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THE "HEARSAY" RULE IN THE MAYOR WALKER CASE AND IN THE COURTS—A SURVEY, CRITICISM AND PROPOSAL

The controversy, in the recent proceedings before the Governor of New York on the removal charges against Mayor Walker, over the admissibility of testimony taken before the Joint Legislative Committee To Investigate The Affairs of the City of New York, and the sharp comment thereon by Mr. Justice Staley in the course of his opinion on the Mayor's application for a writ of prohibition against the Governor,1 dramatically brought to the fore the need for a re-examination of some of our rules of evidence.

The situation, as will be recalled, was: The legislative committee had examined, in public, under oath, a number of witnesses and elicited from them testimony to facts relating to the Mayor's conduct in office. The Mayor, too, was examined; while he admitted all but several of the overt facts that were developed in the examination of the other witnesses, he controverted the adverse inferences drawn therefrom and maintained that he was innocent of wrongdoing in intent and deed. Viewing the evidence in a light different from that avowed by the Mayor, counsel to the committee drew therefrom a number of conclusions adverse to the Mayor. In the capacity of a private citizen, he forwarded to the Governor his "conclusions" together with a supporting analysis of the evidence and also the record itself. A committee of citizens adopted the "conclusions" as formal charges which they filed with the Governor. A copy of these together with a transcript of the evidence was forwarded to the Mayor, who, in due time, filed his answer thereto. Thereafter, the Governor ordered a hearing before himself. At that hearing, the Mayor waged battle against the consideration as evidence against him of the testimony that had been given before the legislative committee. It is to

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be noted that many of the witnesses, the record of whose testimony was being objected to, were friends (political or personal or both) of the Mayor, who had given their testimony grudgingly; and that on the legislative committee were a number of partisans of the Mayor who, by objections and participation in the examinations, were as zealous in the Mayor's favor as any attorney representing the Mayor could have been.

The Charter of the City of New York, by section 122 thereof, in effect, rendered the Mayor removable after giving to him "a copy of the charges against him and an opportunity of being heard in his defense."

Counsel to the Mayor contended that the proceeding Governor, and the quotations therefrom are taken from the minutes of the proceedings as published in the New York Times of August 12, 1932, et seq. before the Governor was judicial in nature, that the Mayor was entitled to a trial in the court sense of that term, and, therefore, was entitled to be confronted, in the trial tribunal (that is, before the Governor), by the witnesses against him and to cross examine them, and that only such testimony as was adduced before the Governor, in the Mayor's presence, with opportunity to cross examine, could be considered; that the testimony taken by the legislative committee, in a proceeding to which, in the legal sense, he was not a party, and in which he had no right or opportunity to cross examine, was merely "hearsay" — "minutes," not evidence — and had "no better legal standing than the story of Robinson Crusoe or Grimm's Fairy Tales," "no higher legal validity than back-fence whisper." Counsel argued that not a "case has ever been written in the English language" countenancing the consideration of such testimony, and that the principles he was relying on were so universal in the "English-speaking world" and so long accepted and invariably practiced that "the memory of men runneth not to the contrary." It was not the law alone on which he grounded himself but "common sense" and the true requirements of justice: "Let us throw away the law

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2 §122 of the Charter read together with §1 of art. X of the Constitution.
3 The statement, in this article, of the proceedings and argument before the
4 The error of this argument appears infra. See text infra in connection with note 13 and notes 20-22 infra and texts in connection therewith.
books," he exhorted, "let's tackle it from a human, fair-minded standpoint * * * fair dealing * * * fair play."

The Governor ruled that inasmuch as the procedure provided for by the statute was that the Mayor be given "a copy of the charges against him and an opportunity of being heard in his defense," no formalism was imposed upon him and he was not "bound by the kind of rules that a Supreme Court Judge is bound by"; and, therefore, he would conduct the hearings according to such procedure as in his opinion "will best accomplish the result" of ascertaining the relevant truth, giving to the respondent adequate opportunity to meet all the evidence and to present his defense. Accordingly, the volumes of testimony taken before the legislative committee and referred to in the charges, the Governor announced, would be considered by him as evidence, with the proviso, however, that "if in their judgment, the defense requires that any person who is available as a witness, whether he did or did not testify before the legislative committee, should be called before the Governor for examination * * * I shall * * * require the attendance of such witnesses before me * * *.

This argument over, the Governor proceeded to examine the Mayor on the merits.

At the continuation of the hearing the following day, the Governor sought to clarify his ruling on the status of the legislative committee testimony, in these words:

"These volumes contain evidence relating to the conduct of the Mayor. Those portions of the evidence referred to by Judge Seabury in his analysis have been presented at this hearing and are before me for consideration. If the Mayor desires to put in evidence any other testimony before the legislative committee I shall, of course, receive such parts, and moreover, if the Mayor or his counsel desire to cross examine any material witness whose testimony is contained in those portions of the legislative committee's records * * * I shall require the attendance of such witnesses to enable the Mayor or his counsel to cross examine. * * * The evidence taken before the
legislative committee is presented at this hearing and, will, therefore, be given such weight as in my judgment it is entitled to receive.”

Counsel to the Mayor reiterated his objections. In an endeavor to show the harm of considering testimony that has not been subjected to cross examination, he cited the story of Suzanna, who had been condemned on what appeared to be the credible and convincing testimony of two respected elders, but whose conviction subsequently was demonstrated erroneous when the prophet Daniel cross examined each of the elders and found such a conflict in their testimony as to the alleged event that it became clear that the accusation was fabricated. This, indeed, was a forceful illustration of the value of cross examination and of the danger of accepting testimony that has not been tested by that process; but counsel was not sufficiently discriminating in the citation of this precedent. The Governor immediately turned the citation into a precedent for the procedure he had prescribed:

“The prophet Daniel asked the attendance of the two elders who had previously testified. You (addressing counsel) are in the same position, and you may ask the attendance of such elders as have already testified.”

