

THE BORDERLAND OF HEARSAY

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In the last century it was the fashion to approach the rules of evidence with a deal of reverence. Lord Ellenborough, that staunch conservative, spoke in the approved manner when he introduced a judgment on a point of evidence by these words:

"I should be extremely sorry if anything fell from the Court upon this occasion which would in any degree break in upon those sound rules of evidence which have been established for the security of life, liberty, and property; but in declaring our opinion upon the admissibility of the evidence in question, we shall lay down no rule which can induce such ruinous consequences, nor go beyond the limits of those cases which have been often recognized. . . ."¹

Today, on the other hand, the most authoritative writer on the subject, whose hand has done more than any other to shape its contours in the last two decades, is ready to reduce the rules of evidence almost to mere discretionary canons for the guidance of the trial court—canons from which he may depart in any instances where their particular application seems unwise.² It is believed also that the temper of lawyers and judges generally reflects likewise the feeling that the law of evidence should by no means be accepted as a fairly stable legal inheritance such as the law of real property, or of wills. Like all procedural rules, those of evidence are losing their sharpness of definition, their clearness of outline. The whole subject is in process of deliquescence, and we feel only this certainty as to the future of the rules of evidence, that so far as they survive at all, they will be fewer and simpler, and far looser of application than those of today.

In this transitional era, it may be justifiable to discuss some phases of the law of evidence which may have little direct practical application, solely because they bring us to a reconsideration of some of the foundations upon which the structure has rested in the past; this may reveal some of those crevices through which the winds of change may blow. These motives have prompted the writer to examine some of the implications:

¹ *Higham v. Ridgway*, 10 East 109, 116 (1808).

² WIGMORE, *EVIDENCE* (2d ed. 1923) § 8a; cf. MORGAN, *THE LAW OF EVIDENCE* (1927) Ch. I.

of the theory of that most far-reaching of evidential doctrines, the hearsay rule.

One intriguing question which stands at the hearsay threshold is whether the hearsay stigma attaches only to evidence of what someone has previously said or written, or whether it may also include evidence of what he has *done*. It is familiar doctrine that the hearsay rule applies only to evidence of out-of-court statements offered for the purpose of proving that the facts are as asserted in the statement. Evidence of such statements made for any other purpose, *e. g.*, to prove the making of a declaration as evidence of the publication of a slander, or to show that the one who uttered or heard it had notice of the facts asserted, is, of course, not hearsay. It is only where the statement is offered as the basis for the inferences, first, that the declarant *believed* it, and, second, that the facts were in accordance with his belief, that the evidence is hearsay. These inferences are believed to be too unreliable to permit the evidence to be thus used by a jury. The declarant, in the first place, may be consciously lying and hence not have believed what he says, and second, even though he believed it, he may, due to faulty information or observation, have been mistaken. All this is the well-worn everyday logic leading to the exclusion of hearsay statements. Does it apply to anything other than statements? More particularly does it apply to evidence of *conduct*? For example, if the sanity of *X* is in question, is it hearsay to prove that *Y*, who has been shown to have known *X* well all his life, agreed to marry him, when such evidence is offered to support the inference that *Y* believed him sane, and hence that he *was* sane? If the issue is as to which member of a group insulted *S*, is evidence that *B*, her brother, who heard the insult, and thereupon attacked *D*, one of the crowd, hearsay when offered to show that *D* was the insulter? Other examples, gleaned from the opinions of the judges in the leading case on the subject³ are: (1) proof that the underwriters have paid the amount of the policy, as evidence of the loss of a ship; (2) proof of payment of a wager, as evidence of the happening of the event which was the subject of the bet; (3) precautions of the family, to show the person involved was a lunatic; (4) as evidence of sanity, the election of the person in question to high office; (5) "the conduct of a physician who permitted a will to be executed by a sick testator," (6) "the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of the vessel embarked in it with his family."

³ See quotations from *Wright v. Tatham*, 5 Cl. & F. 670, 739 (1838); and same case below, 7 Ad. & El. 313, 386 (1837), in WIGMORE, *op. cit.* § 267.

These instances bring out in clear relief the problem: does apparent belief translated into *action* stand in any better case as respects the hearsay rule than apparent belief translated into *statements*?

By way of prelude, it must be observed that the line of cleavage between action and statements is one that must be drawn in the light of substance, rather than form. No one would contend, if, in response to a question "who did it?", one of the auditors held up his hand, that this gesture could be treated as different from an oral or written statement, in the application of the hearsay rule, any more than could the sign-speech of the dumb. So also a gesture may accompany and give meaning to speech, as where A "identifies" B as a sought-for criminal,⁴ or where an eye-witness "points out" the scene of an accident.⁵ Obviously, though described in terms of conduct, the actions are as much a part of the speaker's effort at expression as his words are, and of course in all such cases where the gesture or other act is done, so far as appears, solely for the purpose of expression it is on a parity for all present purposes with any purely verbal statement.

