The Hearsay Rule's True *Raison d'Être*: Its Implications for the New Principled Approach to Admitting Hearsay Evidence

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In three recent cases, the Supreme Court of Canada adopted a fundamentally new approach to when hearsay evidence is admissible. This approach purports to be based on John Wigmore's theory for the hearsay rule's development and raison d'être. Wigmore said that the rule developed as a single exclusionary evidence rule because common law judges believed jurors tended to overvalue out-of-court testimonial statements absent testing by cross-examination. He said the courts of equity subsequently adopted exclusionary rules such as the hearsay rule merely because of the maxim that equity followed the law, and not because these rules were considered necessary when judges were the triers of fact.

The author argues that the hearsay rule is the product of the development and fusion of seven different rules, each of which developed for one or more of five initial reasons. Three of these reasons were based on concerns about the unreliability of certain types of hearsay evidence. The remaining two reasons arose from the fact that the admission of certain types of hearsay deprived both lay and professional triers of fact of the opportunity to observe a witness's demeanour or to have them tested by cross-examination, processes considered essential to the evidence's proper evaluation.

The author argues that Wigmore failed to address four of the initial rationales and unjustifiably linked the fifth one to a perceived evaluative shortcoming unique to juries. Since the Supreme Court's new approach is derived from his theory, it also suffers from these shortcomings in terms of the rule's founding rationales. Finally, the author suggests some modern implications of this conclusion and some potential ramifications for rectitude of decision.

Dans trois arrêts récents, la Cour suprême du Canada a adopté une analyse foncièrement nouvelle de la recevabilité de la preuve de ouï-dire. Cette analyse serait inspirée de la théorie de John Wigmore concernant la raison d'être et l'évolution de la règle du ouï-dire. Wigmore explique que la règle s'est développée en tant que simple règle d'exclusion de la preuve parce que les juges de common law croyaient que les jurés avaient tendance à prêter trop d'importance aux témoignages hors cours non soumis à un contre-interrogatoire. Il indique que les tribunaux d'equity ont par la suite adopté des règles d'exclusion, comme la règle du ouï-dire, simplement à cause de la maxime que l'equity suit le droit et non pas parce qu'on les considérait nécessaires lorsque les juges tranchaient sur les faits.

L'auteur allègue que la règle du ouï-dire est le produit de cette évolution et de la fusion de sept règles différentes, chacune développée initialement pour une ou plus de cinq raisons. Trois de ces raisons étaient liées aux préoccupations concernant le manque de fiabilité de certaines formes de preuve de ouï-dire. Les deux autres raisons étaient liées au fait que la recevabilité de certaines formes de preuve de ouï-dire privait les juges des faits, profanes et professionnels, de la possibilité d'observer le comportement des témoins ou de peser le bien-fondé du témoignage par un contre-interrogatoire, ces procédures étant considérées essentielles pour une évaluation adéquate de la preuve.

L'auteur soutient que Wigmore a omis d'examiner quatre des justifications initiales et qu'il a associé sans motif valable la cinquième aux déficiences présumées des jurés en matière de l'évaluation de la preuve. Étant fondée sur cette théorie, la nouvelle analyse de la Cour suprême présente les mêmes lacunes fondamentales. Enfin l'auteur suggère certaines répercussions modernes de cette conclusion et certaines ramifications possibles justifiant la rectification de cette décision.

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I. INTRODUCTION

The rule precluding hearsay evidence[1] in trials ("hearsay rule") has, since Confederation, been one of the most important rules of evidence in Canadian law. In three recent cases[2] the Supreme Court of Canada fundamentally altered the long-standing approach to exceptions to the hearsay rule by moving from an approach based on established categories of exceptions to one that is purportedly derived from the rule's founding principle.[3] The new approach is one advanced and made famous by the American scholar John Henry Wigmore.[4]

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1. In this article, "hearsay evidence" means any oral or written statement made by a person who did not testify at trial when such a statement is used to prove the truth of any facts asserted in that statement. In the last half of the 19th and for most of the 20th centuries, this definition was generally accepted under English and Canadian law. But see U.K., H.C., "Thirteenth Report of the Law Reform Committee of Great Britain on Hearsay Evidence in Civil Proceedings," Cmnd 2964 in *Sessional Papers*, 1966 1 at 3-4 (the Law Reform Committee lumped together the "strict hearsay rule" and the rule against admitting the previous inconsistent statements of trial witnesses in one of its reports). This seems to have led to an expansion of the meaning of hearsay evidence in England and in Canada in some quarters to mean generally any oral or written statement made otherwise than orally while on the witness stand at trial when such a statement is tendered to prove the truth of anything asserted in it. For the narrower definition see *e.g.* J. J. Robinette, "The Hearsay Rule" in *Special Lectures of the Law Society of Upper Canada 1955: Evidence* (Toronto: Richard De Boo, 1955) 279 at 279; *Dalrymple v. Sun Life Assurance Co. of Canada*, [1966] 2 O.R. 227 at 231, 56 D.L.R. (2d) 385 at 389 (C.A.), leave to appeal to S.C.C. dismissed [1967] S.C.R. v, 60 D.L.R. (2d) 192. For the broader definition see *e.g. R. v. Evans*, [1993] 3 S.C.R. 653 at 661, 108 D.L.R. (4th) 32 at 37.
2. *R. v. Khan*, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92 [*Khan* cited to S.C.R.]; *R. v. Smith*, [1992] 2 S.C.R. 915, 75 C.C.C. (3d) 257 [*Smith* cited to S.C.R.]; *R. v. Starr*, [2000] 2 S.C.R. 144, 147 C.C.C. (3d) 449, 2000 SCC 40 [*Starr* cited to S.C.R.].
3. *Khan*, *ibid.* at 540.
4. In *Smith*, *supra* note 2 at 929, the Court said, "It has long been recognized that the principles which underlie the hearsay rule are the same as those that underlie the exceptions to it." The Court then quoted from Wigmore on the principles that he claimed as underlying the exceptions. Later, the Court said, "It is no accident that the criteria identified by McLachlin J. in *Khan* bear a close resemblance to the principle of necessity, and the circumstantial guarantee of reliability, referred to by Wigmore" (*ibid.* at 932).

In 1904, Wigmore wrote[5] that the hearsay rule[6] emerged in the English common law courts and became established in essentially its modern form between about 1675 and 1696.[7] Regarding the rationale for the rule's development, Wigmore claimed as follows:

> Common law judges developed the rule to prevent out-of-court statements from being admitted for testimonial purposes[8] without the cross examination of someone with personal knowledge of the facts asserted in those statements;[9] and
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> Testing by cross examination was essential in common law trials because it exhibited or exposed possible weaknesses in testimonial statements to the triers of fact, ensuring that the triers of fact did not overvalue such evidence.[10]

Since Wigmore was only writing about common law trials,[11] and dealing with an era when the triers of fact in such trials were always juries,[12] he had only juries in mind in terms of the rule's *raison d'être*. Wigmore felt that judges' training and experience meant that they did not share the jurors' perceived inability to properly evaluate certain kinds of evidence such as hearsay.[13] Thus, the exclusion of testimonial evidence untested by cross examination did not need to occur when judges were the triers of fact.[14] Finally, Wigmore said, "[t]he purpose and reason of the Hearsay Rule

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5. "The History of the Hearsay Rule" (1904) 17 Harv. L. Rev. 437 [Wigmore, "History of the Rule"]. The content of this article was subsequently repeated as paragraph 1364 in his famous treatise, *A Treatise on the System of Evidence in Trials at Common Law Including the Statutes and Judicial Decisions of All Jurisdictions of the United States* (Boston: Little, Brown, 1904) [Wigmore, *Treatise*]. Later editions of the *Treatise* were published in 1923, 1940, and 1985. All subsequent references will be to the 1985 edition.
6. Wignore, *Treatise*, *ibid.*, vol. 5, §1362 at 3, §1364 at 12 (Wigmore defined hearsay evidence as any oral or written statement made by a person who did not testify at trial when it was tendered to prove the truth of any facts asserted in it and the party adversely affected by such evidence had not had an opportunity before trial to cross-examine a person with personal knowledge of the facts so asserted).
7. Wigmore, "History of the Rule," *supra* note 5 at 445, 454-56; Wigmore, *Treatise*, *ibid.*, vol. 5, §1364 at 18, 25.
8. The phrase "testimonial purposes" means that the out-of-court statement was tendered as evidence of the truth of the facts asserted in the statement.
9. Wigmore, "History of the Rule," *supra* note 5 at 448; Wigmore, *Treatise, supra* note 5, vol. 5, §1364 at 20.
10. Wigmore, *Treatise*, *ibid.*, vol.2, §1172 at 397.
11. *Ibid.*, vol. 1, §4 at 30 (Wigmore said that historically the procedural law of the English High Court of Chancery was built on canon law and that its rules of evidence were "outside the present purview," but would be specifically noted from time to time in the book. Since other prerogative courts in England applied similar rules to that of Chancery, it is presumed that Wigmore was excluding all prerogative courts when discussing the history of rules of evidence unless he expressly indicated otherwise in the *Treatise*).
12. W. R. Cornish, *The Jury* (London: Penguin Press, 1968) at 75 (judges only began to be triers of fact in common law trials in the middle of the 19th century).
13. Wigmore, *Treatise, supra* note 5, vol. 1, § para 8c. at 632. See also John H. Wigmore, "Administrative Boards and Commissions: Are the Jury-Trial Rules of Evidence in Force for Their Inquiries?" (1922) 17 Ill. L. Rev. 263 (Wigmore also believed that because of their training and experience, administrators in administrative hearings should not be subjected to "jury-trial rules of evidence," which presumably included the hearsay rule since it was one of the rules involved in the debate over whether the rules should apply to the emerging administrative tribunals). For a more in-depth discussion on this topic and a list of authorities on this debate, see Frederick W.J. Koch, *Wigmore and Historical Aspects of the Hearsay Rule*, (D.Phil. Thesis, Osgoode Hall Law School, 2004) at 78-79 [unpublished].
14. Wigmore, *Treatise*, *ibid.*, vol. 5, §1364 at 28 (since Wigmore described the hearsay rule as "that most characteristic rule of the Anglo-American law of evidence," his comments regarding the rules of evidence arising out of the perceived need to address the evaluative shortcomings of jurors seem applicable to the hearsay rule).

is the key to the exceptions to it."[15] His approach to rationalizing the rule's categorical exceptions was based on his theory for its development. Thus, the Court has adopted Wigmore's theory for why the hearsay rule developed as a basis for its principled approach.

Regarding the hearsay rule's development in the English courts of equity, where the triers of fact were always judges,[16] Wigmore said the rules of evidence developed at common law and were later imported into equity. He said that the High Court of Chancery ("Chancery") adopted the common law exclusionary rules in the 1700s "according to its maxim that equity follows the law."[17] In other words, equity did not adopt the hearsay rule because it was considered particularly appropriate in a system where factual findings were made by trained judges.

In Canada, judges and scholars have largely accepted Wigmore's history of the rule as to its emergence as a single rule in the common law courts of the late 17th century.[18] Many judges and scholars also accept his jury distrust theory as the reason for its emergence.[19]

In this article, I cite sources that do not support Wigmore's theory for the hearsay rule's *raison d'être*. These sources indicate that the rule is the product of the gradual development and fusion of seven separate rules. Two of them seem to have developed first in equity, two at about the same time in equity and at common law, and three seem unique to the latter. Each of these rules appears to have developed for one or both of two reasons. The first reason was a judicial belief that certain kinds of hearsay evidence were generally too unreliable to be part of the evidentiary founda-

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15. *Ibid.*, vol. 5, §1420 at 251.
16. This article focuses on the three most important courts of equity: the High Court of Chancery; the equity side of the High Court of Exchequer; and, until 1641, the High Court of Star Chamber. The trier of fact in Chancery from its inception in the 1400s was the Lord High Chancellor or Keeper of the Great Seal sitting alone. See Henry Horwitz, *Exchequer Equity Records and Proceedings 1649-1841* (Richmond, UK: Public Record Office, 2001) at 11 [Horwitz, *Exchequer Equity Records*]. After 1558, almost all chancellors and keepers were common law lawyers. See W. J. Jones, *The Elizabethan Court of Chancery* (Oxford: Oxford University Press, 1967) at 27, 30-49; Michael R. T. Macnair, *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot, 1999) at 32 [Macnair, *Law of Proof*]. On the equity side of the Exchequer, the four barons sat *en banc* without a jury and, by the reign of Elizabeth I (1558-1603), they were all trained common law lawyers. See Henry Horwitz, "Chancery's 'Younger Sister': The Court of Exchequer and Its Equity Jurisdiction, 1649-1841" (1999) 72 Hist. Research 160 at 163 [Horwitz, "Chancery's 'Younger Sister' "]; Horwitz, *Exchequer Equity Records*, *ibid.* at 1. In the Star Chamber, the Chancellor or Lord Keeper presided and the Court's core usually consisted of himself and those common law judges who happened to be sitting with him. See J. A. Guy, *The Cardinal's Court: The Impact of Thomas Wolsey in Star Chamber* (Sussex, UK: Harvester Press, 1977) at 36-37; Michael Stuckey, *The High Court of Star Chamber* (Holmes Beach, Fla.: Gaunt, 1998) at 3, 32-34.
17. Wigmore, *Treatise*, *supra* note 5, vol. 1, §4 at 27.
18. See *e.g.* Ronald Joseph Delisle, Don Stuart & David M. Tanovich, *Evidence: Principles and Problems*, 7th ed. (Toronto: Thomson, 2004) at 536; Roger E. Salhany, *The Practical Guide to Evidence in Criminal Cases*, 6th ed. (Toronto: Thomson, 2002) at 72-73.
19. See *e.g.* E. G. Ewaschuk, "Hearsay Evidence" (1978) 16 Osgoode Hall L. J. 407 at 407; Salhany, *ibid.* at 72; Lamer C.J.C., speaking for the Court in *Smith*, *supra* note 2 at 935; L'Heureux-Dubé J. speaking for herself and Gonthier J. in *Starr*, *supra* note 2 at 170 (L'Heureux-Dubé and Gonthier JJ. dissented in terms of the way in which the new principled approach should mesh with the old categories of exceptions, but nothing indicates that the majority disagreed with their comments on the origins of the hearsay rule).

tion for judicial decisions, and thus should be excluded. This rationale was related to the perceived reliability of a type of evidence and not to a perceived evaluative weakness in jurors. The second reason was to ensure that triers of fact were provided with two kinds of information considered vital to the proper evaluation of testimonial evidence by either jurors or professional judges: demeanour evidence,[20] and the exposure of potential sources of testimonial weakness through cross examination. When hearsay was admitted, a trier of fact lacked these two kinds of information, and was perceived as less likely to accurately assess the evidence's reliability.

The two founding rationales for the hearsay rule advanced in this article are both aimed at helping to ensure that professional and lay triers of fact make accurate factual findings, something the Supreme Court says is still the ultimate aim of trials.[21] The hearsay rule seeks to achieve this aim by ensuring that only reliable types of testimonial evidence are admitted and by requiring such evidence to be presented in a form that assists with its proper evaluation. Wigmore's theory regarding the rule's *raison d'être* fails to include many aspects of these two rationales. Likewise, since the Court's new approach to hearsay is based on Wigmore's theory, it too suffers from this shortcoming, which has implications for the goal of rectitude of decision in trials.