After the Governor had concluded his examination of the Mayor and of several witnesses whom he personally examined at his own instance, affording the Mayor full opportunity to cross examine them, he called upon the Mayor to go forward with his defense. The Mayor’s counsel asked that all the witnesses whose testimony before the legislative committee was in evidence be summoned for cross examination by him. The Governor tendered to him subpoenas for each of such witnesses. Then the Mayor’s counsel objected to the burden of serving the subpoenas and insisted that that should be done by the Governor. To this, the Governor refused to assent, intimating that the plea of

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6 Book of Daniel, c. V.
burdensomeness was not in good faith: "If," said the Governor to the Mayor's counsel, "you will go through the list of major witnesses in this case, you will find that they were friends of the Mayor."

The tender of these subpoenas was declined. Before it became necessary for the Mayor actually to go forward (several adjournments having intervened), the Mayor resigned, and the hearing thereby came to an abrupt termination.

This resignation came after a court test of the legality of the proceedings before the Governor. The Mayor had applied to the State Supreme Court for an order prohibiting the Governor to entertain, proceed with and decide the charges against the Mayor. In this application, the Mayor complained, among other things, that his Constitutional rights were being violated by the use in the hearing before the Governor of the testimony taken before the legislative committee. Holding that under the law, the Mayor was an officer who may be removed by the Governor, and that the Governor had acquired jurisdiction by giving to the Mayor a copy of the charges and calling a hearing, the court dismissed the application on the ground that the removal proceeding being exclusively within the "sphere of duty established for the executive," "within that orbit of power the exercise of his judgment and authority is immune from judicial encroachment," and "the judicial branch of the Government is powerless to command him how to act or that he refrain from action." "The power and responsibility" for the conduct of the proceeding, substantively and procedurally, rested "solely" with the Governor, and "for errors, if any, of law or of fact" he was responsible only "to

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6 Other points were raised not material to this discussion. The Mayor contended that the power of removal vested in the Governor by §122 of the City Charter contravened the State Constitution and if it was constitutional at the time of the enactment of the Charter it was nullified by the subsequently enacted "home rule" provision in the State Constitution. Mr. Justice Staley overruled both of those contentions. The Mayor contended also that the Governor was without power to entertain some of the charges because they pertained to conduct during the Mayor's previous term of office. Mr. Justice Staley stated that his view of the law was that acts or omissions during a previous term should not be considered unless they amounted to moral turpitude.

7 Note 1 supra.
the people and his own conscience." Nevertheless, Mr. Justice Staley, in the course of his opinion, condemned "the wholesale receipt and use of testimony taken by an investigating committee where the accused officer has not been rep-

8Not only do the courts refuse to interfere with or regulate a removal proceeding conducted by the Executive, where the power of removal is vested in him, but at no time will the courts review the order of removal, either in a direct or collateral attack thereon, and however the question may arise. In the Matter of Gudin, 171 N. Y. 529, 64 N. E. 431 (1902), Gudin, after he had been elected and qualified as sheriff of Kings County, was removed by the Governor on charges, after a hearing, and a successor was appointed, who took over the duties of sheriff and took possession and charge of the sheriff's office. Gudin claimed that his removal was illegal and void and that, therefore, he was still sheriff and brought a proceeding to compel his putative successor to deliver to him the books and papers belonging to the office of the sheriff. The Court of Appeals held that the Governor's removal order was final and binding. Parker, Chief Judge, writing for the Court said:

"In this country the power of removal is an executive power and in this State it has been vested in the Governor by the people. It does not require argument to persuade the mind that the power thus conferred is executive and not judicial and that it was intended to be vested exclusively in the Governor" (p. 531).

"* * * in their wisdom, the framers of the Constitution put the public interest in the foreground and provided a simple and prompt method of removal of county executive officers by the Governor of the State" (p. 535).

"It authorizes the Governor to remove, as we have seen, after 'giving to such officer a copy of the charges against him and an opportunity of being heard in his defense,' and an examination of the record discloses that such requirements of the Constitution were fully complied with in this case. Therefore, we do not examine into the merits, for they do not concern the courts, inasmuch as both the power to decide whether Gudin should be removed from office of sheriff, and the responsibility for a right decision, rest solely upon the Governor of the State" (p. 536).

In an opinion concurring with Chief Judge Parker in the result, O'Brien, J., said (p. 537):

"The Governor has power to prescribe his own rules of procedure and determine whether the charge is sufficiently specific or otherwise, but there must be some act or omission on the part of the officer stated in the papers, which amounts to official misconduct, and when such a paper is presented to the Governor he requires jurisdiction of the person of the officer and of the subject-matter of the charge. For any error of law or of fact that he may commit in the progress of the investigation there is no power of review in the courts. The courts can inquire with reference to a single question only and that is the jurisdiction; but the power to inquire as to jurisdiction necessarily implies the right to examine into the nature and character of the charge, in order to see whether it is in any proper sense a charge at all within the meaning of the Constitution" (p. 537).