On the other hand, it seems equally clear that since hearsay is limited to assertions offered for their truth, *conduct* may properly include *words* used for other purposes than assertion, *e. g.*, words of imprecation, words of discharge to a servant, words used in voting for a candidate for office, words of gift or conveyance, and our identical problem would arise where these words are used to prove the belief of the declarant regarding a certain fact, for the purpose of showing the truth of the belief—the same problem in another form as arises when the actor's non-verbal conduct is offered for similar purposes. Of this last type was the evidence offered in the leading case above referred to,⁶ *i. e.*, evidence that a letter was written to the decedent consulting him seriously in matters of business was offered to show that the writer believed him sane, as proof of his sanity. Of similar type would be evidence of an official's revocation in another state of a driver's license to show the driver's unfitness for employment,⁷ or evidence of the decision of the Superintendent of Banks to close a bank as evidence of the bank's insolvency,⁸ or evidence of an offer of a position as a choir-singer as evidence that the offeree was a skilled musi-

⁴ McBride v. State, 20 Ala. App. 434, 102 So. 728 (1925).

⁵ Jackson v. Vaughn, 204 Ala. 543, 86 So. 469 (1920); Byrd v. State, 89 Tex. Cr. Rep. 371, 231 S. W. 399 (1921).

⁶ Wright v. Tatham, *supra* note 3.

⁷ Cf. McGurdy v. Flibotte, 83 N. H. 91, 139 Atl. 367 (1927).

⁸ Cf. Smith v. Olson, 50 S. D. 81, 208 N. W. 585 (1926).

cian.⁹ The distinction may be illustrated by supposing that, on an issue (in a suit between third parties) of whether at a certain time *A* was indebted in a certain sum to *B*, evidence is offered, (a) that *A* wrote to *B* admitting the debt, (b) that *A* paid the amount of the alleged debt to *B*, and (c) that *A* requested *C* to pay the amount of the claimed debt to *B*. The evidence under (a) is typical hearsay, and our problem here is whether the non-verbal conduct (b), and the verbal, but not assertive, conduct (c), is also hearsay.

Strangely enough, though the problem seems one which, theoretically at least, brings into question the whole scope of the hearsay rule, it has only once received any adequate discussion in any decided case, so far as the writer is aware. In that case, indeed, the arguments pro and con were marshaled in dress-parade, by minds as acute as those of the senior Pollock, and Scarlett, Creswell, and Starkie, at the bar, and the master intellect of Baron Parke, on the bench. It was a celebrated and hard-fought cause, which wound its way from the common law courts to chancery and back again, and was argued and re-argued, and elicited numerous opinions, in the King's Bench, the Exchequer Chamber, and the House of Lords, which fill literally hundreds of pages in the reports. One John Marsden was a country gentleman, seized of certain rich manors in Lancashire, who died at a ripe old age, leaving his estate by will to one Wright, who had risen from a menial station to the position of steward and general man of business for Marsden. Marsden's heir at law, Admiral Tatham, in 1830 instituted litigation, including an action of ejectment for the real estate, to oust the menial intruder from these manors, on the ground, *inter alia*, of Marsden's mental incompetency to make a will. So great was the prejudice supposed to prevail in Lancashire, that one of the branches of the litigation was tried in the York assizes. At the ejectment trial, the ex-steward Wright, the defendant, supporting the will, offered in evidence several letters all written to the deceased by persons no longer living. Among them was one from a relative in America, giving news and expressing affection, and of a tenor such as would be written to one of ordinary understanding, and there were likewise three others which related to matters of business which presumably would only be written to one who was believed by the writers to be able to comprehend and act intelligently upon practical affairs.¹⁰ All these letters were admitted by the trial judge as

⁹ Cf. *Carpenter v. Asheville Power and Light Co.*, 191 N. C. 130, 131 S. E. 400 (1926).

¹⁰ The letters are set out in full in 112 Eng. Rep. Repr. 490-494 (1837). One of the letters, from the Vicar of the Parish, strongly urges the testator to have his attorney meet with the attorney of the Parish, for

evidence of the testator's competency, and the jury returned a verdict for the defendant sustaining the will, after hearing a mass of other evidence which fills two volumes in the verbatim report.¹¹ A rule *nisi* for a new trial, for error in admitting the letters, was granted, and the question of whether the letters were properly admitted caused much "fluttering in the dove-cotes" in English judicial ranks for the next few years. Sir Frederick Pollock the elder, on behalf of the victorious steward, argued strongly that the letters were properly admitted, as showing "treatment" of the testator as a sane man by those who knew him, but the King's Bench held against him, and the case went down for a new trial, the letters were then excluded, and this time the heir, Admiral Tatham, secured a verdict against the will, and the question of the admissibility of the letters again started up the rounds of the judicial ladder. The case was twice acutely argued in the Exchequer Chamber, and all of the judges who considered the point seemed to have agreed in holding that the letters, in the absence of evidence that Marsden, the addressee, acted upon or at least read them, were inadmissible as being equivalent to hearsay evidence of the opinions of the writers. The holding was perhaps most pithily put by Baron Parke in these words:

"The conclusion at which I have arrived is, that proof of a particular fact, which is not of itself a matter in 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; and, therefore, in this case the letters which are offered only to prove the competence of the testator, that is the truth of the implied statements therein contained, were properly rejected, as the mere statement or opinion of the writer would certainly have been inadmissible."