II. Sources

Since this article revisits the hearsay rule's origins, the principal sources used are statutes, published case reports and the early treatise literature. The nominate case reports in the *English Reports*[22] and the reports in *Cobbett's State Trials*[23] compose most of the cited material, although other reports are used periodically. The *Old Bailey Sessions Papers*[24] and *Sir Dudley Ryder's Notes*[25] are cited, but they are not extensively used since they relate more to trial practice.

While these materials have shortcomings, they are the best available sources and have been recently used by two leading evidence scholars, Michael Macnair and

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20. The term "demeanour evidence" refers to the intangible information a trier of fact takes in while observing a witness's behaviour on the stand.
21. *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 at 1206, 141 D.L.R. (4th) 647 at 652.
22. A series of 178 volumes first published by Stevens & Sons in London between 1900 and 1932 [E.R.].
23. Thomas B. Howell, Thomas J. Howell & William Cobbett, eds., *Cobbett's Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours From the Earliest Period to the Present Time*, vol. 1-34 (London: R. Bagshaw, 1809-28)[Cobb. St. Tr.].
24. American scholar John Langbein noted that the titles of the pamphlets in the series wander somewhat before settling on the title *The Proceedings at the Sessions of the Peace, and Oyer and Terminer, for the City of London, and County of Middlesex* [O.B.S.P.]. See John H. Langbein, "The Criminal Trial Before the Lawyers" (1978) 45 U. Chicago L. Rev. 263 at 268, n. 18 [Langbein, "Trial Before the Lawyers"]; T. P. Gallanis, "The Rise of Modern Evidence Law" (1999) 84 Iowa L. Rev. 499.
25. A group of unpublished shorthand trial notes taken by Sir Dudley Ryder C.J.K.B. at *nisi prius* between 1754 and 1756 while he was Chief Justice of the Court of King's Bench [*Ryder's Notes*]. See John H. Langbein, "Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources" (1983) 50 U. Chicago L. Rev. 1 at 6-8.

Richard Friedman.[26] The nominate case reports were considered sufficiently authoritative in the early 18th century to be cited in cases by lawyers and judges.[27] *Cobbett's State Trials* have shortcomings, as noted by American scholar John Langbein,[28] but these must not be overstated since almost all surviving sources from the era of 1550 to 1750 suffer from many of these shortcomings. Also, as noted by Langbein, the reliability of *Cobbett's State Trials* improved by the late 17th century.[29] Further, while Langbein's concern that some procedures of the era were unique to treason trials is founded,[30] evidentiary rulings noted in *Cobbett's State Trials* on topics such as hearsay evidence were cited in the early juristic literature as being applicable in felony cases.[31] Thus, while the sources in this article are not free from doubt, they seem sufficiently accurate to give us an idea of how the law regarding hearsay evidence developed in the English courts.

The sources used are primarily from the era of 1550 to 1750. Before 1550, the surviving published material suggests that juries relied, to an important extent, on information gathered outside the courtroom.[32] So long as this mode of evidence

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26. Macnair, *Law of Proof*, *supra* note 16 at 18-25; Friedman, *infra* note 195 at 95ff.
27. See *e.g. Baker v. Lord Fairfax* (1718), 1 Str. 101, 93 E.R. 411 at 411 (K.B.); *R. v. Reason and Tranter* (1722), 1 Str. 499, 93 E.R. 659 at 661 (K.B.); *Warren v. Greenville* (1740), 2 Str. 1129, 93 E.R. 1079 at 1080 (K.B.) [*Warren* cited to E.R.]; *Omychund v. Barker* (1744), 1 Atk. 21, 26 E.R. 15 at 27-29, 31-33 (Ch.) [*Omychund* cited to E.R.]. Not all the nominate reports, however, were considered to have the same level of authoritativeness. See James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (Chapel Hill: University of North Carolina Press, 1992) vol. 1 at 102-105.
28. *Langbein*, *supra* note 24 at 264-66.
29. *Ibid.* at 265.
30. For example, in treason trials there was a statutory requirement (except in coining cases) that two witnesses had to testify against the accused regarding the same or different acts of treason before the accused could be convicted. See Matthew Hale, *Pleas of the Crown: Or, A Methodical Summary of the Principal Matters Relating to That Subject*, 4th ed. (London: Printed by the Assigns of Richard and Edward Atkyns for D. Brown, 1707) reprinted in *Pleas of the Crown: A Methodical Summary 1678*, ed. by P.R. Glazebrook (London: Professional Books, 1972) at 262; William Hawkins, *A Treatise of the Pleas of the Crown* (London: Printed by Eliz. Nutt & R. Gosling for J. Waithoe & J. Waithoe Jr., 1721) reprinted in *Pleas of the Crown 1716-1721*, ed. by P.R. Glazebrook (London: Professional Books, 1973) vol.2 at 428. In contrast, felony cases of the 1600s required only one witness for the Crown. See *e.g.* William Style, *Regestum Practicale: Or, the Practical Register, Consisting of Rules, Orders, and Observations Concerning the Common-Laws, and the Practice Thereof* (London: Printed by A.M. for Charles Adams, 1657) at 354 [Style, *Practical Register*, 1st ed.] (citing a 1646 decision of the King's Bench); Hawkins, *ibid.* at 428.
31. See William Nelson (attr.), *The Law of Evidence*, 1st ed. (London: Eliz. Nutt & R. Gosling, 1717) at 231 [Nelson, *Evidence*, 1st ed.] ; Hawkins, *ibid.* at 428-31 (numerous statements are cited from the treason trials of the 16th and 17th centuries, reported in the first edition of *Cobbett's State Trials*). See also Macnair, *Law of Proof*, *supra* note 16 at 19 (Macnair makes the point that Langbein himself relied on Hawkins' treatise in one of his articles).
32. James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown, 1898) reprinted in *A Preliminary Treatise on Evidence at the Common Law* (S. Hackensack, N.J.: Rothman Reprints, 1969) at 90-120; William Holdsworth, *A History of English Law*, 5th ed. (London: Sweet & Maxwell, 1942) vol. 3 at 648-49. Recently, scholars have began to date the transition of the jury from investigators to solely in-court triers of fact to the late 15th or early 16th centuries. See *e.g.*, John H. Baker, ed., *The Reports of Sir John Spelman* (London: Selden Society, 1978) vol. 2 at 109; J. G. Bellamy, *The Criminal Trial in Later Medieval England: Felony Before the Courts From Edward I to the Sixteenth Century* (Toronto: University of Toronto Press, 1998) at 101; John Marshall Mitnick, "From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror" (1988) 32 Am. J. Legal Hist. 201 at 203-06.

was important to juries, there was no point to developing rules governing how evidence was presented or excluded at trials. Almost all legal historians agree that it is highly unlikely that any exclusionary rules of evidence emerged at common law before 1550.[33] In equity, a similar conclusion seems warranted. The equity side of the High Court of Exchequer ("Exchequer") only emerged around the 1540s.[34] In Chancery, the work of Nicholas Bacon L.K. (1558-79) largely enabled the development of a standard practice of procedure and the use of precedents.[35] Systematic case reporting in the High Court of Star Chamber ("Star Chamber") only began in the late 1500s.[36] As discussed in the following sections of the article, by about 1750, the sources show that the seven separate exclusionary rules for hearsay evidence were established.

III. The Rule Excluding Unsworn Oral Hearsay

The earliest signs of the rejection of hearsay evidence appear in cases before the courts of equity rather than those of common law. The first type of hearsay that appears to have been rejected was testimony about what someone else had said on some earlier occasion while not under oath, when it was tendered to prove the truth of what it asserted.[37] This kind of hearsay, "unsworn oral hearsay," was rejected first in equity, then about 70 years later at common law. The initial rejection of this type of hearsay in equity contradicts Wigmore's claim that this aspect of the hearsay rule first emerged at common law in the late 17th century because judges were concerned about jurors improperly assessing this type of evidence in the absence of testing by cross examination. It also contradicts his claim that equity followed the law on this aspect of the hearsay rule merely because of its maxim to follow the law on the evidence rules.

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33. See *e.g.* J. H. Baker, "Criminal Courts and Procedure at Common Law 1550-1800" in J. S. Cockburn, ed., *Crime in England, 1550-1800* (Princeton: Princeton University Press, 1977) 15 at 38-39; John H. Langbein, "Historical Foundations of the Law of Evidence: A View From the Ryder Sources" (1996) 96 Colum. L. Rev. 1168 at 1170-71 [Langbein, "Historical Foundations"]; Macnair, *Law of Proof*, *supra* note 16 at 21-22.
34. See W. H. Bryson, *The Equity Side of the Exchequer: Its Jurisdiction Administration, Procedures and Records* (Cambridge: Cambridge University Press, 1975) at 13-15 [Bryson, *The Equity Side*]; W. H. Bryson, *Cases Concerning Equity and the Courts of Equity 1550-1600* (London: Selden Society, 2001) vol. 1 at xiv, xlii [Bryson, *Cases Concerning Equity*].
35. Jones, *supra* note 16 at 15, 31-36.
36. Macnair, *Law of Proof*, *supra* note 16 at 40.
37. This type of hearsay does not include the contents of documents offered at trial as evidence of the truth of the facts asserted in them. While today unsworn oral and written hearsay are subject to a single exclusionary rule, the sources before 1750 suggest that they were the subjects of separate rules before that date. Historians such as Langbein and Macnair assert that before 1750 evidence rules tended to develop separately for written and oral evidence. See Langbein, "Historical Foundations," *supra* note 33 at 1173-74; Macnair, *ibid.* at 21-23, 91-92.

A. *The Rule in Equity*

Unpublished sources indicate that by 1589 a practice was developing whereby masters of Chancery would "weed out the recital"[38] of unsworn oral hearsay in written depositions[39] before the final hearings were conducted. Historian W. J. Jones notes the unreported 1589 case of *Radford v. Pope*[40] where the Master rejected unsworn oral hearsay in two depositions before the final hearing.[41] At their examinations, two witnesses said a maid told them that she had seen Radford tear a leaf out of a church book. Jones says that this judicial editing in *Radford* was but one incident in a developing practice. Henry Horwitz also alludes to a vetting practice by masters.[42] These rejections suggest an emerging Chancery practice not to give credence to unsworn oral hearsay. The conclusion that these rejections were not isolated events is supported by the fact that by the late 1500s deponents in equity cases had to be sworn before answering questions at examinations[43] unless they were peers.[44] It seems improbable, then, that courts of equity would consider unsworn oral hearsay evidence at final hearings since this would defeat the purpose of requiring deponents to be sworn at examinations.

By the beginning of the 17th century, it appears that the requirement for witnesses to be sworn at their examinations was starting to be applied to peers. In *Willoughby contra Dom. Wharton*,[45] Thomas Egerton L.K told Lady Wharton to give her answer as a defendant on oath and not on her honour, and then he said that peers also should "be sworn as witnesses" in Chancery cases.[46] He made a similar comment in *Fisher v. Fanewik*.[47] The requirement for nobles to be sworn was a significant step

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38. Jones, *supra* note 16 at 244.
39. By the mid-1500s written depositions constituted the overwhelming form of substantive evidence used in Chancery, Star Chamber and the equity side of the Exchequer. For Chancery, see Jones, *ibid.* at 236. For Star Chamber, see Stuckey, *supra* note 16 at 62-63. For the equity side of the Exchequer, see Bryson, *The Equity Side*, *supra* note 34 at 15-16, 63-64, 129-30.
40. C38/1, *Radford v. Pope* (1589) as cited in Jones, *ibid.*at 245, n.1 [*Radford*]. Jones found *Radford* in the records of Public Record Office (Chancery Reports and Certificates Division) in England, which to the best of the writer's knowledge are not available in Canada.
41. *Radford* as cited in Jones, *ibid.* at 245 (the reason for rejecting this evidence was that the statements were made by the maid "who had not been examined").
42. Horwitz, *Exchequer Equity Records*, *supra* note 16 at 11.
43. See John H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Cambridge: Harvard University Press, 1974) at 25 [Langbein, *Prosecuting Crime*] (writing about Star Chamber and Chancery in the mid-1500s, Langbein said, " . . . oath was the invariable practice of every English jurisdiction which customarily based decision upon written evidence: Admiralty, Star Chamber, Chancery, the lesser prerogative courts. . . .").
44. *The Trial of Henry Lord Delamere, in the Court of the Lord High Steward, at Westminster, for High Treason* (1686), 11 Cobb. St. Tr. 509 at 562, Anon., *The Tryal of Henry Baron Delamere for High-Treason* (London: Printed for Dorman Newman, 1686) at 53 (Ct. of L.H.S.) [*Lord Delamere* cited to Cobb. St. Tr.] (Herbert C.J.K.B. said peers were not sworn as jurors because there was a presumption that they would be honest in their duties as jurors, hence they did not need to be sworn).
45. (1597), Toth. 10, 21 E.R. 108 (Ch.) [*Lady Wharton*].
46. *Lady Wharton*, *ibid.* at 108. See also Bryson, *Cases Concerning Equity*, *supra* note 34 at 243.

because they had traditionally enjoyed privileges, including the right to testify based on their honour.[48] The move to require peers to be sworn makes it unlikely that courts of equity would continue to consider unsworn oral hearsay. This conclusion is fortified by what later occurred at common law in the mid-17th century.