In the Matter of Richardson, 247 N. Y. 401, 160 N. E. 655 (1928), the Court said at pp. 402-414, that the Executive investigation and removal of officers are not "subject to the supervision of the courts." And in U. S. ex rel. Dunlap v. Black, 128 U. S. 40, 9 Sup. Ct. 12 (1888), it was held that the courts had no appellate jurisdiction over executive acts.
resented by counsel or afforded the opportunity of cross examination," as violative of the requirements of a "fair trial" or "fair hearing," and a disregard of "essentials" which should be "zealously guarded and preserved," "as a matter of common justice."

This dictum was construed by the Mayor and his counsel as a rebuke of the Governor's mode of procedure. In his letter to the Mayor suggesting resignation as one of the courses open to the Mayor, his counsel stated "Judge Staley has sustained our vital contention that the record of the joint legislative committee has no more legal or probative value than a blank sheet of paper." In this letter counsel reiterated "that not a single decision could be found in any court, high or low, not only in New York State but in the whole English-speaking world, to sustain the Governor's ruling. * * * The challenge to produce an authority to sanction the Governor's illegal ruling has been ignored."

Similarly, the Mayor in his public statement accompanying his resignation represented Mr. Justice Staley as having held "that the Governor proceeded in excess of jurisdiction and without warrant of law * * * by denying me the right, to which I am entitled under the Constitution and the law, to confront accusing witnesses and cross examine them" and in other ways. Therefore, he would "refuse * * * to further subject" himself "to an un-American, unfair proceeding."

If the same question had arisen in any court proceeding, it is clear that the record of the testimony taken before the legislative committee would have been held inadmissible. The proponents would have had to subpoena each of the witnesses and examine them again as if they had never testified and would have had to subpoena each of the documents and have them properly identified and offered in evidence as if the legislative committee had never existed. And, probably, weeks would have been consumed in this process.

It is probably fair to assume that the "reasonable man" of "ordinary prudence" upon whom our judicial system

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[11] Mr. Justice Staley's decision was to the contrary.
places such great reliance was mystified by the long debate over the admissibility of the record, and could not understand why it did not constitute evidence. In this reaction, the "reasonable man," probably, was joined by hosts of his superiors, outside of the legal profession, including logicians and men accustomed to scientific procedure in the ascertain-
ment of facts. Had the Governor ruled out the record of the testimony taken before the legislative committee, the "rea-
sonable man," et al., probably would have set it down to tech-
nicality and "red tape"—boresome and useless but as un-
avoidable in proceedings conducted by lawyers, according to the popular view, as measles to children once was accepted to be. On the other hand, most lawyers probably share Mr. Justice Staley's view that the more cumbersome court pro-
dure is scientific and "essential" in the interests and in pro-
motion of "common justice."

That the Governor was legally right in his procedure in view of the fact that the proceeding was executive and not judicial,\(^2\) is not the thesis of this paper. But that evidence of the type there involved is excluded from judicial proceed-
ings is the subject of consideration.

It cannot be denied that there is widespread dissatisfac-
tion and impatience with present-day court procedure. It is
looked upon as antiquated, laborious and wasteful. While,
in some quarters, there is a cry for "reform," many neither agitate nor wait but abandon our system for tribunals of their own creation, arbitrations, where "rules of evidence" are unknown. The danger and evil of the latter movement are those which attend all complete reactions, all swings of the pendulum to the other extremity. It is a jump from extreme restriction and extreme formality and extreme metic-
ulosity to anarchy.

Of course, if our caution in the evidence we admit for consideration is necessary to the just determination of contro-
versies, we must adhere thereto though we may be mis-
understood as captious. But is not our caution, over-caution, and as much an instrument of injustice (even if we overlook wastefulness) as under-caution? Does "common justice" call for the exclusion of testimony previously given?

\(^2\) See notes 20-22 infra and text in connection therewith; also note 8 supra.
In view of the oft repeated argument in the Mayor Walker case that such testimony has been deemed incompetent for so long a time that "the memory of men runneth not to the contrary" and that there is not to be found "a single decision * * * in the whole English-speaking world" to sustain the admission of such evidence, perhaps it is not amiss to consider the relevant historical facts.

Professor Wigmore tells us that court trials, as we now have them, developed in the sixteenth and seventeenth centuries. Before 1500, trial jurors were chosen not for their impartiality and lack of knowledge of the case but because of their familiarity with it, and their verdict was based upon their own knowledge or belief and such information or gossip as they individually gathered from their neighbors, and not upon evidence adduced before them; rarely were witnesses called; indeed, compulsory process for ordinary witnesses was first provided in 1562-63 by Statute 5 Eliz. c. 9 s. 6. As the nature of a court trial changed from a decision based upon the subjective knowledge and private investigations of the triers to a determination upon evidence presented to the triers, there evolved rules as to what may and what may not be heard by the jury and as to what was and what was not evidence worthy of consideration. And it was not until the latter part of the seventeenth century that the "hearsay" rule was definitely established.13

That development represented a reaction from anarchy to the other extreme. From a trial conducted without evidence, without the disclosure to the parties of what was being considered and without an opportunity to them to meet or refute it, once it was definitely recognized that a decision should be based upon evidence openly received with an opportunity to the adverse party to refute the same, it was natural to go to the other extreme of excluding all evidence that was not given vive voca at the trial. And thus for the last two and one-half centuries or thereabouts we have had the "hearsay" rule.