This opinion prevailed with all the other judges who alluded to this question, both in the Exchequer Chamber and on the further appeal to the House of Lords, though the judges of the former court were equally divided upon the question whether the proof sufficiently showed that the testator had read and acted on the letters so as to render them admissible on that ground. Finally in 1838, the House of Lords ended eight years

the purpose of agreeing upon a statement of facts about some dispute between the testator and the Parish to be laid before counsel to whose opinions both sides should submit. Another is from a curate appointed by the testator, written on his resignation and expressing his gratitude and respect. Two others invite the testator to come, in company with the steward, to certain meetings to be held apparently for purposes connected with local public business or politics.

¹¹ 112 Eng. Rep. Repr. 492, note (a) (1837).

of strenuous litigation by holding the letters inadmissible, and Admiral Tatham, the heir, presumably entered at last upon his inheritance.

In no subsequent case has the problem been brought out so clearly—no Pollock and Parke have again crossed swords upon it—but there are a few distinct judicial rulings in America which announce the governing principle in the same fashion as did the English judge in *Wright v. Tatham*.

Thus, in *Thompson v. Manhattan Ry.*,¹² where the issue was whether the plaintiff had actually suffered an injury to the spine, as she claimed, the court rejected evidence that her physician treated her for spinal injuries, and said:

“We think such proof was in the nature of hearsay. The treatment of the plaintiff for a particular disease was no more than a declaration of the physician that she was suffering from such a disease. As the declaration would not be competent, we think proof of the treatment would not be competent.”

A similar question arises when one charged with crime claims that the crime was committed by another, and offers evidence that such other person took refuge in flight after the crime was committed. Of course, evidence that this third person had *confessed* the crime would clearly be a hearsay statement, and as such would be excluded by most courts,¹³ and the question whether evidence of flight would also be hearsay raises our problem directly. The courts have called the flight-evidence “hearsay” and have held it must be excluded,¹⁴ except where it comes within some indefinable range of proximity to the crime, in time and space, and hence is admitted, though hearsay, as part of the *res gestae*.¹⁵

An extreme instance of such identification of conduct with statement in the application of the hearsay rule is presented by some cases in the intermediate appellate courts of New York and Texas. In these cases a claim for a breach of warranty

¹² 11 App. Div. 182, 42 N. Y. Supp. 896 (2d Dep't 1896).

¹³ *Donnelly v. United States*, 228 U. S. 243, 33 Sup. Ct. 449 (1913).

But a few courts admit the evidence as a declaration against interest. *Hines v. Commonwealth*, 136 Va. 728, 117 S. E. 843 (1923); see WICKMORE, *op. cit.* §§ 1476-1477.

¹⁴ *State v. White*, 68 N. C. 158 (1872); *Levison v. State*, 54 Ala. 520 (1875); *State v. Piernot*, 167 Iowa 353, 149 N. W. 446 (1914).

¹⁵ *Terry v. State*, 13 Ala. App. 115, 69 So. 370 (1915); *People v. Mendez*, 193 Cal. 39, 223 Pac. 65 (1924). The former case seems to require strictly that the evidence to be part of the *res gestae* must show the flight as following immediately and hence “instinctively” upon the crime. The latter would seemingly be satisfied if there were any facts which would fairly indicate a causal connection between the crime and the flight.

of quality of goods sold was asserted, and upon the issue of defective quality, evidence was offered for the seller that other goods of the same lot were accepted by other purchasers without complaint. This was held to be "hearsay."¹⁶ There is a sprinkling of other cases which more or less directly support the view that "hearsay" includes conduct.¹⁷ Some are dicta and some are explainable on other grounds.

¹⁶James K. Thompson Co., Inc. v. International Compositions Co., 191 App. Div. 553, 181 N. Y. Supp. 637 (1st Dep't 1920); Altkrug v. William Whitman Co., 185 App. Div. 744, 173 N. Y. Supp. 669 (1st Dep't 1919); George W. Saunders Live Stock Commission Co. v. Kinkaid, 168 S. W. 977 (Tex. Civ. App. 1914). *Contra*: St. Louis Southwestern Ry. v. Arkansas & T. Grain Co., 42 Tex. Civ. App. 125, 95 S. W. 656 (1906).

¹⁷Gresham v. Manning, 1 Ir. R. C. L. 125 (1867). Action by hotel owner for obstruction of light by neighboring land-owner. On the issue of whether the light was actually obstructed, evidence that certain guests refused to take the rooms alleged to be darkened, and that they gave as their reason that they were too dark, was held hearsay and inadmissible.