By the mid-17th century, the common law courts were starting to insist on testimony being sworn to be admissible. In *Audley's Case*,[49] all the common law judges held that witnesses' recorded statements from pre-trial examinations had to be confirmed at trial by the oaths of those witnesses before such records could be read.[50] In a 1646 case, the King's Bench said that counsel's allegations were not evidence.[51] In 1670, a prominent lawyer, William Style, said that the reason for the 1646 ruling was that "[e]vidence to a Jury ought to be given upon the oaths of Witnesses. . . ."[52] Later in the century, it is clear that unsworn oral hearsay was routinely inadmissible, as evidenced by the Act of Parliament in 1696 which allowed Quakers to testify unsworn in civil cases.[53] Before this Act, the common law precluded them as witnesses because of their refusal to swear an oath.[54]

About the time that the common law courts began to insist that testimonial evidence be sworn to be admissible, its judges began having doubts about receiving unsworn oral hearsay evidence and developed a practice of precluding it. In *Rutter*,[55] although unsworn oral hearsay was allowed by the King's Bench, Kelyng J. dissented, saying that it was "no evidence" because the original declarant had not been

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47. *Fisher v. Fanewik* (1602) cited in Bryson, *Cases Concerning Equity*, *ibid.* at 171 ("[a] nobleman is to be sworn where the cause is to be determined by a secular judge either upon his answer in Chancery or [upon] being produced as a witness between part[ies]. . . ."). See also *Countess of Shrewsbury's Case* (1612), 12 Co. Rep. 94, 77 E.R. 1369 at 1371 (Council); *Earl of Lincoln's Case* (1627), Cro. Car. 64, 79 E.R. 659 at 659, Hut. 87, 123 E.R. 1119 at 1119 (Star. Ch.) [*Lincoln's Case* cited to 79 E.R. 659].
48. See *Lord Delamere, supra* note 44.
49. *The Trial of Mervin Lord Audley, Earl of Casterhaven, for a Rape and Sodomy* (1631), 3 Cobb. St. Tr. 401 (Ct. of L.H.S.) [*Audley's Case*].
50. *Ibid.* at 402 (the judges made the ruling at a conference held before the trial began due to questions brought to them by the Attorney General).
51. William Style digested the case in his 1657 digest, *Practical Register*, 1st ed., *supra* note 30 at 112-13. See also *The Trial of John Hambden, esq. at the King's Bench, for a High Misdemeanor* (1684), 9 Cobb. St. Tr. 1053 at 1104 (K.B.), Anon., *The Tryal of John Hambden for Conspiring the Death of the King, and Raising a Rebellion in this Kingdom* (London: Printed by E. Mallet, for D. Mallet, 1685) at 38 [*Hambden* cited to Cobb. St. Tr.] (Jeffreys C.J.K.B. said that nothing said by counsel was evidence).
52. William Style, *The Practical Register, Or the Accomplished Attorney Consisting of Rules, Orders, and the Most Principal Observations, Concerning the Practice of the Common Law in his Majesties Courts at* Westminster, 2d ed. (London: Printed for Thomas Dring, 1670) at 171 [Style, *Practical Register*, 2d ed.]. See also *Earl of Shaftsbury v. Lord Digby* (1676), 2 Mod. 98, 86 E.R. 963 at 964, 1 Freem. K.B. 422, 89 E.R. 314 at 314 (K.B.); Anon., *The Tryals, Convictions & Sentence of Titus Otes, Upon Two Indictments for Willful, Malicious, and Corrupt Perjury* (London: Printed for R. Sare, 1685) at 28 (K.B.) [*Otes*].
53. *An Act that the Solemn Affirmation & Declaration of the People Called Quakers, Shall Be Accepted Instead of an Oath in the Usual Form, 1696* (UK), 7 & 8 Will. III, c. 34 [*Quakers' Affirmation Act*].
54. The *Quakers' Affirmation Act* only altered the common law in civil cases, thus Quakers remained unable to testify in serious criminal trials. See *e.g. R. v. Halle*, O.B.S.P. (17-18 July, 1717) at 4.
55. *Rutter against Hebden and Williams* (1664), 1 Keble 754, 83 E.R. 1225 (K.B.) [*Rutter* cited to E.R.].

under oath.[56] In *Lutterell*,[57] Hale C.B.[58] said, "a *hearsay* was not to be allowed as a direct evidence."[59] The context indicates that he was referring to unsworn oral hearsay. In *Langhorn*,[60] a witness said that another person had told him that the accused was involved in a plot to kill the King. Atkins J. said, "[t]hat is no evidence against the prisoner, because it is by hear-say."[61] Immediately following Atkins J.'s comment, Scroggs C.J.K.B. told the jury that what someone else said was no evidence against the accused because the trial witness lacked personal knowledge of it.[62] Finally, in several late 17th century cases, Crown counsel and judges either stopped witnesses from completing statements that consisted of unsworn oral hearsay or they told juries to disregard them.[63]

Since the common law courts began precluding unsworn oral hearsay shortly after they began insisting on testimony being sworn in the mid-17th century, it seems reasonable to believe that the same process occurred in the courts of equity around 1600, the time when equity began insisting that even peers be sworn. Unfortunately, there is an absence of reported case law on this point. It can, however, be explained by the screening process performed by the masters.[64] Their vetting of depositions meant there were no issues regarding unsworn oral hearsay at the final hearings and thus none reported in the nominate reports of those hearings.

Macnair seems to be the only one who has directly addressed the issue of whether the courts of equity excluded unsworn oral hearsay before the 18th century. He concluded for two reasons that they did not exclude such evidence, but neither reason seems persuasive. His first reason was the lack of any apparent reported instance of depositions being suppressed for containing such hearsay.[65] In Chancery, the vetting process explains the lack of reported cases.

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56. *Ibid.* at 1225.
57. *Lucy Lutterell, Widow, against George Reynell, Esq., George Tuberville, Esq., John Cory and Anne Cory* (1670), 1 Mod. 282, 86 E.R. 887 [*Lutterell* cited to E.R.].
58. Although Hale was Chief Baron at the time, it appears that in this case he was sitting on the King's Bench.
59. *Lutterell*, *supra* note 57 at 887 (emphasis in original).
60. *The Trial of Richard Langhorn, esq. At the Old Bailey, for High Treason* (1679), 7 Cobb. St. Tr. 417; Anon., *The Tryall of Richard Langhorn Esq; Counsellor at Law for Conspiring the Death of the King, Subversion of the Government, and Protestant Religion* (London: Printed for H. Hills *et al.*, 1679) [*Langhorn* cited to Cobb. St. Tr.]
61. *Ibid.* at 441. See also the comments of Jeffreys L.C.J. in the misdemeanour case of *The Trial of Laurence Braddon and Hugh Speke, at the King's Bench, for a Misdemeanor, in suborning Witnesses to prove the Earl of Essex was murdered by his keepers* (1684), 9 Cobb. St. Tr. 1127 at 1180, 1205 (K.B.) [*Braddon*].
62. *Langhorn*, *ibid.*
63. See *e.g. The Trial of Stephen Colledge, at Oxford* (1681), 8 Cobb. St. Tr. 549 at 663, Anon., *The Arraignment, Tryal and Condemnation of Stephen Colledge for High-Treason, in Conspiring the Death of the King, the Levying of War, and the Subversion of the Government* (London: Printed for Thomas Bassett & John Fish, 1681) at 40-41 [*Colledge* cited to Cobb. St. Tr.]; *Lord Delamere*, *supra* note 44 at 568; *The Trial of John Cole, at the Old Bailey, for the Murder of Andrew Clenche, Doctor of Physic* [*sic*] (1692), 12 Cobb. St. Tr. 875 at 876, 883 [*Cole*].
64. The Star Chamber and the equity side of the Exchequer usually adopted practices similar to those of the Chancery, thus there is reason to believe that a similar type of vetting occurred in those courts.
65. *Supra* note 16 at 259.

Macnair's second reason is based on two reported cases where this kind of hearsay was discussed.[66] The first case was *Earl of Mountague v. Earl of Bath*.[67] Mountague sought a Chancery decree avoiding a deed from the late Duke of Albermarle, who left his estate to Bath. One ground Mountague relied on was that, even though the late Duke had had a falling out with Sir Thomas Clarges before the deed was executed, Sir Clarges was nevertheless named as a beneficiary in it.[68] Mountague argued that the Duke could never have intended to benefit Clarges considering the falling out, and thus did not appreciate what he was signing.[69] Macnair relied on two responses to this argument.[70] First, Treby C.J.C.P.[71] rejected it because "the Evidence of the Duke's being displeased with Sir *Thomas*, is but a hearing by a third Hand."[72] This passage may be interpreted to mean that evidence of the Duke's displeasure was inadmissible, or that while admissible, it was weak evidence. Macnair chose the latter interpretation, but gave no basis for preferring it. The second comment that Macnair relied on was given by Somers L.K., who said to Mountague's counsel, "[a]s to the Story of Sir *Thomas Clarges*, and the Differences between the Duke and him, there is no Proof of it; it is at most but an Hear-say, testified by one Witness."[73] This passage may be interpreted as Somers L.K. either saying that unsworn oral hearsay was rejected as inadmissible, or that it was admissible, but it was not full proof since equity at that time required two witnesses, and in that case there was only one witness.[74] The passage may also be read as Somers L.K. saying that the evidence was admissible, but worth little. Macnair chose the latter explanation without providing reasons for his selection.

Macnair also cited *Lady Granvill v. Dutchess of Beaufort*,[75] where the issue was whether the testator intended to give his wife the surplus of his estate. He had instructed a man named Price on the drafting of his will. Price died before he could be examined, but he had reportedly said that the testator intended to benefit his wife. Cowper L.C. said, "proof of what *Price* said in his life-time [was] evidence; but the slenderest sort."[76] Macnair read this passage to mean that the Chancery received

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66. *Ibid.* at 259-60.
67. (1693), 3 Chan. Cas. 54, 22 E.R. 963 (Ch.) [*Mountague* cited to E.R.].
68. *Ibid.* at 79.
69. *Ibid.*
70. *Supra* note 16 at 260.
71. From the late 16th century until at least 1743, chancellors sometimes sought advice from the common law judges on issues in Chancery cases. See *e.g. Lord Buckhurst v. Fenner* (1598), 1 Co. Rep. 1, 76 E.R. 1 at 2 (K.B.); *Omychund*, *supra* note 27. See also Jones, *supra* note 16 at 268-69; George Spence, *The Equitable Jurisdiction of the Court of Chancery* (Philadelphia: Lea & Blanchard 1846) vol. 1 at 382-83.
72. *Mountague*, *supra* note 67 at 978 (emphasis in original).
73. *Ibid.* at 1002 (emphasis in original).
74. Bryson, *Cases Concerning Equity*, *supra* note 33 at 282; *Alam* v. *Jourdan* (1683), Vern. 161, 23 E.R. 387, *sub. nom. Alam v. Jourdon* 1 Eq.Ca. Abr. 230, 21 E.R. 1010 (Ch).
75. (1709), 2 Vern. 648, 23 E.R. 1023, *sub nom. Lady Granville v. Duchess of Beaufort*, 1 P. Wms. 114, 24 E.R. 317, *sub nom. Lady Granvile v. Dutchess of Beaufort* 2 Eq. Ca. Abr. 415, 22 E.R. 352 (Ch.) [*Granvill* cited to 23 E.R. 1023] (the substantive decision of Cowper L.C. was subsequently appealed and reversed by the House of Lords, 3 Bro. P.C. 37, 1 E.R. 1161, 2 Vern.677, 23 E.R. 1040).
76. *Ibid.* at 1024 (emphasis in original).

unsworn oral hearsay, but gave it little weight. However, since the person with knowledge of the testator's intention was dead by the hearing, it may be that the Chancellor merely exercised his equitable discretion and dispensed with the general principle that such evidence was inadmissible. This second interpretation explains why the Chancellor made a point of saying that proof of what Price said was evidence and it accords with the reality that chancellors did not treat legal rules as strictly as common law judges did because of the different nature of their oaths of office.[77] Another interpretation is that in 1709 hearsay evidence of a testator's intention was allowed as an established exception to the rule.

Macnair himself said that his conclusion that courts of equity did not exclude unsworn oral hearsay before the 18th century was tentative for three reasons.[78] First, a witness swearing to only his or her own knowledge was too obvious a point to report. Second, the lack of a reference to the suppression of depositions containing unsworn oral hearsay may be due to the lack of surviving sources. Third, both the cases explicitly dealt with the issue of testator intention and Macnair recognized that this kind of situation might have been an exception to a rule excluding hearsay evidence. Thus, there are reasons to believe that unsworn oral hearsay was inadmissible in courts of equity by the early part of the 17th century.

The unsworn nature of this type of evidence constituted a reason for exclusion because the oath was perceived as making witnesses more inclined to tell the truth[79] and to be cautious in what they said.[80] Witnesses were perceived as being more inclined to sincerity because of the threat of divine punishment for breaking the oath by lying.[81] This inclination was believed to be enhanced by the threat of earthly punishment since witnesses could only be punished by the State for perjury if they lied while under a lawful oath.[82] Also, because of the formality and importance of the oath

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77. See Lord Ellesmere's 1615 letter to King James I, reproduced in George William Sanders, *Orders of the High Court of Chancery, and Statutes of the Realm Relating to Chancery, From the Earliest Period to the Present Time* (London: A. Maxwell & Son, 1845) vol. 1 at 92-93 (Ellesmere L.C wrote that common law judges were bound by their oaths of office to apply the law strictly, but he was bound by conscience instead); William Sheppard, *An Epitome of All the Common & Statute Laws of This Nation, Now in Force* (London: Printed for W. Lee *et al.*, 1656) at 193 (Sheppard wrote that Chancery was "[a] Court of equity or conscience, moderating the rigor of other Courts that are more strictly bound to the letter of the law").

78. *Supra* note 16 at 261.

79. See Michael Dalton, *The Countrey* [*sic*] *Justice* (London: Printed for the Society of Stationers, 1619) reprinted in *The Country Justice* (London: Professional Books Limited, 1973) at 273 (Dalton said that informers who brought accused felons before justices of the peace tended to speak more accurately while under oath); Keith Thomas, *Religion and the Decline of Magic: Studies in Popular Beliefs in Sixteenth and Seventeenth Century England* (London: Penguin Books, 1971) at 67 (historian Thomas said that even "after the Reformation [courts] continued to regard the oath as a guarantee of testimony").

80. See *e.g. The Trial of Thomas White alias Whitebread*, (1679), 7 Cobb. St. Tr. 311 at 331 [*White*].

81. See the comments of Jeffreys L.C.J. to a Crown witness in *The Trial of the Lady Alice Lisle* (1685), 11 Cobb. St. Tr. 297 at 325-26 [*Lady Lisle*]; Willes C.J.C.P. in *Omychund*, *supra* note 27 at 30-31.

82. *Harris v. Dixon* (1605), Yel. 72, 80 E.R. 50 (K.B.); *Lincoln's Case*, *supra* note 47 (standing as authority for the view that there was no remedy against witnesses who lied while not under a proper oath).

in this era, it was also perceived as causing witnesses to be more thoughtful about what they said than they would be in normal conversation. Thus, the initial exclusion of unsworn oral hearsay in Chancery (and perhaps in other courts of equity) had nothing to do with the perceived evaluative shortcomings of jurors or with the maxim that equity followed the law. Instead, unsworn oral hearsay was excluded because of its perceived unreliability in the absence of the threat of divine and earthly punishment for breach of the oath.

The initial exclusion of unsworn oral hearsay in equitable courts where only professional judges tried the facts, rather than in common law courts which used juries, seriously undermines the validity of Wigmore's claim that the perceived tendency of jurors to overvalue testimonial evidence in the absence of cross examination was the initial catalyst for the development of the hearsay rule. Further, concerns about the unreliability of the evidence in the absence of an oath and of the threat of earthly punishment for perjury are as important in courts that use professional triers of fact as they are in courts that use lay triers of fact since the concern relates to the quality of the evidence and not the perceived evaluative shortcomings of a particular type of trier of fact.

B. *The Rule at Common Law*

Although published sources before 1670 are relatively rare, there are indications that there were no restrictions on using unsworn oral hearsay in common law civil or criminal trials.[83] Further, until 1664, there were no signs of a judicial trend towards restricting the use of such evidence.[84] There are several cases before 1670 where unsworn oral hearsay evidence was used in civil trials. In *Rolfe*,[85] a party called three witnesses to prove a will, two of whom "deposed upon the report of others."[86] Although the report indicates the jury gave the testimony little regard, it seems that

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83. Between 1550 and 1750, there were important procedural differences between civil trials and serious criminal trials at common law, which meant that rules of evidence did not always apply in both types of trial. One difference was that while parties in civil trials could be represented by counsel, the accused in treason trials before 1696, and in felony trials before the mid-1700s, could only use counsel to argue points of law. See *An Act for Regulating of Trials in Cases of Treason and Misprision of Treason, 1695* (UK), 7 & 8 Will. III, c. 3, para. 1 [*Treason Act of 1695*] which granted counsel to accused in most types of treason trials. For further discussion on this point see *e.g.* J. B. Post, "The Admissibility of Defence Counsel in English Criminal Procedure" in Albert Kiralfy, Michele Slatter & Roger Virgoe, eds., *Custom, Courts and Counsel: Selected Papers of the 6th British Legal Conference, Norwich, 1983* (London: Frank Cass, 1983) at 23. Another procedural difference was that before 1696 only Crown witnesses were sworn in treason and felony trials. See *The Trial of Thomas Rosewell* (1684), 10 Cobb. St.Tr. 147 at 267 (K.B.) (*per* Jeffreys C.J.K.B.) [*Rosewell*]. The *Treason Act of 1696*, *ibid.*, provided for defence witnesses to be sworn. In 1702, *An Act for punishing of Accessories to Felonies, and Receivers of Stolen Goods and to Prevent the wilful burning and destroying of Ships, 1702* (UK), 1 Anne, Stat. 2, c. 9, para. 3, allowed for swearing of defence witnesses in felony trials. In civil trials, all witnesses could be sworn throughout this period.