The rule against "hearsay," as our other rules of evidence, was evolved by the courts in the process of working out a technique for the then new mode of determining facts

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13 Wigmore, Evidence §1364, pp. 9-25 (2d ed.).
on openly presented evidence. It was natural for the courts to regard the product of their genius as the best and most fair procedure for the determination of rights, the fixing of liabilities and the redress of wrongs. Such a prejudice in favor of their own product was to be expected. Indeed, it would have been natural for lawyers and judges born after the procedure had been the accepted natural order of things for many years and reared on that system, to accept the rules as axiomatic and inseparable from justice. And so, there are to be found judicial opinions, like Mr. Justice Staley's, that condemn as inherently wrong and vicious any mode of procedure which substantially departs from the prevailing court-made rules of evidence. But, on the whole, there is to be observed a remarkable freedom from extreme bias, a recognition that while, on common-law principles, the courts are bound to observe the rules which they themselves had evolved, those are rules for them and not for government and society in general, and that the cause of justice may be served by less rigid modes of procedure.

Thus, the courts have held that the Constitutional requirement of "due process" is not violated by an authorized procedure that disregards our rules of evidence. Indeed, considering the fact that the phrase "due process" in connection with the taking of property and interference with liberty


15 See People v. Johnson, 185 N. Y. 219, 77 N. E. 1164 (1906), and cases, notes 16 and 17 infra. In the Johnson case, the Court said:

"Due process of law does not mean that the legislature cannot change the rules of evidence as they existed at common law * * * Statutes * * * declaring the effect of recitals in tax deeds, and of ex parte affidavits in town-bonding acts and statutory foreclosures, and changing in other respects the common-law rules of evidence and the common-law competency of witnesses, may be referred to as instances sustained by the courts.

* * * *

"But so long as the legislature, in prescribing rules of evidence, in either civil or criminal cases, leaves a party a fair opportunity to make his defense and to submit all the facts to the jury to be weighed by them, upon evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds.

* * * *

"The statute abridged no constitutional right by so expanding the common law as to try to throw more light upon the subject under investigation than had previously been allowed, even if that light, in the judgment of some persons, is of doubtful value."
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is derived from the Magna Charta, and that, as we have seen, in 1354, our concept of a trial and of orderly court procedure was unknown, it would have been most unhistorical to hold that the Constitution universalized and perpetuated the rules of evidence which, at the time of its adoption, obtained in the courts of the land.

In non-court proceedings, even though they be subject to court review, the courts have recognized that the ends of justice do not require the observance of our court rules of evidence.

Thus the statutory authorization to the Inter-state Commerce Commission to fix rates "after full hearing" was held by the United States Supreme Court not to connote the observance of common-law rules of evidence. To the contrary, the Court held that the Commission "should not be hampered * * * by those narrow rules which prevail in trials of common law." 16

Where a statute set up a board, with special machinery, to ascertain and adjudicate, subject to court review, the rights to the waters of a stream, the decision to be based, in part, upon sworn proofs of claim and a report to be made by the state engineer, but which safeguarded to each claimant the right to call, examine and cross-examine other claimants and witnesses and to offer evidence, it was held 17 that the statute was free from objection, because it provided for a full disclosure to each claimant of all the evidence and an opportunity to fully contest the claims adverse to him and to produce any evidence appropriate to be considered. In view of these safeguards, the United States Supreme Court held that the action of the board would not be based "upon anything as evidence that is devoid of evidential value or in respect of which the claimants concerned are not given a fair oppor-

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16 Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 Sup. Ct. 556 (1904). See also Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 33 Sup. Ct. 185 (1913); Spiller v. Atchison, T. & S. F. Ry. Co., 253 U. S. 117, 40 Sup. Ct. 466 (1919). In the Louisville case, as in the case note 17 infra, the essentials of a fair trial or hearing were held to be not observance of "strict rules as to the admissibility of evidence" but that the parties be "fully apprised of the evidence submitted to be considered," be afforded "opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in rebuttal or explanation."

tunity to show its true value, or want of it, in an appropriate way. * * * And while it is true * * * that the sworn statements of claim are taken \textit{ex parte} in the first instance, it also is true that they are then opened to public inspection, that opportunity is given for contesting them and upon the hearing of the contests full opportunity is had for the examination of witnesses, including those making the statements, and for the production of any evidence appropriate to be considered. Thus, the fact that the original statements are taken \textit{ex parte} becomes of no moment.” Similarly, the Court held, the taking of measurements by the state engineer and the acceptance of his report as \textit{prima facie} evidence was a practical measure to overcome “the difficulty encountered when the measurements were made by the various parties when they are nearly always made by different methods and thus confuse and mislead”; “considering the nature of the report and that the claimants may oppose it with other evidence, it is plain that its use as evidence is not violative of due process.”

In the matter of the determination of the amount of taxes, the courts have been singularly free from testing the procedure of the taxing authorities by their own rules of evidence. Indeed, the courts countenance the imposition of a tax predicated practically upon no evidence, so long as the taxpayer is accorded the right, at some stage, before or after assessment, to demonstrate the error of the taxing officer. Not only may the tax authorities proceed on information of all kinds and on subjective or intuitive knowledge, but the rule seems to be, at least in New York with respect to corporate franchise taxes, that where a hearing is accorded to the taxpayer the tax authorities are not required to disclose to the taxpayer the evidence or information upon which the assessment is predicated.\footnote{People \textit{ex rel.} Kohlman & Co. v. Law, 239 N. Y. 346, 146 N. E. 622 (1925); People \textit{ex rel.} Jaeckel & Sons, Inc. v. Gilchrist, 209 App. Div. 120, 124, 204 N. Y. Supp. 509 (3rd Dept. 1924); Matter of Lorimer, Greenbaum Co., Inc. v. Gilchrist, 212 App. Div. 733, 209 N. Y. Supp. 633 (1925).} At such hearing, the taxpayer offers his evidence in an effort to overcome the taxing officers’ conclusion. What that conclusion is based on, the taxpayer does not know and is not informed. If the taxing officers overrule his claims and objections, the Court, on certiorari,
will weigh the taxpayer's evidence in the light of a presumption that the taxing officer's conclusion is correct and is supported by information not disclosed at the hearing and, therefore, not part of the record, and which the taxpayer had no opportunity to meet or refute. From the fact that this rule was laid down by the courts themselves, it is to be inferred that procedure so at variance with the traditions of the courts was deemed by them in the interest of justice.