Hanson v. State, 160 Ark. 329, 254 S. W. 691 (1923). On an issue of whether a bank was in a failing condition at a certain time, evidence that at that time other banks followed the unusual practice of demanding payment from this bank in cash of collections made through it was held inadmissible as hearsay. But the lack of testimonial knowledge would seem to be a clearer objection.

In re Louck's Estate, 160 Cal. 551, 553, 117 Pac. 673, 676 (1911). Question of survivorship as between two persons killed in the same train wreck. The witness was asked if he knew why L, one of the decedents, was placed on a stretcher and the other decedent not. Ruling out the question was held no error. "The only purpose of such a question would be to elicit a statement from the witness that those placing the body on the stretcher believed Mr. Loucks was alive. Their belief was not pertinent but only a statement of the physical facts supporting such belief was admissible in evidence." Other objections to the question are obvious.

In re De Laveaga's Estate, 165 Cal. 607, 133 Pac. 307 (1913). On the issue of the sanity of a testatrix, the court said that the fact that relatives of the testatrix by their conduct treated the testatrix as incompetent, and managed her affairs without consulting her, would be inadmissible if standing alone, but admissible where the circumstances indicate acquiescence by the testatrix in this treatment where a sane person would not acquiesce. The case in this respect is somewhat similar to Wright v. Tatham, *supra* note 3, which would have admitted the letters had it been proved that the testator had read the letters.

In re Hine, 68 Conn. 551, 37 Atl. 384 (1897). On issue of capacity in a will case, evidence that boys in the street made fun of the testatrix was excluded as "hearsay." Similar evidence was admitted by the trial court in Wright v. Tatham, *supra* note 3; see 112 Eng. Rep. Repr. 492.

Pitner v. Shugart Bros., 150 Ga. 340, 103 S. E. 791 (1920). Action for nuisance in operating a cotton gin near a dwelling. Evidence that fire insurance rates were raised because of the operation of the gin was held, in the head note, not elaborated in the opinion, to be "hearsay." The issue upon which the evidence was offered was not stated.

On the other hand, there are other cases whose implications at least would favor the view that evidence of conduct is outside the pale of hearsay. Thus on questions of family relationship, the fact that the person in question was treated as a relative by members of the family is admitted.¹⁸ Similarly, the fact that the neighbors have treated a couple as man and wife is evidence of the marriage,¹⁹ as is of course the evidence of their cohabitation as such,²⁰ and evidence that parents have treated a child as legitimate is admissible to show legitimacy.²¹ Perhaps the familiar doctrine that acts of ownership, control, or possession are admissible (even on behalf of the actor) as evidence of ownership²² has a similar implication. So also, the fact that one purports to carry out the official duties of an

People v. Bush, 300 Ill. 532, 133 N. E. 201 (1921) (evidence that a certain inmate of an institution was not put in the venereal ward, offered to show that she did not have a venereal disease, excluded as "hearsay"); Caruthers v. Balsley, 89 Ill. App. 559 (1899) (where the issue was as to the disposition of a certain horse, evidence that a veterinarian had refused to treat him on the ground that he was a man-eating horse held inadmissible as hearsay); Stallings v. State, 29 Tex. App. 220, 63 S. W. 127 (1901) (to show certain debts not paid, evidence that creditor thereafter preserved bill for same, held hearsay); Wells v. State, 43 Tex. Cr. Rep. 451, 67 S. W. 1020 (1902) (evidence that husband of rape victim assaulted accused inadmissible when offered to show husband believed defendant was the assailant); Brittain v. State, 52 Tex. Cr. Rep. 169, 105 S. W. 817 (1907) (evidence that third person picked out marked money which had been stolen from a large lot held hearsay); Ray v. State, 88 Tex. Cr. Rep. 196, 225 S. W. 523 (1920) (witness having stated he had been indicted for theft at instance of express company was asked if the express company had not made a compromise of his claim for malicious prosecution; held, hearsay); Murray v. State, 56 Tex. Cr. Rep. 438, 120 S. W. 437 (1909) (evidence in prosecution for liquor-selling that certain ladies asked the accused to quit selling "Frosty" held hearsay).

Gillespie v. State, 73 Tex. Cr. Rep. 585, 166 S. W. 135 (1914). Seduction: on issue of chaste character of prosecutrix, accused seeks to ask whether witness who had gone riding at night with her, before the crime, had not requested one E, who had seen them riding, not to tell anybody. Held hearsay.

Powell v. State, 88 Tex. Cr. Rep. 367, 227 S. W. 188 (1921). The defendant, charged with theft for selling his grandmother's cow in her absence, claimed to have acted under belief that she had authorized the sale. Evidence for the state that the grandmother on her return demanded the cow and not the money was held hearsay.

¹⁸ Greaves v. Greenwood, 2 Ex. D. 289 (1877); 13 HALSBURY'S LAWS OF ENGLAND (1910) 446.