84. This does not mean, however, that such evidence was given any significant weight by juries before this time.

85. *Rolfe, Widow, against Hampden, Knight* (1542), 1 Dy. 53b, 73 E.R. 117 (K.B.) [*Rolfe* cited to E.R.].

86. *Ibid.* at 117.

such unsworn oral hearsay was admissible. Similarly, in 1591, "hear-say [was] allowed for a proof" before the Queen's Bench.[87] In 1623, the King's Bench said, "proof per hearsay" was sufficient under a tithes statute.[88] A majority of the King's Bench still admitted unsworn oral hearsay evidence in 1664.[89] Then, in 1670, Hale C.B. said, "a *hearsay* was not to be allowed as a direct evidence."[90] By 1744, Lee C.J.K.B. said, "[t]here is not a more general rule, than that hear-say cannot be admitted."[91]

The surviving published case law suggests that the unrestricted admission of unsworn oral hearsay in felony and treason trials continued until about 1679. Six felony cases between 1590 and 1679 contain one or more instances of unsworn oral hearsay being received.[92] In another case, *Moders*, a witness testified to what someone not present at trial had told him.[93] In reply, the Court said, "[h]earsays must condemn no man"[94] but did not direct the jury to disregard this evidence. Ten treason trials between 1554 and 1678 also contain multiple instances of unsworn oral hearsay being admitted.[95] In some of these cases, the accused complained that the

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87. *Stransham v. Cullington* (1591), Cro. Eliz. 228, 78 E.R. 484 at 484(Q.B.) [*Stransham* cited to E.R.]. See also *Webb v. Petts* [1601] Noy. 44, 74 E.R. 1013 (Q.B.) [*Webb* cited to E.R.] ("a proof (by hear-say) was good enough to maintain the surmise within the statute," *ibid.* at 1014).

88. *Bennet and Snell's Case* (1623), Palmer 377, 81 E.R. 1132 at 1132 [*Bennet* cited to E.R.]

89. *Rutter*, *supra* note 55.

90. *Lutterel*, *supra* note 57 at 887, cited in Nelson (attr.), *Evidence*, 1st ed., *supra* note 31 at 149 (emphasis in original). It was further cited in Charles Viner, *A General Abridgment of Law and Equity* (Aldershot: Printed by the author, 1741) vol. 12 at 118.

91. *Omychund*, *supra* note 27 at 31.

92. *The Trial of Mr. John Udall, a Puritan Minister, at Croydon Assizes, for Felony* (1590), 1 Cobb. St. Tr. 1271 at 1283 (Assiz.); *The Trial of Robert Carr Earl of Somerset, May 25, for the Murder of Sir Thomas Overbury* (1616), 2 Cobb. St. Tr. 965 at 978, 980-81, 992 (Ct. of L.H.S.)[*Earl of Somerset*]; *A Trial of Witches at the Assizes held at Bury St. Edmond's for the County of Suffolk* (1664), 6 Cobb. St. Tr. 687 at 691, 692-93, 694-95, Anon., *A Tryal of Witches, at the Assizes Held At Bury St. Edmunds for the County of Suffolk* (London: Printed for William Shrewsbery, 1682) at 17-18, 20, 23, 26, 29-30, 31, 34-35, 38 [*Witches* cited to Cobb. St. Tr.]; *The Trial of Lord Morley, for Murder, before the House of Lords* (1666), 6 Cobb. St. Tr. 769 at 776-77, 782 (Ct. of L.H.S.); *The Trial of Robert Hawkins, Clerk, late Minister of Chilton, at the Assizes at Aylesbury, for Felony* (1669), 6 Cobb. St. Tr. 921 at 935 (Assiz.); *The Trial of Philip Earl of Pembroke and Montgomery, at Westminster, for the Murder of Nathanial Cony* (1678), 6 Cobb. St. Tr. 1309 at 1325, 1334, 1336, 1338-39, 1341-42 (Ct. of L.H.S.).

93. *The Trial of Mary Moders alias Stedman, styled the German Princess, at the Old Bailey, for Bigamy* (1663), 6 Cobb. St. Tr. 273 (Comms. of O. & T.) [*Moders*].

94. *Ibid.* at 276.

95. *The Trial of Sir Nicolas Throckmorton, Knight, in the Guildhall of London, for High Treason* (1554), 1 Cobb. St. Tr. 869 at 883-884, Annabel Patterson, ed., *The Trial of Nicholas Throckmorton* (Toronto: Centre for Reformation & Renaissance Studies, 1998) at 53, 56 [*Throckmorton* cited to Cobb. St. Tr.]; *R. v. Thomas* (1554), 1 Dy. 99b at 99b-100a, 73 E.R. 218 at 218-19 (Q.B.) [*Thomas* cited to E.R.]; *The Trial of Thomas Howard, Duke of Norfolk, before the Lords at Westminster, for High Treason* (1571), 1 Cobb. St. Tr. 957 at 977, 993 (Ct. of L.H.S.) [*Duke of Norfolk*]; *The Arraignment of Edmund Campion, Sherwin, Bosgrave, Cottam, Johnson, Bristow, Kirbie, and Orton, for High Treason* (1581), 1 Cobb. St. Tr. 1049 at 1056, 1063 (Q.B.) [*Campion*]; *The Trial of Phillip Howard, Earl of Arundel, before the Lords, for High Treason* (1589), 1 Cobb. St. Tr. 1249 at 1254, 1257 (Ct. of L.H.S.) [*Earl of Arundel*]; *The Trial of Robert Earl of Essex, and Henry Earl of Southhampton, before the Lords, at Westminster, for High Treason* (1600), 1 Cobb. St. Tr. 1333 at 1344, 1346 (Ct. of L.H.S.) [*Earl of Essex*]; *The Trial of Sir Walter Raleigh, Knight, At Winchester, for High Treason* (1603), 2 Cobb. St. Tr. 1 at 19, 20, 25, 1 Jardine's Crim. Tr. 400 at 424, 428-429, 436 (Comms. of O. & T.) [*Raleigh* cited to Cobb. St. Tr.]; *The Trial of Thomas, Earl of Strafford, Lord Lieutenant of Ireland, for High Treason* (1640), 3 Cobb. St. Tr. 1381 at 1427, 1439 (H.L.) [*Earl of Strafford*]; *The Trial of Connor Lord Macguire, at the King's Bench, for High Treason, in being concerned in the Irish Massacre* (1645), 4 Cobb. St. Tr. 653 at 673, 676, 678 (K.B.) [*Lord Macguire*]; *The Trial of William Ireland, Thomas Pickering, and John Grove, at the Old Bailey, for High Treason* (1678), 7 Cobb. St. Tr. 79 at 109, 111 (Comms. of O. & T.) [*Ireland et al.*].

person with personal knowledge of the out-of-court assertions should have been required to testify.[96] Also, a number of the earliest published digests that addressed the law of evidence contained rulings which excluded certain types of evidence but, with one exception noted in the next paragraph, none digested cases that excluded unsworn oral hearsay evidence.[97]

The one exception before 1679 is Sir Edward Coke's book on serious criminal cases, completed between 1628 and 1634.[98] In it, Sir Coke said that in the 1572 case of Lord Lumley,[99] the Queen's Bench denied that one of the two Crown witnesses required in treason cases by *An Act for the Punishment of Diverse Treasons*[100] could testify by way of hearsay. He said that this case overruled *Thomas*,[101] where the Queen's Bench had said that one of the witnesses could testify by way of hearsay.[102] Whether he intended his comment to apply generally to unsworn oral hearsay or only when dealing with the statutory two-accuser requirement is unclear. Further, Sir Coke's claim seems questionable for two reasons. First, *Thomas* was cited in *Raleigh*[103] but Sir Coke, who was the prosecutor in the case, did not note that it had been overruled by *Lord Lumley's Case*.[104] Second, there are treason cases after 1572 that contain instances of unsworn oral hearsay being received,[105] thus making one suspect his position.

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96. *Throckmorton*, *ibid.*at 884; *Duke of Norfolk*, *ibid.* at 985; *Earl of Arundel*, *ibid.* at 1257.

97. See *e.g.* William Sheppard, *A Grand Abridgment of the Common and Statute Law of England*, (London: Printed by E. Flesher *et al.*, 1675) vol. 2 at 141 [Sheppard, *A Grand Abridgment*] (a defendant's answer in an equity case could be read against them in a common law trial, but could not be used as evidence against the other parties at law). See also Style, *The Practical Register*, 1st ed., *supra* note 30 at 355-56; Sheppard, *A Grand Abridgement*, *ibid.* at 138 (both digests note that people who were convicted felons, infidels, or interested in the cause were not competent as witnesses at common law).

98. Sir Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (London, 1644; repr. London: Printed for E. & R. Brooke, 1797; repr. Buffalo: William S. Hein, 1986) [Coke, *Third Part*]. For information on the dating of this manuscript see Catherine Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke* (Boston: Little, Brown, 1957) at 505, 523.

99. *Lord Lumley's Case*, Hil. 14 El. Lo. Lumley's Case, 2 Mar., Dier, 99-100 as cited in Coke, *ibid.* at Cap.2, Petit Treason, 25 ("And the strange conceit in 2 Mar. that one may be an accuser by hearsay, was utterly denied by the justices in the Lo. Lumleys case").

100. *1551-52* (UK), 5 & 6 Edw. VI, c. 11 (the spelling in the title of the statute has been modernized). Paragraph 9 of the Act provided that after June 1, 1552, no one could be convicted or attainted for any form of treason unless the person were accused by two lawful accusers who had to appear at the arraignment unless deceased.

101. *Supra* note 95.

102. Coke, *Third Part*, *supra* note 98 at 25.

103. *Raleigh*, *supra* note 95.

104. *Ibid.* at 20 (Raleigh said at his trial that there was a law of two sorts of accusers, one of his own knowledge, another by hearsay. The Earl of Suffolk replied that he should "[s]ee the case of Arnold."Then, Popham C.J.K.B. said, "It is the Case of sir Will. Thomas, and sir Nicholas Arnold." Raleigh replied that if the case was law, "you will have any man's life in a week."The reference by Popham C.J.K.B. is clearly to *Thomas* because Sir Nicholas Arnold was one of the accusers noted in the report of that case).

105. See *e.g. Campion*, *supra* note 95 (1581); *Earl of Arundel*, *supra* note 95 (1589); *Earl of Essex*, *supra* note 95 (1600); *Raleigh*, *ibid.* (1603); *Earl of Strafford*, *supra* note 95 (1640); *Lord Macguire*, *supra* note 95 (1645); *Ireland et al.*, *supra* note 95 (1678).

Starting in 1679, common law judges began to treat unsworn oral hearsay evidence as inadmissible or, at least, to discourage its use in treason, felony and misdemeanour trials. This practice coincides with Wigmore's work regarding his timing of the beginnings of a rule excluding one form of hearsay evidence. In several late 17th century trials, judges said this kind of evidence was not to be used.[106] In 1681, North C.J.C.P. told a witness: "Nothing is evidence, but what you know of your own knowledge; you must not tell what others said."[107] In 1684, Jeffreys L.C.J. said that unsworn oral hearsay is "a sort of evidence, but it is not to be allowed."[108]

Early 18th century published literature confirms that, by then, an evidence rule had emerged which rendered unsworn oral hearsay inadmissible. An influential evidence law treatise credited to Sir Jeffrey Gilbert, [109] written before 1726,[110] noted "[t]he Attestation of the Witness must be to what he knows, and not to that only which he hath heard, for a mere Hearsay is no Evidence, for 'tis his Knowledge that must direct the Court and Jury."[111] A 1721 treatise by William Hawkins also said that it seemed agreed that as far as hearsay evidence was concerned, what a stranger had been heard to say to the witness was no evidence for or against an accused.[112]

In 2003, Langbein said that statements from the late 17th century felony trials where unsworn oral hearsay was "no evidence" or "not evidence" were not likely attempts to exclude such hearsay. Instead, he characterized them as likely "an exercise of the judicial power to comment on the evidence."[113] He bases his claim on summaries of some 18th century trials in the *Old Bailey Sessions Papers* and in *Ryder's Notes* that suggest that unsworn oral hearsay continued to be received in significant quantities.[114] There are five reasons, however, why Langbein's position seems unlikely and Wigmore's seems relatively accurate on this point.

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106. See *e.g. Langhorn, supra* note 60 at 441; *Colledge, supra* note 63 at 628; *The Trial of Ford Lord Grey of Werk, Robert Charnock, Anne Charnock, David Jones, Frances Jones, and Rebecca Jones, at the King's Bench, for a Misdemeanor, in debauching the Lady Henrietta Berkeley, Daughter of the Earl of Berkeley* (1682), 9 Cobb. St. Tr. 127 at 152 (K.B.) [*Lord Grey*]; *Hambden, supra* note 51 at 1053; *Braddon, supra* note 60 at 1180-81, 1189; *Lord Delamere, supra* note 44 at 568; *The Trials of Robert Charnock, Edward King and Thomas Keyes, at the Old Bailey, for High Treason* (1696), 12 Cobb. St. Tr. 1377 at 1412, 1414 & 1454 (Comms. of O. & T.) [*Charnock*].

107. *Colledge, ibid.* See also the comments of Jeffreys L.C.J. in *Braddon, ibid.* at 1180 and of Holt C.J.K.B. in *Charnock, ibid.* at 1454.

108. *Hambden, supra* note 51 at 1101. See also *The Trial of William Lord Russell, at Old Bailey, for High Treason* (1683), 9 Cobb. St. Tr. 577 at 608 (Comms. of O. & T.) (Pemberton C.J.K.B. said to the accused that unsworn oral hearsay "is nothing against you, I declare it to the jury."); *Cole, supra* note 63 at 883 (Dolben J. told a jury that "[t]he court hath already declared to you, that her evidence, being only what her husband told her, is no evidence in law to take away a man's life").

109. Sir Jeffrey Gilbert (attr.), *The Law of Evidence* (Dublin: Sarah Cotter, 1754; repr. N.Y. Garland Publishing, 1979) (regarding authorship, the treatise itself merely indicates it was "[b]y a Late Learned Judge").

110. Michael Macnair, "Sir Jeffrey Gilbert and his Treatises" (1994) 15 J. Legal Hist. 252 at 259, 266-67, n. 107 (Macnair suggests the treatise was written in the early 1700s before 1710; although written before 1726, it was first published in 1754, and has since been published in six different editions in England).

111. Gilbert (attr.), *supra* note 109 at 107.

112. Hawkins, *supra* note 30 at 431. See also Nelson (attr.), *Evidence*, 1st ed., *supra* note 31 at 231 ("Hearsay, or a Report of what another Man said, is no Evidence against a Prisoner").

113. John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003) at 236 [Langbein, *Adversary Trial*].

114. *Ibid.* at 234, 238-41.