With respect to the executive removal of subordinate governmental officers, the courts, generally, have not read into constitutional or statutory provisions that the officer be afforded a hearing, the requirement that such hearing be conducted in the manner and by the rules governing a court trial. In Wilson v. North Carolina, the United States Supreme Court held that "due process" in the removal of an official called for only an "opportunity to be heard before being condemned," and that he was not entitled "to be confronted with his accusers and to cross-examine the witnesses." Similarly, in the New York case of Matter of Guden, the Court recognized that "the ability to act quickly in the removal of administrative officers and clerks * * * is important" and putting "the public interest in the foreground" it is proper that the method should be "simple and prompt." A like ruling was made by the New York Court of Appeals with respect to the trial of a patrolman by the board of police commissioners. The commissioners, the Court said, were not "confined by the application of strict legal rules which prevail in reference to trials and proceedings in courts of law." 22

The above examples suffice to indicate that the courts—at least those of them who have been called upon to give the matter more careful consideration—despite a natural prejudice in favor of their own system, have recognized that our

20 Ibid.
21a Whether in so holding, the courts have not swung too far from our accepted concept of justice, and have gone counter to the "essentials" of "due process" as laid down in other than tax cases (see notes 15, 16, 17, supra, and texts in connection therewith) are not of moment to this paper.
21 Note 8 supra.
22 People ex rel. Flanagan v. Board of Police Commissioners, 93 N. Y. 97 (1883).
technical mode of procedure and rules of evidence are not only not essential to a proper administration of justice, but at times are a hindrance to justice. Indeed, to have adhered to our court procedure as the “only safe system of investigation in matters of liberty and property,” would have been to ignore the historical fact that “other nations have had a long experience of successful justice” with other systems.\(^2\) That our legislative bodies feel that some of our rules are either unnecessary or a hindrance to justice is evidenced by the fact that in setting up quasi-judicial administrative boards with extensive power over the property of citizens, such as public service commissions, the Interstate Commerce Commission, workmen’s compensation boards, and the like, provision is usually made empowering them to conduct their proceedings without regard to the technical rules of evidence.

With respect to the hearsay rule as observed in our courts, it is important to distinguish (1) hearsay which is merely the repetition of the assertions of others from (2) truly testimonial assertions which are “hearsay” only in the sense that they were made at some place outside the trial or formal depositions taken in preparation for the trial.

The undesirability of non-testimonial hearsay is obvious. Yet it has been found impracticable to wholly exclude even that type of hearsay. If a witness be asked the date of his birth, it might reasonably be objected that his answer would be hearsay. At least in that instance the witness’s answer would, in all probability, be predicated upon information that had been imparted to him by his parents or others with direct knowledge of the simple fact. But if the witness be asked who his father was, his answer is not only the mere repetition of what had been told to him but a reiteration of some informant’s conclusion without proof that the informant was in possession of or properly evaluated the evidentiary facts. Yet a witness is held to be competent to testify concerning his ancestry.\(^4\)

While we admit this type of evidence, we exclude, with some exceptions, all manner of first-hand, truly testimonial

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\(^2\) See Wigmore, Evidence, 29 (2d ed.).

\(^4\) For other types of admissible non-testimonial hearsay see 3 Wigmore, Evidence §1430 et seq.
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evidence (not formally given in the action or proceeding by deposition or at a previous trial) simply because the testifier is not then on the witness stand, whatever, rationally, may be its probative value. At the same time, we do recognize the probative value of such testimony, for it must be considered if admitted without objection, and may be used in the cross-examination of the testifier should he be called as a witness by the adverse party. To be sure in the latter instance, the court is required to instruct the jury that the previous assertions of the witness may only be considered in determining the credibility of the testimony which the witness gave from the stand but is not evidence per se. When we assign to the self-same evidence probative value for one purpose and not for another, e. g., effectiveness to discredit but impotence to receive credit, it seems to me we have reached the height of artificiality.

Of course, in the great majority of cases, the refusal to receive in evidence assertions made by witnesses outside of court, works no injustice. But there are numerous exceptions. In straining to protect the party against whom evidence is offered by permitting only what generally is the best kind of evidence, we forget that it is equally important to protect the party who is offering the evidence from injustice due to the exclusion of what sometimes is the only evidence he has. And wherein lies the justice of disregarding pertinent material, regardless of how justly persuasive it is to a fair-minded, cautious, intelligent, logical mind?