¹⁹ Fleming v. Fleming, 4 Bing. 266 (1827); Re Thompson; Langham v. Thompson, 91 L. T. (N. S.) 680 (1904).

²⁰ WIGMORE, *op. cit.* § 268.

²¹ Woodward v. Blue, 107 N. C. 407, 12 S. E. 453 (1890), and other cases cited in WIGMORE, *op. cit.* § 269.

²² Jones v. Williams, 2 M. & W. 326 (1837); 13 HALSBURY'S LAWS OF ENGLAND 442.

office is admissible as evidence that he is the incumbent.²³

It is observable, however, that all of these instances are of the admission of what is usually presented as evidence of conduct of a *generalized* sort. It is either conduct of a given person extending over a substantial period of time, or the united similar actions of the members of a group such as a family or neighborhood. It is different from evidence of an isolated act of an individual.

The cases do offer examples of the admission of somewhat more individualized conduct, however. Thus in *Martin v. Johnston*,²⁴ the court held admissible, on the issue of whether a person, then in an asylum, was competent at the time to make his will, evidence as to whether he was then actually held under restraint. The case of *Meserve v. Folsom*²⁵ must be counted on the same side. There the plaintiff claimed to be domiciled in Sutton, and the defendant contested this. The defendant was allowed by the trial court to ask the plaintiff whether he was allowed to vote in Sutton, to which the plaintiff objected as hearsay, but was forced to answer that he was not. On appeal the court approved this ruling, and in response to the plaintiff's argument that the evidence that he was not allowed to vote was but hearsay evidence of the belief of the board of civil authority as to his residence, said:

"But the question was not admitted for the purpose of proving what the board said or did respecting the plaintiff's residence in Sutton. It was admitted to show a *fact*—to show that one of the characteristics of residence was lacking."

To be similarly classified are cases where to prove the existence of a contract, or its terms, evidence that one of the parties has acted in a way consistent only with such a contract, or such terms, is received.²⁶ Finally, cases may be found which permit on the issue of the quality of goods evidence of the conduct of third persons in accepting them.²⁷

²³ Commonwealth v. John McCue, 16 Gray 226 (Mass. 1860).

²⁴ 1 F. & F. 122, 123 (1858).

²⁵ 62 Vt. 504, 20 Atl. 926 (1890).

²⁶ WIGMORE, *op. cit.* § 272, citing Reg. v. Fordingbridge (Inhabitants), E. B. & E. 678 (1858), 4 Jur. (N. S.) 951 (1858) (the fact that *J D* worked as apprentice admitted to show that an apprenticeship indenture had been executed); and Wrigley v. Cornelius, 162 Ill. 92, 44 N. E. 406 (1896) (to show that a contract was as he claimed, plaintiff was allowed to show that he acted under it, in a way consistent only with a belief that its terms were as claimed).

²⁷ Ft. Worth & D. C. Ry. v. Harlan, 62 S. W. 971 (Tex. Civ. App. 1901) (in action for damage to vegetables in transit, consignor offers evidence that all the vegetables before shipment had been accepted by his foreman as being in first class condition; held admissible); St. Louis Southwestern

Upon such a question as the one under discussion, as to which the decisions are few and for the most part casual and ill-considered, the opinions of the text-writers are more important in pointing the future direction of the law than those of the judges. Only in the treatises can we find any later discussion which rises to the level of Pollock's argument and Baron Parke's judgment in *Wright v. Tatham*.

Wigmore²⁸ suggests that the theory of circumstantial evidence is broad enough to admit evidence of conduct or utterances as evidencing belief of a past fact to show the truth of the fact, but that the objection to it is "that the pretended double inference is equivalent to giving credit to a testimonial assertion and involves therefore a danger of evasion of the Hearsay Rule." Without expressing any decided opinion as to the proper solution of the problem, he contents himself with stating what he conceives to be the consensus of judicial opinion. His conclusions are indicated in these passages:

"What exit did the common law take from this dilemma? It followed that instinct of compromise which has affected so many British institutions; it conceded something to both principles. In a few specific instances, mostly of traditional inheritance, it yielded fully to the theory of circumstantial inference; in a large group of other instances, it yielded in fact, but only because the evidence was commonly there also admissible for other reasons, and thus it became practically of no consequence which theory was relied on for its reception; and in all remaining instances it denied the propriety of the circumstantial inference and insisted on the application of the Hearsay rule to conduct which was equivalent to an extra-judicial assertion. . . . Whatever instances of opposite tendency may be noted in the following sections, and however well-founded these may be in a given case, they must be regarded as casual and unusual."