Regarding common law civil trials, *Ryder's Notes* were only brief summaries made for Ryder's own use, and thus they are not detailed and reliable reports.[115] Second, *Ryder's Notes* covered trials at *nisi prius* from 1754 to 1756, but not trials before the central courts at Westminster.[116] Trials at Westminster were conducted in a more solemn manner,[117] and thus one would expect evidence rules to have been more strictly applied. Third, Langbein cited only three cases from more than 250 civil cases in which *Ryder's Notes* appear to preserve instances of the receipt of unsworn oral hearsay.[118] This low number may indicate that counsel of the day recognized the inadmissible character of such evidence and tried to avoid using it. Finally, the receipt of unsworn oral hearsay in a few trials does not necessarily indicate that no exclusionary rule existed. In *Ryder's Notes* there is a case where a copy of a paper was admitted without any indication that the original was unavailable, thus suggesting that no best evidence rule applied.[119] However, by 1754 it appears that copies were inadmissible without proof the original was unavailable; thus, the rules of evidence were not always enforced.[120] It seems that unsworn oral hearsay evidence was received in civil trials of the era because judges applied the evidence rules in a more discretionary fashion than was done in the late 18th and 19th centuries.[121]

Regarding treason and felony cases, Langbein's suggestion that the judges of the late 17th century were merely commenting to the jury on the value of unsworn oral hearsay seems at odds with the case reports. In *Colledge*,[122] Crown counsel interrupted a witness, preventing him from finishing his statement because it was unsworn

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115. The average length of Ryder's notes is between 1.5 and 2.0 typed, single spaced pages; each note summarizes the testimony of five or six witnesses, the statements of counsel, any legal arguments and objections. Even though trials of the era were often only about twenty to thirty minutes in duration, it is obvious the notes contain only a portion of what transpired. See J.S. Cockburn, *A History of English Assizes, 1558-1714* (Cambridge: Cambridge University Press, 1972) at 137-38 (few *nisi prius* hearings in the 1600s lasted beyond twenty minutes).

116. Only two trials summarized in *Ryder's Notes* were at Westminster Palace before the full King's Bench; namely, *Ferrand v. Prentice* (17 May 1754) at 4 and *Harrison v. Shirley* (24 May 1754) at 6. Seven cases noted on June 26, 1754 (43-46) and seven cases noted on July 1-2, 1756 (47-52) may have been at Westminster since the dates are within the Trinity term but *Ryder's Notes* are silent on which court was involved. However, the cases involve minor matters; hence, it seems unlikely that these cases were before the full bench where only important and difficult trials were tried. See Oldham, *supra* note 27 at vol. 1, 119; Style, *Practical Register*, 1st ed., *supra* note 30 at 310.

117. See Style, *Practical Register*, 1st ed., *ibid.*

118. Langbein, "Historical Foundations," *supra* note 33 at 1186, nn. 88-90 (citing *Fleming v. Needham* (1754), 13 Ryder N.B. 14; *Parsons v. Sharpe* (1754), 13 Ryder N.B. 62; *Buckenam v. Garden* (1754) 13 Ryder N.B. 64).

119. *Fletcher v. Cargill* (6 July 1754), *Ryder's Notes* 62 at 63 (N.P.). See also *Gascoyne v. Cleeve* (5 Mar. 1756), *Ryder's Notes* 48 at 53 (N.P.) [*Gascoyne*] (a deposition was received despite no indication that the deponent was unavailable to testify *viva voce* at the trial).

120. See *e.g. Eden v. Chalkill* (1661), 1 Keble 117, 83 E.R. 847 (K.B.) [*Eden* cited E.R.]; *Matthews v. Port* (1687), Comb. 64, 90 E.R. 345 (K.B.) [*Matthews* cited to E.R.]. See also Thomas Wood, *An Institute of the Laws of England; Or, the Laws of England in Their Natural Order, According to Common Use*, 4th ed. (Dublin: J. Watts, 1724) vol. 4 at 595-96.

121. See Gallanis, *supra* note 24 at 502-03, 505, 512, 515, 527.

122. *Supra* note 63.

oral hearsay.[123] North C.J.C.P. supported the interruption, saying, "[n]othing is evidence, but what you know of your own knowledge; you must not tell what others said."[124] Later in that trial, a witness made the statement: "I heard one say," and was interrupted by Jeffreys L.C.J. who said, "[y]ou must speak your own knowledge."[125] The judges did not admonish Jeffreys L.C.J. for interrupting. Other cases contain similar kinds of interruptions.[126] By preventing the witnesses from revealing the content of the hearsay evidence, neither the judges nor the jurors in these cases were in a position to assess its weight, thus suggesting that unsworn oral hearsay was being treated as inadmissible, and not just as lacking credit. Also, a judge's comment from the era suggests that the common law courts were at least starting to distinguish between the ideas of weight and admissibility.[127]

In 2003, Langbein also said that declarations made by late 17th century judges that unsworn oral hearsay was "no evidence" referred to the "notion of materiality, that is, the court's power to refuse to waste time hearing pointless evidence."[128] The context in which these declarations were made, however, raises doubts about this conclusion. In *Langhorn*,[129] the judges said that a witness's testimony that someone else told him the accused was involved in the plot, was no evidence.[130] Evidence of the accused's involvement in such a plot was material to proving his guilt; thus, its treatment as no evidence did not relate to materiality. Likewise, in *Otes*,[131] when a witness said he heard Whitebread had used Otes poorly, Jeffreys L.C.J. said it was no evidence because the witness did not himself know it.[132] Otes was accused of committing perjury against Whitebread; thus, testimony about how Whitebread had treated Otes was material to a motive for why Otes would have lied at his trial. Therefore, these declarations that unsworn oral hearsay was "no evidence" point to the development of an exclusionary rule.

The sole reason for the initial exclusion of unsworn oral hearsay evidence appears to be that it was unsworn, and hence perceived as lacking sufficient reliability to be received. Again, this rationale conflicts with Wigmore's claim that judicial

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123. *Ibid.* at 628.

124. *Ibid.*

125. *Ibid.*

126. See *e.g. The Trial of Dr. Oliver Plunket, Titular Primate of Ireland, at the King's Bench, for High Treason* (1681), 8 Cobb. St. Tr. 447 at 461 (K.B.) [*Plunket*] (Pemberton C.J.K.B. stopped a witness from testifying about what others had told him); Anon., *The Tryal of Sr. Miles Stapleton Bar. for High Treason in Conspiring the Death of the King, &c. at York Assizes* (London: Printed for Richard Baldwin in the Old Bailey, 1681) at 14; *Lord Delamere*, *supra* note 44 at 568.

127. *White*, *supra* note 80 at 407 (North C.J.C.P. said that certain witnesses were lawful, but that did not mean that they were necessarily credible).

128. Langbein, *Adversary Trial*, *supra* note 113 at 237.

129. *Langhorn*, *supra* note 60.

130. *Ibid.* at 441.

131. *Otes*, *supra* note 52.

132. *Ibid.* at 27.

concerns about juries' evaluative shortcomings were at the heart of the hearsay rule's *raison d'être*. In *Rutter*, Kelyng J. dissented because the original declarant's statement was unsworn.[133] In *Lutterell*, there is nothing to indicate that Maynard's out-of-court statements were sworn.[134] The statements were admitted as corroboration because the purpose of such admission was not to prove the truth of the facts asserted in such statements, but to show that he had consistently said the same thing. In *Braddon*,[135] Jeffreys L.C.J. told a witness that she should have disclosed that her testimony was based on what another had told her: "You are upon your oath, and must affirm nothing but your own knowledge."[136]

Regarding Wigmore's claim that the lack of opportunity for cross examination was the reason for the initial exclusion of unsworn oral hearsay, the first mention of this reason in the context of this type of hearsay seems to be in Hawkins' 1721 treatise.[137] Hence, Wigmore's rationale, so far as it relates to cross examination, seems to have been developed after this aspect of the rule began to solidify. Further, the first references to cross examination in connection with the exclusion of this kind of hearsay evidence do not link the importance of cross examination to the use of jurors at common law. Thus, there appears to be no support for Wigmore's conclusion that cross examination became a reason for the exclusion of unsworn oral hearsay evidence at common law before 1721, and nothing to link it to juries.

IV. The Affidavits Rule

The remaining six rules that initially precluded hearsay evidence under English secular law all dealt with precluding factual assertions contained in papers of various types. The first type of paper that seemed to have its contents excluded was one called a "voluntary affidavit"; namely, an affidavit that was prepared on a party's own initiative and not made pursuant to a court's order for affidavit evidence on some point.[138] Like the rule excluding unsworn oral hearsay, this rule's origins seem

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133. *Rutter*, *supra* note 55.

134. *Lutterell*, *supra* note 57.

135. *Braddon*, *supra* note 61.

136. *Ibid.* at 1180. Jeffreys L.C.J. also said in that trial that if a witness whose out-of-court statement was being repeated by another person at trial had come to court wishing to speak, the Court could not treat what the witness said as evidence unless the person swore to it under an oath (*ibid.* at 1189). Later in the case, Jeffreys L.C.J. told the jury that hearsays were not evidence because they were unsworn (*ibid.* at 1205). See also *Lord Delamere*, *supra* note 44 at 568 (two years after *Braddon*, Jeffreys L.C.J. refused to hear a witness's testimony about what a bailiff told him because everyone knew "how easy a thing it [was] to hear a bayliff tell a lye," when not under oath); *Cole*, *supra* note 63 at 876, 878 (Dolben J. told a witness that what her husband had told her was not evidence because her husband's statement was unsworn).

137. Hawkins, *supra* note 30 at 431 (the absence of an oath was also mentioned as a rationale by Hawkins).

138. The phrase "voluntary affidavit" does not seem to be directly defined in the 16th and 17th century literature, but it is used. See *e.g. Anon.*, (1655) Style 445 at 446, 82 E.R. 849 at 850 (K.B.) [*Anon.* 1655 cited to E.R.]; Style, *Practical Register*, 1st ed., *supra* note 30 at 318; Sheppard, *A Grand Abridgment*, *supra* note 97 at Part II, 141; Sanders, *supra* note 77 at 66 (in a 1595 order, Puckering L.K. refers to a kind of affidavit not expressly ordered by the Chancery); *Eyres v. Sedgewicke* (1620), Cro. Jac. 601 at 602, 79 E.R. 513 at 514 (K.B.) [*Eyres* cited to E.R.](Houghton J. refers to an affidavit which was "a voluntary act" by the deponent).

to have been in equity, not at common law, thus raising more reason to doubt the accuracy of Wigmore's theory about the hearsay rule's origins.

A. *The Rule in Equity*

In *Farrington*,[139] Puckering L.K. prohibited the use of voluntary affidavits for proof of substantive facts.[140] His order does not appear to have been limited to that case because, as Bryson notes, his successor, Egerton L.K., precluded the use of affidavits as substantive evidence in two more Chancery cases between 1598 and 1602.[141]

Puckering L.K.'s reasoning was that the opposing party was not privy to the affidavits beforehand and, if the contents were deliberately false, this party had no remedy. Later, in a case before Egerton L.K., he said that such affidavits were not to be allowed on issues relating to land titles in Chancery "for that [was] mischievous and perilous."[142] Thus, the message from Puckering L.K. and Egerton L.K. was that this type of evidence was too prone to falsehoods; hence, it was too unreliable to be received. Since this rationale relates to concerns about the reliability of a type of evidence, its admission is no more justifiable in courts where triers of fact are judges than in courts that utilize jurors as triers of fact. The use of unreliable evidence by either professional or lay triers of fact holds the potential for inaccurate factual findings. Wigmore recognized this point and to avoid it he argued that the reason for exclusion of hearsay evidence was solely the lack of testing by cross examination and not the nature of the unsworn evidence.[143] Wigmore had to take this position in order to maintain that it was the perceived evaluative shortcomings of jurors that were at the root of the exclusionary rules of evidence such as the hearsay rule.

B. *The Rule at Common Law*

The earliest surviving signs of the exclusion of voluntary affidavits at common law are two King's Bench cases in 1646 and 1648. In both cases the Court said that voluntary affidavits sworn before Masters should not be read in trials before it.[144] Similarly, in an anonymous 1655 case,[145] the High Court of Upper Bench[146] held that such an affidavit could not be read. Further evidence of the rule's development is

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139. *Tho. Farrington, Plaintiff against John Bylbye, Defendant*, 37 Eliz. 10 June, 1595 cited in Sanders, *ibid.* at 66 [*Farrington*].
140. *Ibid.*
141. Bryson, *Cases Concerning Equity*, *supra* note 34 at "Cases in Tempore Egerton" (Ch. c. 1598 x c. 1602) CUL MS. Gg. 2.31, ff. 437-478v at 295, 310.
142. *Ibid.* at 295.
143. Wigmore, *Treatise*, *supra* note 5, vol. 5, 7-10, §1362 at 26-28, §1364-65.
144. Trin. 22. Car. B.r., Pase. 24. Car. B.r. digested in Style, *Practical Register*, 1st ed., *supra* note 30 at 25-26 ("An Affidavit made before a Master of the *Chancery* is of no force, nor ought to be read in this Court," *ibid.*).
145. *Anon.* 1655, *supra* note 138, digested in Style, *Practical Register*, 1st ed., *supra* note 30 at 318, Sheppard, *A Grand Abridgment*, *supra* note 97 at vol. 2, 141.
146. The High Court of Upper Bench was the name of the King's Bench during Cromwell's Commonwealth.

found in the fact that by the early 18th century, the rule was regularly noted in sections of digests and treatises dealing with the common law of evidence.[147] Thus, by the second half of the 17th century, there are signs of the start of a rule excluding voluntary affidavits sworn before Masters in trials before the King's Bench, something Wigmore does not mention in his work on the hearsay rule's origins.

The reason for the preclusion of affidavits in King's Bench trials appears to relate to the fear of perjury. In other words, such affidavits were initially excluded because they were considered to be generally too unreliable. Thus, Wigmore's claim that the initial exclusion of sworn hearsay evidence occurred in 1696 solely because of the lack of testing of such evidence by cross examination appears inaccurate.[148] In 1657, Style said that such affidavits were excluded because "a Master of the Chancery hath not authority to administer such an Oath, and therefore if the party did swear falsly, it is not perjury, nor can he be endicted for it, because it is *Coram non judice*; and therefore such oaths are of little credit to be given in evidence."[149]

Style does not explain why the King's Bench felt that a Master had no authority to administer such an oath. It may have been that such affidavits were not *per se* required by Chancery as a step in a case only after joinder of the issue(s).[150] However, the case law of the era indicates that if the King's Bench did not recognize an oath as lawful, then the deponent of that affidavit could not be guilty of statutory or common law perjury.[151] This leads to the conclusion that since the breach of oath did not carry the threat of earthly punishment for perjury, judges believed there was a greater temptation for deponents to lie. Thus, the King's Bench precluded these affidavits.

By the early 18th century, Sir Gilbert advanced another reason for the preclusion of voluntary affidavits; namely, the absence of an opportunity for the adversely

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147. Nelson (attr.), *Evidence*, 1st ed., *supra* note 31 at 79; Gilbert (attr.), *supra* note 109 at 44, 49; Wood, *supra* note 120 at 596; Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius*, 3rd ed. (London: W. Strahan & M. Woodfall, 1781) at 241.