Every practitioner can call to mind instances of gross injustice worked by such exclusion. To illustrate by a few examples—

A sheriff or a marshal or like officer-sells the property of a judgment-debtor under an execution. The judgment-creditor is the purchaser. As is not infrequently the case, the price realized is grossly inadequate in comparison with the fair value of the property. The judgment-debtor shortly thereafter is adjudicated a bankrupt. His trustee investi-

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25 Spiller v. Atchison, T. & S. F. Ry. Co., note 16 supra, holding at p. 130 that hearsay evidence when admitted without objection "is to be considered and accorded its natural probative effect, as if it were in law admissible."

gates the circumstances of the sale. He examines the selling officer. That examination adduces facts which establish that the required public notice had not been given. The trustee then commences an action against the selling officer and the judgment-creditor who acquired the property. After the action is commenced, the selling officer, contrary to his previous testimony, asserts that he had given all the notices that were required. The discrepancy between the two versions is over the posting of notice in public places, as to which there is no satisfactory record. At the trial, it is useless for the plaintiff to call the selling officer because he knows that he will testify to a state of facts in accord with his post-litem version. Therefore, he offers in evidence the selling officer’s pre-litem testimony. It is received as against the selling officer as admissions against interest, but is deemed wholly incompetent as against the other defendants. There being no other evidence as to the absence of proper notice, the action is dismissed as against the other defendants. The selling officer takes the stand in his defense and testifies in accordance with his post-litem version. This, however, is disbelieved. There follows a judicial determination that the required notice was not given and judgment goes against the selling officer. The purchaser at the sale, the judgment-creditor who profited thereby, however, escapes liability, on the technical, procedural ground that the selling officer’s pre-litem sworn testimony was “hearsay” as to him.

Of course, the purchaser is in no position different from the selling officer, except where, by statute, it is provided otherwise, as is the case with respect to purchasers at a sheriff’s sale in New York, under certain circumstances, by virtue of §662 of the Civil Practice Act.

This is another instance of holding the same evidence as probative for one purpose and valueless for another—an extremely artificial refinement.

In Lent v. Shear, 160 N. Y. 462, 55 N. E. 2 (1899) the action was by a receiver in supplementary proceedings to set aside, as fraudulent, a conveyance by the judgment-debtor to his wife. Both the defendants, that is the judgment-debtor and his wife, had been examined in supplementary proceedings, and the testimony of the husband was such as to establish that he made the transfer with fraudulent intent and that his wife had notice thereof. At the trial, the plaintiff offered in evidence the testimony that had been given in the supplementary proceedings by the two defendants and by two other witnesses. This was received over the objection of the defendants. Each of the defendants took the stand at the trial in their own behalf “and their testimony did not in some material respects, and especially in respect to fraudulent intent and notice thereof, agree with the version given by them * * * in the supplementary proceedings.” The court gave credence to the supplementary proceedings testi-
A, a chauffeur employed by B, while operating B's automobile in the service of B, runs over C. A, a little later, explains to a policeman who had come to the scene what had happened, and his statement makes it clear that the accident was due to his negligence. C brings suit against B for damages. C, as a result of the injuries sustained, is unable to testify as to how the accident occurred. Eye-witnesses other than A are lacking. C's attorney calls the policeman to testify to A's statement, but, of course, it is excluded on B's objection that the statement is incompetent as against him. Having no other course, C calls A as his witness. A then testifies to a state of facts sufficiently different from his statement to the policeman as to exculpate himself from blame. C's attorney then questions A as to his statement to the policeman, but A, while he does not deny that he had spoken as he is claimed to have, insists that his present testimony is correct. From the explanations that the witness offers for the discrepancy between his two versions, from the fact that his statement to the policeman was made when the occurrence was fresh in his mind and that what he then stated was against his interest and against the natural tendency to exculpate oneself from blame, the judge is convinced that A's statement to the policeman set forth the truth. Under our present system, however, the judge is bound to dismiss the case.

mony over the testimony given at the trial and granted judgment for the plaintiff. Held, judgment reversed.

"The testimony of Mrs. Shear, being an admission of a party to the record, was properly received as against herself, and the testimony of Mr. Shear as against himself, but we do not see upon what principle the testimony of Mr. Shear could be received as against his co-defendant, for it did not appear, other than by the evidence objected to, that there was either joint interest or privity of design between them.

***

"The fact that the testimony of Mr. Shear was taken in a judicial proceeding did not make it any the less a declaration as to Mrs. Shear, who was not a party, but simply a witness in that proceeding. It was as to her hearsay evidence and inadmissible upon any ground. *** Declarations made under oath do not differ in principle from declarations made without that sanction and both come within the rule which excludes all hearsay evidence with some exceptions not now material. ***

"An attempt is made to justify the introduction of this evidence upon the ground that it affected the credibility of the testimony given by the defendants on the trial, but when it was introduced no testimony had been given in behalf of the defendants, and if it had not been introduced no testimony would have been necessary in their behalf."
In the same situation, if we suppose that A was arrested charged with reckless driving, and in the proceedings before the magistrate, wherein he was represented by B's attorney, A testified to a state of facts which showed that the accident was due to his negligence, B would still escape judgment if C be without knowledge and other eye-witnesses be lacking and A testifies to a different state of facts when called as a witness.

In the same case, if A be joined as a party defendant, his statement to the policeman and his testimony before the magistrate are received to establish a cause of action against him, but there would still be a dismissal against B, although as a matter of law B is liable if A is.

If prior to the trial of the action of C against B, there had taken place the trial of D, another person injured in the same accident, against B, and A had testified in the course of that trial, substantially in accord with the testimony which he had given before the magistrate, and was then subjected to cross-examination by the attorney for B, the offer of this testimony at the trial of C against B, would still be ruled out.

The reason assigned for excluding out of court statements as evidence is that the statements were made at a time and place where the party against whom it is offered had no opportunity to cross-examine the declarants. But that reason does not cover the latter case. There B had cross-examined A. Still A's testimony is excluded as hearsay. In each of the other posed cases, the person whose statement or previous testimony was being offered was in court available for cross-examination. What does it matter that the declarant was not cross-examined at the time that he made his declarations, if at the trial he is available for cross-examination? All the probing and revelation that could have been done then, can still be done. The extent and accuracy of the declarant's knowledge or lack or faultiness of it or general credibility can be brought out fully by cross-examination at the trial. That was the consideration that the Governor acted on in the Walker case. That was the effective procedure in the case of the Elders against Suzanna.