Chamberlayne, whose treatment of the question is much more brief and casual, seems to have no doubt of the correctness of the rule of *Wright v. Tatham*, and is clearly to be counted in the muster of its supporters.²⁹

A protagonist of the rule far more pugnacious than the doubting Wigmore or the colorless Chamberlayne has appeared in the

Ry. v. Arkansas & T. Grain Co., 42 Tex. Civ. App. 125, 95 S. W. 656 (1906) (damage to corn; evidence of consignor that he sold balance of shipment, other than damaged part, as number 2 corn and that he received no complaints from the purchasers, held not hearsay). Compare the cases, *contra*, in note 14, *supra*.

²⁸ WIGMORE, *op. cit.* § 267; see also *ibid.* §§ 268-273. In § 459 he seems to confine the hearsay rule to "utterances" but doubtless this is done *alio intuitu*.

²⁹ CHAMBERLAYNE, EVIDENCE (1911) §§ 1900, 2706.

person of Gulson, an Englishman whose *Philosophy of Proof*³⁰ deserves to be better known in this country. He attacks the problem with enthusiasm. Throughout his book he has distinguished between "immediate" and "transmitted" evidence, the latter being evidence which depends on the veracity or sincerity of another. He classifies "conduct" when offered to found an inference as to the actor's belief and hence to the fact believed as "transmitted." He gives as examples: (1) a man's running away with fear on his countenance, as evidence of the situation feared; (2) a ship-captain's embarking in a ship, as evidence of seaworthiness; (3) a person's reading a newspaper aloud or reporting a speech, as evidence of the contents of the article or the speech; (4) one pointing out a spot where he says some event has occurred; (5) the positions of the hands of a clock as evidence of the correct time—distinguishing similar evidence as to the hour indicated by a sundial. Mr. Gulson says that it is impossible to draw a line between those cases of conduct where the circumstances furnish a reliable guaranty of sincerity (as in example (2) above) and those cases where they do not, and that therefore all should be treated alike, that is, rejected.

Likewise, another sprightly English monograph writer, Tregarthen,³¹ subscribes unquestioningly to the soundness of the rule of exclusion.

Nevertheless, this view has by no means gone unchallenged, but has been attacked by commentators of unusual acuteness. Perhaps the first ripple on the waters appears in the treatise of Judge Pitt Taylor.³² Bowing to the inevitability of submission to the result, he nevertheless points out the danger of injustice which it involves. After mentioning the stock examples³³ of the embarking ship-captain, and the paying underwriter, he says:

³⁰ GULSON, *PHILOSOPHY OF PROOF* (1923) §§ 193-197, 361-363, 526.

³¹ TREGARTHEN, *THE LAW OF HEARSAY EVIDENCE* (1915) 32: "Facts that are hearsay are not necessarily written or spoken words, they may be also the voluntary conduct of a person which so far as the facts in issue are concerned, only amounts to a statement by the person regarding them. This variety of hearsay does not appear to have received much attention in practice. Counsel probably are not alert to recognize as hearsay, evidence which appears in the guise of ordinary mechanical action, and no doubt testimony as to personal conduct is often received without protest, which so far as the issue is concerned only amounts to a voucher as to a relevant fact."

³² TAYLOR, *LAW OF EVIDENCE* (8th ed. 1885) §§ 570-575. The first edition was printed in 1848, the last in 1920, and presumably the discussion referred to has remained unchanged in general tenor through the various editions.

³³ See *supra* note 29.

"In most of the instances given above, as illustrating the occasional inconvenience of the rule, the evidence rejected amounted to something more than the mere declarations of parties not examined on oath, nor subjected to cross-examination; for these *declarations were accompanied by acts* done in confirmation of their sincerity, and as such, the evidence was, morally speaking, entitled to great weight. The law, however, will not on this account allow any exception to be made in favor of hearsay; for although, if an act done be evidence per se, any declarations accompanying that act are . . . admissible for the purpose of illustrating, qualifying, or completing it; yet, if the act be in its own nature irrelevant to the issue, and the declaration be inadmissible, the union of the two cannot render them evidence."

More recently, Mr. Eustace Seligman in an article which dealt with another question, that of the admissibility of declarations of intention, has with swift strokes of the scalpel opened up the problem of what is hearsay, as a part of the necessary preparation for his major surgery. That he lets in some light on the difficulty is indicated by the excerpts in the notes.³⁴

³⁴ Eustace Seligman, *An Exception to the Hearsay Rule* (1912) 26 HARV. L. REV. 146, 148-149, n. 6: "Can utterances alone be hearsay, and can all utterances be hearsay? As to the first part of this question, it is clear that non-verbal conduct might well be excluded; for example, waving a signal-flag or talking in sign-language is really one form of speech. On the other hand, some human conduct is clearly admissible; for example, the flight of an accused may be shown to prove his guilt. What is the distinction? In each case the conduct is used to evidence a belief in order to prove the fact believed, and so in each case there seems to be a possibility of the same three defects [first, inaccurate perception; second, faulty memory; third, untruthfulness] which are usually present in hearsay. Yet there is a difference, which lies in this: in the first example the conduct was intended to convey thought, in the second it was not. When there is no intention to communicate to any one there is very much less chance that the act was done in order to deceive, and hence the third and fundamental danger in admitting hearsay does not here exist, or at least not so strongly. Furthermore, as a rule the fact believed in this latter class of cases is a simple one, and hence the first and second dangers are decreased. Accordingly, there appears to be a sound distinction between the cases, which may be formulated in the statement that only conduct apparently intended to convey thought can come under the ban of the hearsay rule. It is to be noted that the test employed is apparent intent, for it is obviously impossible to apply an internal standard in this connection."