148. Wigmore advanced this claim in his *Treatise*, *supra* note 5, vol. 5, §1364 at 25-26.

149. Style, *Practical Register*, 1st ed., *supra* note 30 at 318.

150. William Style, *Style's Practical Register, Begun in the Reign of King Charles I, Consisting of Rules, Orders, And the Principal Observations Concerning the Practice of the Common Law in the Courts at Westminster, Particularly the King's Bench as well in Matters Criminal as Civil*, 3rd ed. (London: Printed for Thomas Dring & Executors of S. Leigh, 1694) at 512 [Style, *Practical Register*, 3rd ed.] (Style noted an anonymous 1646 case in which the King's Bench held that a trial was unlawful because there had not been joinder of issue. He said, "there was nothing before them to try, and so it was *coram non Judice*"). See also *Watt's Case* (1663), Hards. 331 at 332, 145 E.R. 483 at 483 (Ex. Ct.) [*Watt's-Case* cited to E.R.]; *Howard v. Tremain* (1692), 4 Mod. 146, 87 E.R. 314, (*sub nom. Howard v. Tremaine*) 1 Show. K.B. 363 at 364, 89 E.R. 641 at 641, Carth. 265, 90 E.R. 757, 1 Salk. 278, 91 E.R. 243 (K.B) [*Howard* cited to 87 E.R. 314].

151. See discussion at *supra* note 83 (and accompanying text) regarding the inability to punish a witness under statute for lying under an unlawful oath. See also *Nannge v. Rowland* (1608), Cro. Jac. 212, 79 E.R. 184 at 185 (Star Ch.) [*Nannge* cited to E.R.] (the Chief Justices of the King's Bench and Common Pleas said that Crown witnesses who swore falsely at a trial could be punished at common law, thus suggesting the existence of a common law offence) See also Coke, *Third Part*, *supra* note 98 at 164 (a note regarding the case of Rowland Ap Eliza in the Star Chamber where it was resolved that "perjury in a witnesse was punishable by the Common law," *ibid.*).

affected party to cross examine the deponent.[152] About the mid-18th century, Francis Buller's treatise on evidence law cited Sir Gilbert's explanation, but did not note Style's.[153] Thus, in the 18th century, the lack of opportunity for cross examination seemed to replace the initial reason for exclusion. Nothing in the writings of Sir Gilbert or Buller, however, indicated why the opportunity for cross examination was viewed as important. Thus, Wigmore's theory that it was important because of a judicial perception that jurors would overvalue testimonial statements in the absence of cross examination seems to have been speculation on his part.

Regarding the exclusion of voluntary affidavits in treason and felony trials before 1750, there does not seem to be any surviving published material that expressly addresses admissibility of this type of evidence.[154] Thus, there is no evidence of an exclusionary rule specific to voluntary affidavits in treason and felony cases before 1750.

V. THE SAME PARTIES RULE

Chronologically, the next exclusionary rule developed at the start of the 17th century. The "same parties rule" provided that a deposition in one proceeding was inadmissible in another one if the opposing parties or the issues were not the same in both proceedings. The first signs of the rule appeared in common law civil cases and in equity cases between 1600 and 1623, and it developed in tandem in the two systems.[155] Again, the rule's development in both court systems undermines Wigmore's theory that hearsay evidence began to be excluded first at common law because of the perceived evaluative shortcomings of lay jurors.

A. *The Rule at Common Law*

The first case on the same parties rule appears to be a 1600 Common Pleas' decision.[156] The Court held that a Chancery deposition could not be read "because the party in this action was [not] party or privy to the suing out of the commission

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152. *Supra* note 109 at 44, 49.

153. *Supra* note 147 at 241.

154. In *R. v. Still (alias Cutterel)*, O.B.S.P. (27 & 28 Feb. and 1 & 2 Mar., 1716/17) at 2, a murder trial, the Crown tendered the victim's affidavit in which he identified the accused as his killer. The accused objected to the affidavit's use, but little can be inferred from this objection with respect to the existence of an exclusionary rule because the accused was apparently unrepresented by counsel and it is unclear if a justice of the peace took the affidavit in accordance with the Marian Statutes, in which case, the contents were admissible by statutory authority rather than under the common law. See *An Act Appointing an Order to Justices of Peace for the Bailement of Prisoners, 1554* (UK), 1 & 2 Phil. & Mar., c. 13; *An Acte to Take examinacon of Prysoners Suspected of Manslaughter or Felonye, 1555* (UK), 2 & 3 Phil. & Mar., c. 10 [Marian Statutes].

155. Henry Bathurst (attr.), *The Theory of Evidence*, (Dublin: Sarah Cotter, 1761) at 30 (the first surviving reference to the rule in such trials).

156. *Anon.* (1600), 3 Dy. 301b, 73 E.R. 677, n.41 [*Anon.*1600 cited to E.R.]. This case was not cited by Wigmore and does not seem to have been cited by anyone else. The case report is brief, but *Dyer's Reports* have a good reputation for accuracy. For more information regarding the accuracy of *Dyer's Reports*, see William Wallace, *The Reporters*, 4th ed. (Boston: Soule & Bugbee, 1882; repr. Buffalo: Dennis & Co., 1959) at 126-27.

[that led to the deposition], and so some might be cheated."[157] The case does not appear to have been an isolated one, but instead marked the start of an exclusionary rule's development. In 1653, the King's Bench held that if a witness could not be found, then his or her deposition "in a cause betwixt the same parties plaintiffe and defendant" could be read.[158] This meant that if the parties were different in the case that produced the deposition and in the King's Bench case, then the deposition could not be read, even though the deponent was unable to testify at trial. In 1657, Style noted two cases where the King's Bench said that, in civil trials, Chancery depositions could not be read when the cause and parties were not the same in the equity and common law suits.[159] By 1684, the rule seems to have been so well established that Jeffreys L.C.J., on his own volition, excluded a deposition where the parties were different.[160] This is affirmed by three early to mid-18th century works which said that a deceased witness's deposition could be read in a jury trial involving the same parties, but not if the parties were different.[161]

The primary reason for the development of the same parties rule appears to be out of concern for the reliability of depositions' contents. In the 1600 case, the Court expressed the view that the opposing party "might be cheated" by the deposition's receipt since that party had not been privy to the examination that produced the deposition.[162] Also, around 1600, a Master expressed concern that when the opposing party was not involved in the process, there was an opportunity for the other party to improperly manipulate the witness's evidence without detection.[163]

This concern about cheating fits with developments around 1600. At this time, there were growing concerns with parties deliberately miscopying parts of Chancery depositions for use in jury trials, and with the integrity of Chancery examiners.[164] The first development so threatened Chancery's reputation that in 1596, Egerton L.K. ordered that no copy of a deposition be used in a Chancery hearing unless it contained the hand of a Chancery officer.[165] His order did not, however, apply to copies of depositions used in jury trials; thus, it would not have reduced reliability concerns at common law. A second development concerned the integrity of the commissioners conducting examinations. Examinations were constantly followed

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157. *Anon.*, 1600, *ibid.* (the word "not" has been added to this quote because it seems to have been mistakenly omitted before the words "party or privy to" in the case report since it makes no sense to say that one of the common law parties might be cheated by the admission of the deposition because he or she was a party to or privy to the Chancery commission that led to the deposition's creation).

158. *Anon.* (1653), Godbolt 326 at 327, 78 E.R. 192 [cited to E.R.].

159. Style, *Practical Register*, 1st ed., *supra* note 30 at 80, 113.

160. *The Lady Ivie's Trial*, ed. by Sir John C. Fox (Oxford: Clarendon Press, 1929) at 97.

161. Giles Duncombe, *Trials per Pais: Or the Law of England Concerning Juries by Nisi Prius, &c.*, 5th ed. (London: Eliz. Nutt & R. Gosling, 1718) at 357-59; Gilbert, *supra* note 109 at 47; Wood, *supra* note 120 at 596.

162. *Supra* note 157.

163. Jones, *supra* note 16 at 262 (in reference to Master Tindall's concern).

164. *Ibid.* at 86.

165. Sanders, *supra* note 77 at 73-74.

by reports of falsification and error, and of setting down testimony other than what the witnesses had said.[166] Early in the 1600s, there were cases where commissioners were accused of colluding with litigants.[167] Thus, there were clear reasons for concern about the reliability of depositions when a party in the common law case was not involved in the Chancery examination process.

Although the Common Pleas' 1600 decision seems to have been primarily concerned with the reliability of depositions, the lack of opportunity for the adverse party to cross examine the deponent may have also played a part. By 1656, at least one common law judge was citing this point as a reason for exclusion.[168] However, there is no source which suggests the judges were linking that lack of opportunity to any perceived tendency of jurors to overvalue such evidence, thus raising doubts about Wigmore's linkage of these two concepts. Concerns about the lack of opportunity for cross examination may have been just as important to the proper evaluation of testimonial evidence in the courts of equity, where trained judges tried the facts, as they were to judges and juries in the common law courts.

B. *The Rule in Equity*

Three early 17th century cases suggest that a similar rule was developing in equity, again raising doubts about Wigmore's claim that the rule's origins were strictly in the common law courts because of their use of jurors. In *Sallowaie*,[169] a majority of the Star Chamber admitted depositions taken in the Marches Court even though that case involved different parties. Egerton L.K., however, said that the depositions should not be read, apparently because the parties were not the same in both cases. His dissent in the Star Chamber suggests that if the matter had come before him alone in Chancery, he would have excluded the depositions. In *Maddoxe*,[170] the Star Chamber allowed depositions from the Marches Court because "there was a former order for it, and upon that same order the defendant built and forbore to examine the witnesses."[171] In *Jennyson*,[172] the equity side of the Exchequer rejected depositions from a prior treason case involving the King and an ancestor of one party unless the other party consented to admission.

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166. Jones, *supra* note 16 at 241, n. 6.

167. See *e.g. Moor v. Foster* (1605), Cro. Jac. 65, 79 E.R. 55, (*sub. nom. Moore v. Foster*) Yel. 62, 80 E.R. 43 at 44 (K.B.) [*Moor* cited to E.R.] (a commissioner was accused of taking bribes); *Peacock's Case* (1611), 9 Co. Rep. 70b, 77 E.R. 837 (Star Ch.) [*Peacock's Case* cited to E.R.] (a commissioner was found to have colluded with a litigant); Jones, *ibid.* at 242 (about 1600, a Master castigated commissioners as unlearned and partial).

168. Henry Rolle C.J.U.B., *Un Abridgment des Plusieurs Cases et Resolutions del Common Ley* (London: Printed for A. Crooke *et al.*, 1668) vol.2 at 679, para. 9.

169. *Sallowaie v. Walle* (1602), reported in John Hawarde, *Les Reports del Cases in Camera Stellata 1593 to 1609*, ed. by William Paley Baildon, (London: Privately Published, 1894) 155 at 156.

170. *Maddoxe v. Owen* (1605), reported in Hawarde, *ibid.* at 249.

171. *Ibid.* at 250.

172. *Smith v. Jennyson* (1611) digested in Bryson, *Cases Concerning Equity*, *supra* note 34 at 392.

By 1618, definite signs of the rule's formation appear in the form of Chancellor Bacon's ruling in *Grantham v. Sapcotts*, in which a party sought leave to read depositions from former suits.[173] Bacon L.C. said they could be read only if a Master certified that the cases involved the same lands and parties as the current one. Presumably, if the Master found either to have been different, then Chancellor Bacon's order precluded these depositions, thus constituting an application of the rule. By 1670, the rule was established. In *Tolson v. Lamplugh*, the Chancellor rejected the use of depositions from a former suit against a party who had not been involved in it.[174]

The clear provision of reasons for the same parties rule in equity is found in *Rushworth v. Countess de Pembroke*[175] where the equity side of the Exchequer ordered a jury trial to determine title to a manor. The Countess sought leave from the Exchequer to use at trial depositions from a prior case related to the manor, one to which she had not been a party or privy. The Court refused because the depositions could not have been used against her, thus she should not have their benefit. Also, the Court said that not having been a party to the prior suit, she was not "in a capacity of examining any witnesses in it, or preferring interrogatories in it."[176]

Clearly, the development of the same parties rule in equity was not related to concern about inexperienced or untrained triers of fact misevaluating depositions in the absence of cross examination because the triers of fact in courts of equity were judges.[177] Thus, the importance of the adverse party having an opportunity for cross examination was linked to something other than the perceived evaluative shortcomings of lay triers of fact as claimed by Wigmore.

VI. THE *VIVA VOCE* RULE

Chronologically, the next rule developed exclusively at common law because of the way in which evidence was presented at trial. The "*viva voce* rule" provided that depositions were inadmissible when the deponents could testify *viva voce* at trial. The rule did not develop in the courts of equity because of their pre-established practice of using depositions rather than oral testimony at their hearings.

In *Fortescue & Coake's Case*, the Common Pleas "would not suffer depositions of witnesses taken in the Court of Chancery, or Exchequer, to be given in evidence,

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173. John Ritchie, *Reports of Cases Decided by Francis Bacon, Baron Verulam, Viscount St. Albans, Lord Chancellor of England, in the High Court of Chancery (1617-1621)* (London: Sweet & Maxwell, 1932) 88 at 89.

174. (1669-70), 2 Ch. R. 43, 21 E.R. 611 [*Tolson* cited to E.R.] (the Chancellor said that if the defendants derived their title from the defendants in the previous case, "then the said former Depositions ought to be admitted as Evidence against them," *ibid.* at 612).

175. *Rushworth v. Countess de Pembroke and Currier* (1668), Hardr. 472, 145 E.R. 553. (Ex. Ct.) [*Rushworth* cited to E.R.].

176. *Ibid.* at 553.

177. See discussion at note 16 (and accompanying text).

unlesse *affidavit* be made, that the witnesses who deposed were dead."[178] This case seemed to mark the start of the gradual recognition of the *viva voce* rule. The King's Bench said that if a party established that reasonable efforts to find a witness had failed, then the witness was, in effect, dead to that party, and the witness's deposition from another English court could be read. Thus, if a witness was available to testify at trial, his or her deposition was inadmissible, even though there was an opportunity for cross examination in the court of equity's proceedings that produced the deposition. This conclusion is confirmed by *Dawby's Case*, where it was held that a deposition from an ecclesiastical case could be read to the jury "because the witnesses were dead."[179]

Sir Gilbert's treatise provides further proof that *Fortescue & Coake's Case* led to the development of a separate exclusionary rule. In it, Sir Gilbert said depositions could be read in a common law trial when the deponents were dead, but not if they were alive. Also, he said that when they could not be found, their depositions could be read.[180] Further, Sir Gilbert noted the same parties rule separately from the requirement that the witness be unavailable to testify at trial before their deposition was admissible, thus suggesting they were separate rules.[181]

No extant material addresses the admission of depositions in treason and felony trials before 1750.[182] Some material, however, addresses the admissibility of notes taken by justices of the peace at witnesses' pre-trial examinations.[183]

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178. *Sir Francis Fortescue and Coake's Case* (1623), Godboltoloold 193, 78 E.R. 117 (K.B.) [*Fortescue & Coake's Case* cited to E.R.] (italics in original).

179. *Dawby's Case* (1637) reported in John Clayton, *Reports and Pleas of Assizes at York* (Dublin: S. Powell for Edward Hamilton, 1741) at 62 [*Dawby's Case*]. Further examples of the exclusion of this type of hearsay evidence are found in a 1650 case digested in Style, *Practical Register*, 1st ed., *supra* note 30 at 113 and in the 1702 Common Pleas' decision referenced in *Lady Holcroft v. Smith* (1702), 2 Freem. Chy. 260, 22 E.R. 1197, 1 Eq. Ca. Abr. 224, 21 E.R. 1006, 2 Eq. Ca. Abr. 413, 22 E.R. 351 (Ch.) [*Lady Holcroft* cited to 22 E.R. 351].