27c See note 17 supra.
It is submitted that the admission of out-of-court testimonial assertions where the declarants are in court available for the other side's cross-examination does not violate any principle fundamental to our present procedure. The exclusion of such evidence has no rational justification—it is arbitrary—except where the making of the assertion relied on is disputed. In the event of such a dispute it is possible that the trial should become a contest over the collateral issue of whether or not the declarant had spoken as testified to. The fact that such an issue might arise in some cases is no reason for excluding such evidence in cases where no such issue exists. Furthermore, a dispute as to whether or not witness A had said so and so is no different from a dispute created by party B's disputing of party C's testimony of what he, party B, had said. The arising of a dispute of the latter kind does not suggest to us that we strike out C's testimony of the admission against interest he claims B had made; we say the issue of whether or not party B had said what C testifies he had said is an issue of fact (though it be collateral to the main issues) to be determined as any other issue of fact. What difference does it make whether the issue is over what party B had said or over what witness A had said? We sense no such difficulty when the remarks attributed to witness A are part of the res gestae; does insurmountable difficulty arise if the remarks are made one hour after the event? 28

It is submitted that there is no valid reason for excluding out-of-court testimonial assertions by adverse or hostile witnesses, where the witnesses are at the trial available for cross-examination.

The question arises whether such testimonial assertions should be admitted in evidence where the declarants are not in court and cannot be produced in court because of death, incapacity, absence from jurisdiction, inability to locate them, or for any other reason. The admission of their out-of-court assertions would be admitting evidence incapable of being subjected to the test of cross-examination. Doubtlessly, the opportunity to cross-examine is of substantial value. Professor Wigmore rates cross-examination as "the most

efficacious expedient ever invented for the extraction of truth," 29 "the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure." 30 But at the same time Professor Wigmore recognizes that cross-examination is only one test, one safeguard, and that it does not follow that evidence is unreliable because it had not been subjected to cross-examination. 31 Rationally, the fact that evidence had not been subjected to the test of cross-examination is a fact to be taken into consideration in evaluating the evidence; in some cases it may be deemed worthless, and in other cases highly probative, all depending upon the circumstances. Indeed, we must recognize that cross-examination is sometimes a distorter of truth. Many a witness who has told the truth on direct examination is made to appear a liar on cross-examination; the witness may become nervous, he may place himself at great disadvantage by a hostile and sniping attitude to the cross-examiner—a reaction natural to inexperienced witnesses, he may be over-awed by the cross-examiner's reputation for skill and ferocity. To quote Professor Wigmore again, cross-examination "like torture—that great instrument of the Continental system—is almost equally powerful for the creation of false impressions." 32 The skillful cross-examiner "may, it is true, do more than he ought to do; he may make the truth appear like falsehood." 32a Thus Professor Wigmore says: 33

“No one could defend a rule which pronounced that all statements thus untested [by cross-examination] are worthless; for all historical truth is based on un-cross-examined assertions.” The true rule should be “that all testimonial assertions ought to be tested by cross-examination, as the best attainable measure; and it should not be burdened with the pedantic implication that they must be rejected as worthless if the test is unavailable.”

29 1 Wigmore, Evidence, 109.
30 3 Ibid. 27.
31 1 Ibid. 138; 3 id. 154-156, 270-279, 738.
32 1 Ibid. 109.
32a 3 Ibid. 27.
33 1 Ibid. 138.
As a matter of fact, our courts have recognized that the objection that there has been no opportunity to cross-examine must, at times, yield to other considerations. Thus, there has evolved a formidable list of exceptions to the hearsay rule. The absence of cross-examination is held not a disqualifying factor, either because it is believed that in given circumstances the assertions are so highly credible that the test of cross-examination is unnecessary—as for example, in the case of a dying declaration, *res gestae* assertions, a party's admission against interest—and in other cases because cross-examination is unavailable, and, faced with the alternatives of having no evidence or untested evidence, the latter is chosen as the lesser of the two evils—as in the case of proof of pedigree.

In practice, courts receive a substantial quantity of evidence untested by cross-examination. For example, documents that bear a certificate of acknowledgment purported to have been signed by a notary public or like officer are deemed self-probatory in so far as genuineness and date of signatures are concerned; a certificate purported to have been signed by a notary public attesting that the signer had duly presented a note or similar paper and had protested it for dishonor and had given notice thereof to persons listed by him, is receivable in evidence in proof of the contents thereof; old maps are received in evidence without proof of their authorship and correctness; recitals in old deeds are received in proof of the substance of the recitals; certificates by officials as to matters within their jurisdiction given in the discharge of official duties are deemed evidentiary; and so on.

In recent years, a great departure was made, in New York, from traditional procedure, by the adoption of a statute making admissible in evidence books and records kept in the regular course of business, in proof of the substance thereof. In 1928 the New York Legislature adopted section 874a of the Civil Practice Act reading as follows:

"Admissibility of certain written records. 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, transac-
tion, 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."

The Court of Appeals in construing this statute pointed out that it is a verbatim adoption of a rule advocated by the Legal Research Committee of the Commonwealth Fund in its report, "The Law of Evidence—Some Proposals for Its Reform," so as to "give evidential credit to the books upon which the mercantile and industrial world relies in the conduct of business," and quoted Professor Wigmore's argument:

"It would seem that expedients which the entire commercial world recognizes as safe could be sanctioned, and not discredited, by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the court room. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who as attorneys have already employed and relied upon the same methods. In short, courts must here cease to be pedantic and endeavor to be practical."