To which he adds this note: "This conclusion would appear to be in accord with the authorities, although, the distinction is not clearly made. Non-verbal conduct is generally admissible. See Phipson on Evidence, 5 ed., 207. Professor Wigmore's view does not seem clear. In one section (§ 459) he admits conduct and says that 'the hearsay rule excludes only deliberate utterances in terms affirming a fact.' In another section (§ 266 c), however, he takes the position that 'conduct evidence as supporting an inference of the person's belief and thus of the fact believed, is

From these it will be seen that he would admit all conduct as evidence of the actor's belief and of the fact believed, except where the conduct is "apparently intended to convey thought," *i. e.*, is of the sign-language type, and hence as plainly assertive as words written or spoken. Thus he would admit the sea-captain's going up the gang-plank, and the handing over of the money by the underwriter and all the other examples listed by Baron Parke as acts which should be excluded as hearsay. On the other hand, following *à outrance* his distinction between conduct intended to convey thought and other conduct, he would exclude any *communication*, though not offered in the guise of an *assertion*. Thus, he would have admitted, seemingly, evidence that some one sent to the testator a mathematical treatise, but not, seemingly, the sending by the same person of an invitation to take part in a mathematical conference. By this distinction he is able to support the actual holding in *Wright v. Tatham*, while at the same time he repudiates the principle upon which it was grounded.

Finally, Phipson,³⁵ the author of what is probably the most authoritative of the later English texts on evidence, is decidedly opposed to the inclusion of evidence of conduct within the hearsay designation. He supports and distinguishes the result in *Wright v. Tatham* on the ground that the evidence was inadmissible not as hearsay but as opinion³⁶ and he rejects the doctrine of that case in these terms:

"In England, the doctrine of *Wright v. Tatham*, on this point, has apparently never been followed, acts of treatment being admitted or excluded on grounds of relevancy only and not of hearsay. Indeed, that assertion by conduct is not convertible, as regards admissibility, with assertion by statement, is shown

in general . . . declared inadmissible, as being open to construction as assertions and therefore as mere hearsay. . . . Whatever instances of opposite tendency may be noted in the following sections and however well-founded they may be in a given case, they must be regarded as casual and unusual.' The learned author then cites in Sec. 268-293, 459-464, innumerable decisions of the 'opposite tendency,' and the only case cited in support of the supposed rule is *Wright v. Tatham*, 5 Cl. & F. 670 (1838), where the sending of letters to a testator by various persons was not admitted to show their belief in his sanity and thus the fact of his sanity. Whether or not in this case there is a hearsay use of evidence is discussed below; but that such evidence is susceptible of a hearsay use upon the test suggested is clear, for letters are apparently intended to convey thought."

³⁵ PHIPSON, *THE LAW OF EVIDENCE* (6th ed. 1921) 219, 220; see also *ibid.* 116, 117, 134, 135.

³⁶ This is a distinction which, however valid in England, would not support a similar holding in most American jurisdictions, which freely admit opinion evidence of non-expert observers on sanity. WIGMORE, *op. cit.* §§ 1933, 1938.

in many cases, *e. g.* acting in a capacity or relationship is admissible in a party's own favor, while his mere declaration that he was entitled to act would not be; so, the act of attestation may be proved but not declarations of having attested; and what is publicly done by the tenants throughout a district is receivable in proof of an agricultural custom, though their statements, even on oath, of what they think the custom is, are not. Again in legitimacy and allied cases, though a bare assertion by the parent that a child is illegitimate would be excluded, yet the same assertion regarded as an item of conduct and so affording merely presumptive evidence of illegitimacy is receivable." (references omitted)

Probably the foregoing presents a fair sampling of the cases and comments pro and con on the question. From the data given it seems apparent, first, that *Wright v. Tatham* expresses the more generally accepted view in holding that conduct, even when not intended as assertive, is hearsay when offered to show the actor's belief and hence the truth of the belief, and second, that this view has, since the leading case, received such slight consideration in subsequent decisions which follow it, and has evoked such contrariety of opinion among the commentators (as well as a sprinkling of contrary decisions) that it is open for re-examination in the light of general policy.