180. *Supra* note 109 at 46. Similar statements to that of Gilbert are made in other 18th century works on evidence law. See *e.g.* Giles Jacob, *A New Law-Dictionary: Containing, the Interpretation and Definition of Words and Terms Used in the Law* (London: E. & R. Nutt & R. Gosling, 1729) at EV; Viner, *supra* note 89 at 107.

181. Gilbert, *ibid.* at 46 (*viva voce* rule), at 47 (same parties rule). See also Viner, *ibid.* at 107-08 (noting the *viva voce* rule and the same parties rule separately).

182. Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* (London: M. Flesher, 1644) at 279 [Coke, *Fourth Part*](Coke said, "the courts of the Common law do judge upon witnesses, but they must ever give their testimony *viva voce*," referring to the *viva voce* rule in the context of treason and criminal causes).

183. This material is insufficient for definitive conclusions, but it is sufficient for some preliminary ones on the point.

184. See *e.g. Earl of Essex*, *supra* note 95 at 1340-42, 1345-48 and Bowen's discussion of *Earl of Essex* in Bowen, *supra* note 98 at 149, 152; *Raleigh*, *supra* note 95 at 10-12, 17-20, 23; *R. v. Deuice* (1612) as noted in Dalton, *supra* note 79 at 270; *The Trial of Richard Weston, at the Guild-hall of London, for the Murder of Sir Thomas Overbury* (1615), 2 Cobb. St. Tr. 911 at 925-27 (Comms. of O. & T.) [*Weston*]; *The Trial of Sir Jervis Elwes, knt. Lieutendant of the Tower, at the Guild-hall of London, the 16th of November for the Murder of Sir Thomas Overbury* (1615), 2 Cobb. St. Tr. 935 at 941-42 (Comms. of O. & T.); *Earl of Somerset*, *supra* note 92 at 978-82; *Audley's Case*, *supra* note 49 at 410, 413; *Earl of Strafford*, *supra* note 95 at 1442, 1446; *Macguire*, *supra* note 95 at 673. See also Hawkins, *supra* note 30 at 430.

Before 1645 the *viva voce* rule did not seem to apply in serious criminal cases because there are many cases in which notes from pre-trial examinations prepared by justices of the peace were read at trial even though there was no evidence led about the witness's unavailability to testify.[184] Examples include *Weston*,[185] where notes from the examination of six witnesses were read as evidence of the accused's involvement in a murder, and *Earl of Somerset*,[186] where such notes were read despite no evidence that the witnesses were unavailable.

Sources suggest that between 1658 and 1676 common law judges began to apply the *viva voce* rule to the pre-trial notes of justices of the peace. In *Mordant's Trial*,[187] State counsel led considerable evidence of a witness's unavailability before tendering evidence from his pre-trial examination. While nothing in the case's report says that these notes would have been excluded if the State had not established the witness's unavailability, the efforts made to prove this fact suggest it was becoming a pre-condition to admissibility. Before the start of Lord Morley's 1666 murder trial,[188] all the common law judges agreed that notes of witnesses' testimony at a coroner's inquest could be read at trial if it were established they were dead, unable to travel, or had disappeared because of the accused's efforts. At the trial, the Court refused to admit a note of one of the witness's inquest evidence because it was not satisfied that this witness was unavailable to testify by virtue of the accused's efforts.[189] Between 1645 and 1676, Matthew Hale C.B., one of the great 17th century judges, said that in treason and felony trials the notes from a witness's pre-trial examination could be read if they were dead or unable to travel to trial, but not otherwise.[190]

The early cases that precluded depositions when the deponents could testify at trial give no reason(s) for such exclusion. Surviving published sources suggest three plausible reasons:

(1) a concern about the unreliability of depositions when compared to *viva voce* trial testimony from the deponents; (2) a judicial belief that demeanour evi-

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185. *Weston*, *ibid.*

186. *Supra* note 92.

187. *The Trial of John Mordant, esq. Before the High Court of Justices, for High-Treason* (1658), 5 Cobb. St. Tr. 907 at 921-22 (H.C.J.) [*Mordant's Trial*].

188. *The Trial of Lord Morley, the Murder, before the House of Lords* (1666), 6 Cobb. St. Tr. 769 (Ct. of L.H.S.) at 770 [*Morley* cited to Cobb. St. Tr.] (*sub nom. R. v. Morly* Kel. J. 55, 84 E.R. 1079 (K.B.)[*Morly* cited to E.R.]. See *Morly* at 1080 for a copy of the memorandum regarding the judges' pre-trial resolution.

189. *Morley*, *ibid.* at 776-77.

190. Matthew Hale, *Pleas of the Crown: Or, a Methodical Summary of the Principal Matters Relating to that Subject* (London: Richard & Edward Atkyns for W. Shrewsbury, 1751) at 262-63; Matthew Hale, *The History of the Pleas of the Crown* (London: E. and R. Nutt and R. Gosling for F. Gyles, T. Woodward and C. Davis, 1847) vol. 1 at 305 and vol. 2 at 284 [Hale, *History of the Pleas*] (first published in 1736, but based on a manuscript Hale C.B. wrote before his death in 1676). Other sources also indicate that by the late 1600s such notes were inadmissible if the witness could testify at trial. See *Proceedings in Parliament against Sir John Fenwick, bart. Upon a Bill of Attainder for High Treason* (1696), 13 Cobb. St. Tr. 537 at 593, Anon., *The Tryal, Attainder, or Condemnation of Sir John Fenwick* (Hague, 1697) at 42 (Parl.)[*Fenwick's Trial* cited to Cobb. St. Tr.] (a statement by Sergeant Gould suggests the *viva voce* rule was well established in the criminal courts by 1696). See also Hawkins, *supra* note 30 at 430.

dence was important to the trier of fact's task of accurately evaluating a witness's testimony, whether the trier was a trained judge or layperson; and (3) a belief that witnesses were less inclined to lie in open court at trial than in private examinations on interrogatories.

Regarding the first rationale, as noted earlier, several developments at the start of the 17th century gave rise to concerns about depositions' accuracy.[191] Even when there was no attempt to produce a misleading deposition, the judges may have been concerned about their accuracy since the skill of taking shorthand notes was just starting to develop in the early 17th century, and was not widely practiced.[192] Answers were recorded in the third person, using the scrivener's own words to encapsulate the testimony.[193]

Regarding demeanour evidence, by 1600, Chancery was referring disputed factual issues to juries where the witnesses testified *viva voce*.[194] Since there was an opportunity for cross examination in the process of taking Chancery depositions, these referrals suggest demeanour evidence was a factor.[195] In 1606, Popham C.J.K.B. said *viva voce* testimony was preferred over depositions, partly because the jury could often discern witnesses' countenance by how they handled themselves while testifying.[196] In 1619, the Star Chamber referred a disputed fact to a jury because hearing and seeing the witnesses would assist in weighing their evidence.[197]

Regarding the rationale that witnesses were less likely to lie in open court, Hale C.B. said that the excellence of it was "[t]hat it is openly; and not in private before a Commissioner or Two, and a couple of Clerks, where oftentimes Witnesses will deliver that which they will be ashamed to testifie pubickly."[198] In 1696, a prominent barrister echoed this view in *Fenwick's Trial*.[199]

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191. See *supra* notes 162-167 and accompanying text.
192. See Harry M. Scharf, "The Court Reporter" (1989) 10 J. Legal Hist. 191 at 191-193; G. Kitson Clark, *The Critical Historian* (New York: Basic Books, 1967) at 89.
193. Bryson, *The Equity Side*, *supra* note 34 at 136. See also comments of Pulteney to Parliamentary committee in 1705 (U.K., Journal of the House of Commons) vol. 15 (19 March 1705) at 198, cited in Joseph Parkes, *A History of the Court of Chancery* (London: Longmans *et al.*, 1828) at 275-78 [Pulteney] (sometimes the recording in the scrivener's own words caused a change in meaning to the testimony).
194. See *e.g. Barnes v. Worlich* (1604), Cro. Jac. 25, 79 E.R. 20 (K.B.) [*Barnes* cited to E.R.]; *Woolwich v. Massy* (1605), Cro. Jac. 67, 79 E.R. 57 (K.B.) [*Woolwich* cited to E.R.]; *Philpot and Feilder's Case* (1618), Godbolt 334, 78 E.R. 196 (K.B.) [*Philpot* cited to E.R.] (suggesting the practice goes back to at least 1585).
195. Macnair, *supra* note 16 where it was noted that in equity the "adverse party must have the opportunity to cross-examine." (*ibid.* at 169). See also Richard D. Friedman, "No Link: The Jury and the Origins of the Confrontation Right and the Hearsay Rule" in John W. Cairns & Grant McLeod, eds., *"The Dearest Birth Right of the People of England": The Jury in the History of the Common Law* (Oxford: Hart Publishing, 2002) at 95.
196. *Le Case del Union, del Realm, D'Escose, ove Angleterre* (1606), Moo. K.B. 790 at 798, 72 E.R. 908 (K.B.) at 913 [cited to E.R.]. A similar view was echoed later in the century by Hale C.B. in *The History of the Common Law of England* (London: J. Nutt, 1713) at 258-59 [Hale, *History of the Common Law*].
197. *Dame Darcy v. Leigh* (1619), Hob. 324, 80 E.R. 466 at 467 [*Dame Darcy* cited to E.R]. See also William Hudson, *A Treatise of the Court of Star Chamber* in Francis Hargrave, ed., *Collectanea Juridica*, (London: Printed for E. & R. Brooke, 1792) vol.2 at 200 (for the dating of Hudson's work, see Guy, *supra* note 16 at 4).
198. Hale, *History of the Common Law*, *supra* note 196 at 257.
199. *Fenwick's Trial*, *supra* note 190 at 592. See also Pulteney, *supra* note 193, in which a parliamentary committee member made a similar comment in 1705.

The lack of opportunity for cross examination if a deposition was admitted in a common law trial does not seem to have been a reason for the emergence of the *viva voce* rule because a right to cross examination was protected in equity as part of the regular deposition process. Thus, the exclusion of such depositions at common law had nothing to do with a lack of opportunity for cross examination. This once again undermines Wigmore's claim that the hearsay rule initially developed at common law because of cross examination's perceived effect on the accurate assessment of testimony by lay triers of fact.

VII. The Court of Record Rule

A 1641 Common Pleas' case[200] denotes the starting point for the fifth rule's development. The "court of record rule"[201] provided that a deposition taken under the authority of a court which was not one of record was no evidence in a common law civil trial.[202] In the 1641 case, the Court refused leave to use at trial depositions from an ecclesiastical court proceeding because it was not a court of record. The decision was made to exclude the depositions even though the deponents were dead.[203] Wigmore does not refer to the case, or to subsequent authorities that cite it, in his discussion of the hearsay rule's history, but there seems no reason not to treat it as an aspect of the rule's history since the ruling excluded out-of-court assertions tendered for the truth of what they asserted when a person with personal knowledge did not testify at trial.

Two reasons suggest that the 1641 case marked the start of a new rule's development. First, before 1641 there are cases in which such evidence was admitted.[204] Second, from 1656 onwards, the 1641 decision was repeatedly cited for the proposition that depositions from a court that is not one of record are inadmissible even when the deponents are dead.[205]

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200. *Anon.* (1641), March, N.R. 120, 82 E.R. 439 (K.B.) [*Anon.* 1641 cited to E.R.].

201. Originally, "court of record" referred to a court whose proceedings were enrolled on parchment (as were those of the superior courts of the common law). Thus, the term excluded the ecclesiastical courts, whose proceedings were not so enrolled. See *Halsbury's Laws of England*, 3rd ed. (London: Butterworths, 1956) vol. 9 at 347, para. 816, n. (*l*). By the start of the 1600s, the common law courts began to develop the doctrine that only a court of record could fine and imprison. See *e.g. Griesley's Case* (1588), 8 Co. Rep. 38a at 38b, 77 E.R. 530 at 532 (K.B.) [cited to E.R.]; *Thomlinson's Case* (1605), 12 Co. Rep. 104, 77 E.R. 1379 (K.B.) [cited to E.R.].

202. No published material appears to address the admission of this type of deposition in treason or felony trials before 1750.

203. *Anon.* 1641, *supra* note 200 at 439.

204. See William Nelson (attr.), *The Law of Evidence*, 3rd ed. (London: E. & R. Nutt & R. Gosling for R. Gosling, 1739) at 115 [Nelson, *Evidence*, 3rd ed.]; Viner, *supra* note 89 at 108 (both digests note an anonymous 1628 Common Pleas' case where the majority allowed a Spiritual Court deposition). See also *Dawby's Case*, *supra* note 179 (ecclesiastical court depositions were allowed because the witnesses were dead by trial time).

205. *Howard*, *supra* note 150 at 314; Sheppard, *Epitome*, *supra* note 77 at 1052; Sheppard, *A Grand Abridgment*, supra note 97 at 141; Nelson, *Evidence*, 1st ed., *supra* note 31 at 96; Duncombe, *supra* note 161 at 356; Viner, *supra* note 89 at 108.

The reason why common law courts began to exclude depositions produced in courts that were not of record seemed unconnected to ensuring an opportunity for cross examination and, thus, undermines Wigmore's theory. English ecclesiastical courts followed the Roman-canon law of procedure, thus an opportunity for cross examination should have been provided in the 1641 ecclesiastical case.[206] If the opposing party in the 1641 Common Pleas' case was not a party to the ecclesiastical case, then one would expect the depositions to have been rejected under the same parties rule, and not because they were taken in a court that was not one of record.

The importance of courts not being of record was linked to the particular wording in a 1562 statute (the "*Perjury Act*"),[207] which was intended to discourage perjury and its subornation in civil cases through the imposition of serious penalties not available at common law. The *Perjury Act* imposed those penalties on persons who committed perjury or suborned it in a civil case pending in Chancery, Star Chamber, a series of named local courts, or in "any of the Queen's Majesty's Courts of Record."[208] Because of this wording, if perjury occurred in a case before a court other than one of the enumerated ones or a "court of record," then the statutory penalties did not apply.[209] Without the threat of such penalties there was a greater perceived risk of perjury as the preamble to the statute makes evident.[210] Thus, the reason for exclusion seemed to be a judicial fear that the depositions from such courts were too unreliable.

The timing of the 1641 decision tends to reinforce this conclusion. It arose immediately after the abolition of the Star Chamber. The Star Chamber was the court that often punished perjury committed in ecclesiastical cases.[211] After its demise, the only certain punishment for perjury in ecclesiastical depositions or in depositions from other courts not of record was a religious one.[212]

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206. See Friedman, *supra* note 195.

207. *An Act for Punyshement of Suche Persones as Shall Procure or Comit any Wylllfull Perjurye, 1562* (U.K.), 5 Eliz. I., c. 9 [*Perjury Act*].

208. *Ibid.* in the preamble.

209. See Michael D. Gordon, "The Invention of a Common Law Crime: Perjury and the Elizabethan Courts" (1980) 24 Am. J. Legal Hist. 145 at 166 (with special attention to authorities cited).

210. *Perjury Act*, *supra* note 207 at preamble.

211. Gordon, *supra*, note 209 at 159. See also *Pascal v. Jeakel*, (1664) 1 Keble 653, 83 E.R. 1166 [*Pascal* cited to E.R.] (Twisden J., in his charge to a grand jury, said that perjuries were "much more frequent" since "the Star-Chamber [was] put down," *ibid.* at 1167).