35 Published in 1927 by the Yale University Press.
36 3 Wigmore, Evidence, p. 278.
The opinion of the Court, concurred in by all the judges, proceeds to hold that the purpose and effect of the enactment was to "afford a more workable rule of evidence in the proof of business transactions under existing business conditions * * * to permit a writing or record made in the regular course of business to be received in evidence without the necessity of calling as witnesses all of the persons who had any part in making it, provided the record was made as part of the duty of the person making it or on information imparted by persons who were under a duty to impart such information. The amendment permits the introduction of shop books without the necessity of calling the clerks who may have sold different items of account." The opinion continued:

"Under modern conditions the limitations upon the right to use books of account, memoranda or records made in the regular course of business, often resulted in a denial of justice, and usually in annoyance, expense and waste of time and energy. A rule of evidence that was practical a century ago had become obsolete. The situation was appreciated and attention was called to it by the courts and text writers. (Wood's Practice Evidence [2d. ed.] 377; 3 Wigmore on Evidence [1923] §1530).

* * *

"An important consideration leading to the amendment was the fact that in the business world credit is given to records made in the course of business by persons who are engaged in the business upon information given by others engaged in the same business as part of their duty."

* * *

"The Legislature has sought by the amendment to make the courts practical. It would be unfortunate not to give the amendment a construction which will enable it to cure the evil complained of and accomplish the purpose for which it was enacted."

The rule represents an extremely radical departure from traditionally accepted rules of evidence. For example, under
the rule, the delivery of certain goods on a certain day to a certain person at a certain agreed price, is established, *prima facie*, simply by the introduction in evidence of an account in the seller's sales ledger, without calling the person with whom the sale had been agreed upon, the packer who packed the goods, the shipping clerk who delivered the goods to the truckman, and the truckman who made the delivery—without tracing the goods into the premises of the defendant, without identifying the recipient, without a receipt, or any of the incidents that used to attend the proof of the delivery of goods. The need of a mass of evidence is displaced by the introduction in evidence of a record which is the product of hearsay upon hearsay, given *prima facie* probative force, despite the absence of cross-examination of the persons who supplied the information to the person who made the entry. And the acceptance of such hearsay is deemed not only expedient but a preventive of what "often resulted in a denial of justice, and usually in annoyance, expense and waste of time and energy," a "cure" of "the evil" wrought by our rules of evidence.

The same Legal Research Committee which had promulgated the rule above quoted, proposed, in the same report, that

"A declaration, whether written or oral, of a deceased or insane person shall not be excluded from evidence as hearsay if the court finds that it was made, and that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."

In that connection, the Committee pointed out that such a rule has prevailed in Massachusetts with respect to the declarations of deceased persons, since 1898.37

Why should the rule be limited to declarations of deceased or insane persons? Certainly, a declaration attains no greater probability of verity because of the subsequent death or insanity of the declarant; on the other hand, his death or insanity removes the possibility of subjecting his

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declaration to the test of cross-examination. If necessity be the justification for admitting the declaration, the necessity exists equally where the witness is adverse or hostile and has changed his narrative between the time of his original declaration and the date of trial. If it is wise and expedient to admit the declaration where the declarant has died or has become insane, it is at least equally wise and expedient to do so where the witness has joined forces with the other side. The fact that in the latter instance the declarant is available for examination, is additional ground for admitting the declaration and not a ground for excluding it, because his availability at the trial enables the side whom he favors at the trial to do everything possible by cross-examination to explain away or destroy the force of his declaration—an opportunity denied to an adversary where the declarant is dead or insane and a circumstance which renders the admission of the declaration fairer to the adversary. But if the declarant is not available at the trial or for formal examination by deposition, what difference does it make that his absence is due to a cause other than death or insanity, so long as the absence be not for the purpose of evading cross-examination? The declaration is just as trustworthy or wanting in trustworthiness, when the declarant's absence from the trial is due to the fact that he cannot be located as when it is due to death or insanity. On the other hand it is worthy of greater credence when the declarant is away at the instance or for the accommodation of the party against whom the declaration is offered. The refusal to receive such declarations or the reception of such declarations as evidentiary against the declarant but not against those who are liable equally with him, leads to such monstrous results as are set forth in the examples discussed above. The fact that such travesties follow logically from our rules merely proves that the rules are illogical.

CONCLUSION.

It is submitted that:

A declaration, whether written or oral, of a person who (1) at the time of trial is adverse or hostile, or (2) is un-
available for attendance at the trial or taking of his deposition, by reason of death, insanity, inability to locate or other circumstance beyond the control of the party, shall not be excluded from evidence as hearsay if the court finds that it was made, and that it was made in good faith upon the personal knowledge of the declarant, provided, however, that in instance "(1)" the declarant shall be in court available for cross-examination by the party against whom the declaration is offered or his absence is explained to the satisfaction of the judge, and provided further that if the trial be before a jury, in a case where there is substantial conflict of evidence as to the making and substance of the declaration, the judge may, and, at the instance of either party, shall, submit, with proper instructions, that issue for determination by the jury.

Conceivably, the rule might be subjected to abuse and, in some isolated cases, work injustice. Nothing has yet been devised by man—or, for that matter, by nature—that is not subject to the same criticism. The question is not whether the proposed rule is incapable of abuse, but whether, by and large, it will promote the administration of justice.

It is believed that the proposed rule would be a rational and practical aid to judicial investigation of controversies and discovery of truth.

Copal Mintz.

New York, November 16, 1932.