements of offer and acceptance in entering into a contract. When Witness (W) reports that plaintiff said, "I offer ten shares at a thousand dollars," and that defendant responded, "I accept," there is no need to cross-examine the speakers, plaintiff and defendant. These statements do not depend for their credit on the jury's evaluation of the credibility and reliability of plaintiff and defendant. They depend on the accuracy of W's report. It is W's credibility which needs to be evaluated. Did W hear accurately? Does W remember accurately? Does W mean what he just said? Is he telling the truth? Is he a friend of plaintiff's? These questions all relate to W, and *he* is on the stand, under oath, telling his story directly, and subject to cross-examination. This is not hearsay.

A third example of non-hearsay declarations is statements by which the declarant gives notice of some kind to his hearer. Testimony by W that he heard the plaintiff-insured give notice of the burning of his house to his insurance company is not hearsay to prove that notice was given, since we are not concerned about the insured's credibility. We do not need to cross-examine him at this point. The question is, did he say certain words—not: were they true? Simply: did he say them? W is direct witness to this fact, and fully meets the requirement of being subject to cross-examination. (If we were seeking by this means to prove not notice

but rather the burning of the house, then of course W's testimony that plaintiff said his house burned would be hearsay on that issue.)

These are the easy cases of non-hearsay, and every lawyer knows dozens more like them.

Easy Examples of Hearsay: Assertive Conduct

We turn now to instances of hearsay, to situations in which cross-examination is legitimately desired. We can start with the easy and obvious case: the case where a declarant's statement is offered, second-hand, to prove the truth of what he said. (McCormick says: to prove declarant's belief that it is true.) For example:

Criminal charge of burglary against defendant. I say to you that defendant was the burglar. You are called as witness to report my statement. Clearly this is hearsay to prove that defendant is the burglar.

Civil action for personal injury by plaintiff against defendant. I say to you that defendant entered the intersection against the red light. You are called as witness to report my statement. Clearly this is hearsay. Plaintiff's lawyer will want to know all about me and my story: Did I see the accident? Am I confused as to which defendant was driving? Am I color-blind? Am I related to plaintiff? When I said "defendant," did I mean defendant? Could I see the light and defendant's car simultaneously? And so on. Of course the lawyer wants to cross-examine, and of course this is hearsay evidence. Indeed, this is elementary.

Equally elementary is the case of non-verbal conduct which is intended by the actor to serve as an assertion. Testimony to his observed conduct is hearsay. For example, if in the burglary case of a moment ago, instead of my saying "Defendant was the burglar," you ask me who the burglar was and I point to defendant, then your testimony as to my pointing is hearsay evidence. It is

exactly as if I had said, "Defendant was the burglar." The test is: Was there a communication intended? Whether it is verbal or non-verbal makes no difference.

Even silence may be communicative. That is to say, a communication may be inferred from it. Illustrative is the idea of adoptive admissions: Where Jones is accused of something under circumstances in which, we say, it is "normal" for him to deny it if it isn't true, his failure to deny is treated as an assertion by him that it is true. Similarly, on the issue of unwholesomeness of food served, the silence of all others served with the same food is sometimes treated as hearsay evidence of non-injury or non-illness on the part of the other customers, as if there were assertions of non-injury. Clearly, non-verbal conduct can be communicative, and if offered to prove the truth of the communication, it runs afoul the hearsay rule.

Hard Examples of Hearsay: Non-Assertive Conduct

But consider the case where the so-called declarant was not declaring or intending to communicate anything to anybody. He simply was talking to himself, or grasping his injured ankle, or locking the windows in his home. Can there possibly be hearsay in such circumstances? Although it would be much simpler if we could say no, the cases suggest that sometimes the answer is yes. Precisely here is the difficult problem.

We think of the hearsay objection as based on the need for cross-examination. And we think of cross-examination as an engine for testing the truthfulness of an observer. When such an observer asserts something as true, we want to cross-examine him to probe the depth of that truth. On the surface, at least, it would seem to follow that only when a person asserts something can there be any question of his truthfulness. It is difficult to think of truth versus falsity

in a man who is talking to himself, or who is acting without the consciousness that he is observed. He is not trying to assert anything to anybody. Cross-examination, it would seem, can accomplish nothing by way of probing the sincerity of a person who is seeking to communicate with no one.