It is only the technique of that general reconsideration that is of any real importance, and the assembling of the foregoing chance driftwood from the decisions is of value only so far as it clears the way for such a reconsideration. These decisions, though casual and inharmonious, serve chiefly to show the situations in real life which call for the application of such theory as we may adopt. And it is just here that the reader may ask, "Why assume that any one solution is likely to work for all the types of cases which seem to occur?" It will have been observed, certainly, that the cases fall into three groups. The first and simplest, for present purposes, are the cases of stark action with no element of communication at all. Such is the ship-captain example, and most of Parke's other illustrations. But in real life, as the cases show, the element of words enters in. Thus we may distinguish a second group where acts and words explaining them are offered together. Of this type is the evidence of the guest who refuses the hotel-room, objecting that it is too dark, offered to show the undesirability of the room,³⁷ and the evidence of the rejection of similar goods as defective by other customers, to show breach of warranty.³⁸ Finally, the third group comprises those cases where the conduct consists of words solely, but words not of assertion, but of action, such as

³⁷ Cf. *Gresham v. Manning*, *supra* note 17.

³⁸ Cf. cases in notes 16 and 27, *supra*.

an offer of a position (to show the *offeree's* skill³⁹) or the letters in *Wright v. Tatham* itself. It seems, however, that to base any difference in results on the mere circumstance that the conduct is verbal or non-verbal would be an undesirable rule of thumb not corresponding to any difference in probable trustworthiness.

If all three types, then, are to be treated alike, what shall that treatment be? The problem is one that will eventually be solved according as the profession adopts one or another general attitude toward the rules of proof. Possible attitudes might favor the admission of any and all offered items of proof, as seems to be the method in French criminal trials, or might lean toward vesting a large discretion in the trial judge to admit or exclude, guided only by certain general canons and standards, as seems to be the present English tendency, or, on the other hand, the attitude may remain one of adherence to the present system in vogue in the United States, of sharply defined rules prohibiting the admission of many rigidly classified types of evidence.

The advocates of entire exclusion of evidence of conduct to show belief, to show the truth of the fact believed, as being hearsay, hark back to the traditional technique of jury trial administration as it hardened in the eighteenth century. Judges then, to paraphrase a well-worn epigram, were surer about everything than judges today are about anything. That technique consisted of creating large, simple, but definite categories under which offered items of proof could be classified accurately and, above all, quickly. All the contents of each of these classes were either black or white, admissible or inadmissible. The largest of these categories of inadmissible evidence (though its recognition as such was later than we usually suppose⁴⁰) is that of hearsay. The advantages of these clear-cut rules of exclusion are obvious. They enable the lawyer preparing his case to know in advance with fair certainty what he can get in, and what he cannot. If a question as to admissibility does arise, the judge who has no time for subtle discrimination in the heat of trial can make a decision in his stride, as it were. This is splendid, and the only difficulty is that it does not work. The rule excluding all hearsay, clear and simple in its original form, when it was tested by the offer of particular hearsay evidence of a peculiarly indispensable or reliable kind cracked under the strain. To relieve the pressure, exception after exception was recognized until today the rule is riddled with thirteen

³⁹ Suggested by *Carpenter v. Asheville Power and Light Co.*, 191 N. C. 130, 131 S. E. 400 (1926).

⁴⁰ Wigmore, *op. cit.* § 1364.

or more exceptions. The exceptions are in some instances quite as rigidly defined as the rule itself.

To be contrasted with this sort of progress through the mitigation of a rigid rule by numerous rigid exceptions, is the different technique of development of such rules as, for example, those which provide for the order of presenting proof. These have from the outset been merely guides and not limits to the judge's discretion and consequently have never had to be complicated by exceptions. Would it not have been wiser to set up the hearsay rule also in some similar form, as for example: "Hearsay is inadmissible except where the judge in his discretion finds it needed and trustworthy"? The astonishing conservatism of most lawyers⁴¹ and of most judges drawn from their ranks, and their almost religious reverence for these mere procedural rules, will make progress towards such a result slow, but doubtless such a change is on the cards. At all events, newly evolved evidence rules are likely to be of that discretionary type.⁴²

Focusing these considerations upon our present problem, we find the orthodox, but not wholly settled or established, view to be that conduct to show belief, to show the fact believed, is invariably to be put in the "hearsay" category and banned as such. The result is that evidence which has the strongest circumstantial guaranties of reliability may be banned. Evidence that a doctor, since deceased, has operated upon a man for appendicitis, would be inadmissible as evidence that the patient actually had that disease. It is true, on the other hand, that very much of such conduct-evidence if admitted would be of trivial value and probably a general inclusionary rule, that all such evidence is admissible wherever the actor's testimony on the stand would be, would be only one degree better than wholesale exclusion. It would seem sensible to conclude that conduct (other than assertions) when offered to show the actor's beliefs and hence the truth of the facts so believed, being merely analogous to and not identical with typical hearsay, ought to be admissible whenever the trial judge in his discretion finds that the action so vouched the belief as to give reasonable assurance of trustworthiness.

⁴¹ See MORGAN, *op. cit. supra* note 2, Ch. VI: "The Outlook for Reform."

⁴² Compare the Massachusetts hearsay statute, MASS. GEN. LAWS (1921) c. 233, § 65: "A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."