But what will you do with this case: The sanity of X, a testator, is in issue. Y, who has known X for many years, promised at about the time of the execution of the will to marry X. Would it occur to you that there is any hearsay problem involved in proving the marriage promise as evidence of X's sanity?

Here is a better one: As bearing on X's insanity, evidence is offered as to the precautions of X's family for his safety and the like. Is there conceivably a hearsay problem there?

And another one: On the issue of the seaworthiness of a ship, evidence is offered that the deceased captain, after examining every part of the vessel, embarked in it with his entire family? How is there a hearsay question in this?

The Opening of Pandora's Box

The landmark case on this problem is *Wright v. Doe d. Tatham*, and these illustrations are based on that famous—or infamous—case. In brief the facts of *Wright v. Tatham* were these: In an ejectment suit against a devisee of John Marsden, the plaintiff, who was an heir at law of Marsden, alleged that Marsden lacked testamentary capacity. Seeking to prove that Marsden was, on the contrary, entirely competent, the defendant offered in evidence several letters written to Marsden by different persons, all of whom were likewise deceased by this time. Three of the letters related to matters of business and were of a kind which, presumably, would be sent only to one able to comprehend and to engage in ordinary business transactions. The fourth was personal, contained family news and expressions of affection, and was of a kind which, presumably,

would not be sent to an insane person. Defendant, offering these letters, was unable to establish that old man Marsden had acted on them, or even read them. The case ranged up and down the English courts for several years, with two trials and numerous appeals, finally ending with a decision of the House of Lords. The decision usually cited is that in one of the Exchequer Chamber hearings (7 A. & E. 313, 112 Eng. Repr. 488 [1837]), and in particular the opinion of Baron Parke. (Incidentally, Sir Frederick Pollock was defendant's lawyer. With both Baron Parke and Sir Frederick working on the case, it is not surprising that history was made.) The holding which finally emerged was that the letters which had been written to Marsden were inadmissible as hearsay.

Defendant's counsel, Pollock, argued that the "treatment" of Marsden by his friends was circumstantial, relevant evidence of sanity. But the court held otherwise. If there had been some action by Marsden in carrying on social intercourse with these friends, that would be something else again—as, for example, if Marsden had made a purchase from old friend Smythe, or if Marsden had consulted with his lawyer, or if Marsden had entertained his neighbors, and, all of these things had been done as by a normal person, that evidence would be admissible. But that was not the case here. The evidence was letters from friends and business acquaintances written in a fashion indicating that the letter writers believed Marsden was sane. Said Baron Parke,

“. . . proof of a particular fact which is not of itself a matter of issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible.”

In other words, these letters themselves were not in issue; only as they were offered as a basis for inferring the writ-

ers' opinions of Marsden's sanity were they relevant. Had one of these letter writers said or written to a friend, "I think old Marsden is sane," obviously the friend could not testify to the statement; it would be hearsay beyond any question. *Wright v. Tatham* says that when some action—here, writing letters of a particular kind—is used as a basis for inferring the opinion of the actor, and the action is not otherwise relevant, then the action is hearsay to prove the opinion. The writing of a normal communication to Marsden is equated with the writer's statement, "I think Marsden is still sane." Before we will let that come in, we want to cross-examine the writer.

It should be borne in mind that, for all anyone knows, the letter writers were not trying to assert anything whatever about Marsden's sanity. They were not trying to say, "We think Marsden is sane." Clearly there is no problem of their truthfulness or sincerity. How then, can there be any need for cross-examination? The answer lies in the fact, mentioned earlier, that there are elements other than truthfulness that may be probed on cross-examination. The opportunity to observe, for example: How recently had the letter writers seen old Marsden, and therefore how accurate is the appraisal of him which we infer has been made and expressed? Adequacy of communication to the tribunal, for example: Is it possible that the writers knew that Marsden was failing but that they wrote "letters as usual" to keep up his spirits? Could we discover these things by cross-examination of the writers? Would we like to try?

In other words, if we accept the notion that it is legitimate to use cross-examination to probe testimonial ability as well as testimonial sincerity, then—because the hearsay rule is designed to safeguard the right to cross-examination—the hearsay rule applies to block evidence of actions and statements which, though not intended to be assertive, are

used to indicate what the actor would have asserted had we asked him about it.

What then, are the answers to the problem cases of a few moments ago? Under *Wright v. Tatham*, Y's agreement to marry X would be hearsay evidence of her opinion of X's sanity. Under *Wright v. Tatham*, the precautions taken by X's family would be hearsay evidence of their opinion of X's sanity (or lack of it). Under *Wright v. Tatham*, the embarkation of the captain and his family, after inspection of the ship would be hearsay evidence of his expert opinion of the seaworthiness of the ship.

Perhaps, too, the silence cases fit in here—the cases which appeared rather simple in the discussion above: The silence of other consumers of foodstuffs may be hearsay evidence as to wholesomeness. And we infer an assertion in the case of the one who is silent in the face of an accusation; such a case is regularly held hearsay without even a tip-of-the-hat to *Wright v. Tatham*.

One might go to a ludicrous extreme and suggest that on the issue of whether it is cold outside, it would be hearsay to testify that a stranger was observed walking along, bundled up in his coat, rubbing his ears, and the like. His actions hearsay to prove it was cold? Why so? Because we are equating his conduct with an assertion by him of his belief that it is cold, and we want to cross-examine him to inquire whether he has any disease or physical peculiarity which makes him react to temperatures differently from most of us, or whether he is a walking advertisement for a local clothier trying to drum up overcoat business by reminding people that winter is on the way. There are some cases almost in point.

Ludicrous? Yes, even ridiculous. Yet this point is almost on the borderline of hearsay, and it is helpful to know that the theory of the rule may go this far, for then the typical case, lying nearer the center of things, will be much more easily understood.

Strangely there has been no full-dress judicial review of the problem exemplified by *Wright v. Tatham* in the century since. One can say only that there is no reason to believe that there has yet been a significant withdrawal from its principles.

A Clutch of Prophecies

It is interesting to speculate about the future of the hearsay rule. Of four brief prophecies, the first relates to the *Wright v. Tatham* kind of problem.

There has been a steady drumfire of criticism of using the hearsay rule to exclude evidence of an act merely because the act may be equated with an assertion: There was in fact no assertion and no question of truthfulness is involved. Some writers would apply the hearsay rule only where it is desired to test for credibility—that is, only where an assertion was intended. The contrary theory of *Wright v. Tatham* is undeniably logical, but as sometimes applied it seems to run counter to common sense. The Model Code of Evidence of the American Law Institute, which has been adopted nowhere, expressly embodies the principle of *Wright v. Tatham*. The Uniform Rules of Evidence impliedly reject it, while some writers, notably Professor McCormick, expressly reject it. The criticism plus the influence of the new Uniform Rules probably will produce a decline of the rule that conduct not intended to be assertive may nevertheless be hearsay.

Second, I predict that we shall become less concerned with the sharp question of admitting or excluding hearsay evidence and that we shall become more concerned with evaluating the trustworthiness of the particular piece of evidence, letting it in if it carries good credentials (especially if the declarant is unavailable as a witness), excluding it if it looks tenuous and unreliable. This would mean a difference in treatment between, for example, a carefully worked out affidavit and multiple hear-

say or gossip, as where *A* reports what *B* told him *C* said. There already is a tremendous quantity of hearsay evidence coming in under exceptions on the ground that it is trustworthy. Indeed, practitioners would do well to be more alert, even under present rules, to the difference in probative value of their proofs. Some lawyers work very hard at getting the court to accept evidence which, when all is said and done, was hardly worth the effort. It was marginal because it was weak; it was weak because it was marginal. Meanwhile, the jury's attention unfortunately has been focused on a weak portion of his case.

Third, there are in fact some differences between treatment of hearsay by courts sitting with juries and courts without, and there is apparent inevitability of faster emasculation of the hearsay rule in judge trials than in jury trials. There are some judges and scholars (the terms are not mutually exclusive) who would be characterized as rather conservative about the law who advocate immediate discard of the hearsay rule in trials to a judge.

Fourth, and last, there is a surprising concurrence among the commenators that, like many other exclusionary rules, the hearsay rule will eventually disappear. The practice will then be, as is now the case under continental practice and in modern Canon law, to receive hearsay and evaluate it. Probably this can take place only as the judge takes a somewhat more active role in the conduct of the examination of witnesses. But there are evidences that this is the trend. The hearsay rule will not be gone by tomorrow, or by 1984, or, perhaps, even by 2057. But I, too, predict that it will eventually disappear. When that time comes, we who teach Evidence may find that our curriculum committees have reduced the Evidence course to one hour or less, and we shall have to turn to the teaching of such dreary subjects as Bills and Notes and Domestic Relations.