212. See Gordon, *ibid.* at 146-149 (there was uncertainty as to whether common law judges had the authority to impose penalties when the perjury did not fall within the confines of the *Perjury Act*).

VIII. The Joinder of Issues Rule

The next rule arose from *Brown's Case*,[213] a 1662 case on the pleas' side of the Exchequer. The "joinder of issues rule" provided that a deposition taken to preserve a witness's memory prior to the issues being joined in a case before the court that authorized the examination, could not be read at common law. The rule did not apply, however, if the party seeking to use the deposition was denied the opportunity to examine the deponent after joinder because the opposing party had delayed delivering their answer for so long that they were in contempt of court. Wigmore did not cite the authorities relating to this aspect of the hearsay rule's history.

In *Brown's Case*, the plaintiff examined a witness to record the witness's memory of facts before the issue in any proceeding had been joined. Shortly after joinder, the witness died without having been re-examined by the plaintiff. The defendants were not in contempt for slow delivery of their answers, and this seemed to be an important point in the case. The Exchequer held that the deposition could not be read at the trial on the pleas' side. Authorities from the 17th and the first half of the 18th centuries cite *Brown's Case* as authority for the idea that depositions taken to preserve memory before joinder were not admissible at common law, thus suggesting the basis for a rule of evidence.[214]

None of the surviving published sources before 1750 address the admissibility of this kind of deposition in treason and felony trials. Therefore, no conclusion can be made as to whether the rule also applied in these kinds of trials before 1750.

The initial reason for the exclusion of these depositions was that the examinations that produced them occurred before there was joinder in any suit. In *Watt's Case*[215] the pleas' side of the Exchequer held that this type of deposition could not be read because "there was no issue joined, so as there could be a legal examination."[216] This reason was repeated by Holt C.J.K.B. in *Howard*[217] where the deponents died before joinder, but there had been a long delay in delivery of the defendant's answer. The depositions were allowed as evidence at Assizes. The case then came before the King's Bench for review. The defendant argued the depositions were no evidence at common law because no issue had been joined, and thus "no perjury [could] be

213. *Anon. v. Brown* (1662) 145 E.R. 475 (*sub nom. Brown's Case*) Hardr. 315 [*Brown's Case* cited to E.R.] (the decision appears to be on the pleas side, not the equity side, because the case was for ejectment from an estate, a common law action). For a discussion of the division of actions between the pleas' side and the equity's side of Exchequer, see J. H. Baker, *An Introduction to English Legal History*, 2nd ed. (London: Butterworths, 1990) at 59, 341-43.

214. See *Marsden v. Bound* (1685), 1 Vern. 331, 23 E.R. 502 (Ch.) [cited to E.R.] (citing the joinder of issues rule). See also Gilbert (attr.), *supra* note 109 at 48; Viner, *supra* note 89 at 109 (both digests cite *Brown's Case* as authority on this point).

215. *Supra* note 150.

216. *Ibid.* at 483.

217. *Supra* note 150.

assigned upon such depositions."[218] Holt C.J.K.B. asked if "any Court by course of [common] law can examine witnesses till issue be joined," and expressed doubt that the depositions could be evidence, even though Chancery admitted such depositions.[219] An earlier King's Bench case explains Holt C.J.K.B.'s comment. In it, the Court said that a trial where there had not been joinder was not a good one.[220] Style, in writing about this case, said the trial was not lawful because "there was nothing before them to try, and so it was *coram non judice*."[221]

These authorities suggest that the rule in *Brown's Case* developed because common law judges felt that no court could authorize a witness's examination before joinder.[222] In their view, the oath given to a witness who was examined before joinder was unlawful; thus the witness was under no threat of serious punishment for perjury when examined. This meant that judges perceived the witness as being more inclined to lie. Thus, exclusion arose from judicial concerns about the unreliability of this type of deposition. This rationale contradicts Wigmore's claim that the hearsay rule arose because such evidence was not tested by cross examination and, thus, judges excluded it because of concern that jurors would overvalue it.

The joinder of issues rule did not arise in courts of equity because these courts felt they had the lawful authority to grant examinations to preserve memory before joinder.[223] They believed the oaths administered to such witnesses at their examinations were lawful and that such witnesses were subject to serious perjury penalties if they lied. Thus, in the eyes of courts of equity, such depositions were sufficiently reliable because of the threat of serious punishment for lying.

The earliest mention of the lack of opportunity for cross examination as a reason for the joinder of issues rule seems to have been a comment by Gregory J. in *Howard*, which was decided after the rule began to develop.[224] Even when this rationale began to be noted, however, nothing expressly linked it to concerns about jurors' inability to adequately evaluate such evidence absent testing by cross examination. This lack of evidence of a linkage provides an explanation for why Wigmore made no reference to this aspect of the hearsay rule.

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218. *Ibid.* at 641.
219. *Ibid.*
220. *Anon.* Hill. 21 Car. B.r., digested in Style, *Practical Register*, 3rd ed., *supra* note 150 at 512.
221. *Ibid.*
222. See Macnair, *supra* note 16 at 171-72 for a more detailed discussion of this topic.
223. See Holdsworth, *supra* note 32, vol. 5 at 28 (Chancery was authorizing examinations to preserve memory by the late 1400s); *Brown's Case*, *supra* note 213 (the equity side of the Exchequer authorized examinations to preserve memory).
224. *Supra* note 150 at 641.

IX. The Rule Excluding Unsworn Written Hearsay

Before 1750, unsworn written and oral hearsay were not excluded under the same rule, but instead were excluded pursuant to the development and operation of separate rules. The first sign of the exclusion of unsworn written hearsay seems to arise in 1631, but no exclusionary pattern appears to emerge at common law until the end of the 17th century or in equity until the early decades of the 18th century.

A. *The Rule at Common Law*

The earliest instance of the exclusion of unsworn written hearsay at common law seems to be the judges' 1631 decision before the start of *Audley's Case*. They held that notes of witnesses' pre-trial testimony could not be used unless those witnesses affirmed the notes under oath at trial.[225] Counsel cited this ruling to the House of Lords in the 1723 trial of the Bishop of Atterbury[226] to exclude unsworn statements from Crown witnesses, thus suggesting the 1631 ruling was an authoritative precedent. The next relevant source is Hale C.B., who wrote sometime between 1640 and 1676 that the pre-trial notes of justices of the peace in felony cases under the *Marian Statutes* could not be read at trial if the witnesses were unsworn at the pre-trial examinations.[227] Since these statutes did not impose an oath requirement, Hale C.B. was applying a common law concept. Finally, in *Otes*, Jeffreys C.J.K.B. rejected journals of the House of Commons and the House of Lords because the evidence recorded in them was unsworn.[228]

Although these authorities suggest the start of an exclusionary rule, this kind of evidence continued to be received in a few criminal trials of the late 17th and early 18th centuries.[229] Despite the receipt of such evidence in some criminal cases, there are two reasons to believe that an exclusionary rule was developing. First, the rulings in *Audley's Case* and in *Otes* were cited in later trials and in early evidence law books, thus suggesting that these rulings were precedents. Second, American scholar T. P. Gallanis has recently argued that before the late 18th century, evidence rules were applied in a more *ad hoc* manner than today.[230]

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225. *Supra* note 49.

226. *Proceedings in Parliament against John Plunkett, George Kelly alias Johnson, and Dr. Francis Atterbury, Bishop of Rochester, upon Bills of Pains and Penalties for a Treasonable Conspiracy* (1723) *(sub nom. Bishop Atterbury's Trial)* 16 Cobb. St. Tr. 323 at 535.

227. See Hale, *History of the Pleas*, *supra* note 190.

228. *Supra* note 52 at 55, 64. Jeffreys' rulings were cited in four 18th century evidence law works, thus suggesting they had general application. See Nelson (attr.), *Evidence*, 1st ed., *supra* note 31; Duncombe, *supra* note 161 at 462-63; Jacob, *supra* note 180 at EV; Viner, *supra* note 89 at 122.

229. See *e.g. The Trial of George Busby, at Derby Assizes, for High Treason, being a Romish Priest* (1681), 8 Cobb. St. Tr. 525 (Assiz.)(Street B. allowed the contents of a Privy Council warrant as corroboration for other evidence, *ibid.* at 530); *Lord Grey*, *supra* note 106 (a witness cited a letter from Lady Harriet—who was not a trial witness—in which she wrote that she spent the night with Lord Grey, a point in issue in the case, *ibid.* at 137); *R. v. Panting*, O.B.S.P. (Sept. 1717) cited in Stephan Landsman, "The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England" (1990) 75 Cornell L. Rev. 497 at 566 (a further instance of letters being allowed); *R. v. Lord Lovat* (1747) in David N. Mackay, ed., *Trial of Simon, Lord Lovat of the '45* (Toronto: Canada Law Book, 1911) 15 at 229-31 (Ct. of L.H.S.).

230. *Supra* note 24 at 503.

The first apparent instance of the exclusion of unsworn written hearsay evidence in a civil trial is *Pyke v. Crouch*.[231] In that case, the King's Bench said that if a copy of a will was sent by a testator to another person, and the recipient sent back a letter noting its receipt, then "after the death of the stranger [recipient] such letter may be read as circumstantial evidence, to prove that such duplicate of the will was sent by the testator to the said stranger."[232] The words "after the death" suggest that if the person who received the copy of the will was alive at trial time then the letter would not be admitted for the truth of its contents.

Two cases in the first half of the 18th century indicate the development of a rule in civil trials was underway. In *Warren*,[233] the defendant sought to use an entry in a deceased attorney's debt book. Despite objection, the King's Bench admitted it because it was not prepared for the purposes of the suit and the attorney could have been examined on the topic if he had lived. The implication from the Court's ruling was that if the attorney had been alive or the book had been prepared for the suit, its contents would not have been received. In *Craig dem. Annestey v. Anglesea*,[234] the pleas'-side of the Exchequer stopped a witness from reading a letter she had received,[235] however a registry entry by a deceased person was allowed.[236]

The surviving sources indicate that the initial reasons for the exclusion of unsworn written hearsay evidence were the lack of oath (along with the accompanying absence of the threat of punishment for perjury) and the preference for *viva voce* trial testimony when it was available. In *Audley's Case,* the absence at trial of sworn confirmation of the accuracy of notes regarding witnesses' pre-trial examinations would have rendered those notes inadmissible. In the treason case of *White*, Scroggs J. excluded a pamphlet saying a witness would be more cautious in what was said under oath than in what was written.[237]

Regarding *viva voce* delivery of the evidence, in the treason case of *R. v. Anderson*, the accused was precluded from reading a letter.[238] Since defence witnesses in 1680 could not be sworn in treason trials, yet could testify, the unsworn nature of the letter's contents was not the reason for its preclusion. Instead, a judicial prefer-

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231. (1696) 1 Ld. RAYM 730, 91 E.R. 1387 [*Pyke* cited to E.R.].

232. *Ibid.* at 1387.

233. *Supra* note 27.

234. *The Trial in Ejectment between Campbell Craig, Lessee of James Annestey, esq. And others, Plaintiffs and the Right Hon. Richard Earl of Anglesea, Defendant; before the Lord Chief Baron Bowes, the Hon. Mr. Baron Monterey, and the Hon. Mr. Baron Dawson, Barons of his Majesty's Court of Exchequer in Ireland* (1743), 17 Cobb. St. Tr. 1139 [*Craig dem. Annesty v. Anglesea*].

235. *Ibid.* at 1296 (the witness, Heath, could read the date of a letter from Mrs. MacMullen to refresh her memory of that date, but she could not read aloud the contents).

236. *Ibid.* at 1213.

237. *Supra* note 80. See also *Otes*, *supra* note 52 (Jeffreys L.C.J. forbade Crown counsel from reading from the House of Lords' journal because "it appears it was not upon Oath," *ibid.* at 64).

238. *The Trials of Lionel Anderson alias Murray, William Russell alias Napper, Charles Parris alias Parry, Henry Starkey, James Corker, William Marshal, and Alexander Lumsden, with the Arrignment of David Joseph Kemish, at the Old Bailey, for High Treason, being Romish Priests* (1680), 7 Cobb. St. Tr. 811 at 865 (Comms. of O. & T.) [*R. v. Anderson*].

ence for *viva voce* testimony seemed to be the reason, especially since Scroggs J. asked if anyone was able to testify *viva voce* on the topics in the letter.[239] In *Pyke*, the King's Bench suggested that the recipient's letter regarding the copy of the testator's will could be read "after the death of the stranger," but before death the evidence had to be delivered *viva voce*.[240] In *R. v. Kidd*,[241] an accused asked to read a certificate attesting to his reputation. Ward C.B. said it would "signify nothing; [the Court could not] read certificates; they must speak *viva voce*."[242] In 1701, defence witnesses were not sworn in felony trials;[243] thus, Ward C.B.'s insistence on *viva voce* testimony was not because the certificate's contents were unsworn.

The exclusion of the contents of unsworn papers because they were prepared while the author was not under oath points to a judicial concern about the unreliability of this type of hearsay evidence and not, as Wigmore argued, to the absence of testing by cross examination and the accompanying fear that lay triers of fact would thus overestimate this kind of evidence. Regarding the second rationale, a preference for *viva voce* testimony, there is nothing in that rationale *per se* that points to the opportunity for cross examination or to the fear that the jury would overvalue as motives behind this preference. A few of the cases on unsworn oral hearsay point to the opportunity for the trier of fact, whether lay or professional, to observe the witness's demeanour as a reason for preferring *viva voce* testimony. This may have also been a motive for insisting on *viva voce* testimony to the exclusion of unsworn written hearsay evidence. Further, even if the lack of opportunity for cross examination was the sole motive for excluding unsworn written hearsay, nothing expressly links it to the use of lay jurors at common law, thus Wigmore's theory lacks support.

B. *The Rule in Equity*

There are two reasons which indicate that by the first half of the 18th century the courts of equity were not considering unsworn written hearsay when persons with personal knowledge of the papers' contents were able to attend regular examinations. The first reason is found in the case law from the era and the second reason relates to developments in those courts.

Regarding the case law, in *Woodnoth v. Lord Cobham*,[244] Woodnoth sued Lord Cobham in the Exchequer for tithes. Cobham said a payment had been made in lieu of the tithes and, in support, offered the accounts of Chaplin who, before his death,

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239. *Ibid.* at 865-66

240. *Supra* note 231 at 1387.

241. *The Trial of Wm. Kidd, Nicholas Churchill, James Howe, Robert Lambey, Wm. Jenkins, Gabriel Loffe, Hugh parrot, Richard Barlicorn, Abel Owens, and Darby Mullins, for Piracy and Robbery, on a Ship called "The Quedagh Merchant"* (1701), 14 Cobb. St. Tr. 147 (Comms. of O. & T.)[*Kidd*].

242. *Ibid.* at 177.

243. See *Rosewell*, *supra* note 83.

244. (1724), Bunb. 180, 145 E.R. 639 [*Woodnoth* cited to E.R.].

had been a servant of Cobham's father. Woodnoth objected that a litigant's records or those of his predecessor in title were never admitted. The majority of the Barons allowed the entries. Gilbert B., one of the majority, said, "if Edward Chaplin had been alive, [the accounts] ought not" to have been used as proof.[245] Gilbert B.'s comment suggests a rule excluding such evidence if the witness is available to be examined under oath. In *Glynn v. Bank of England*,[246] Nicholas Harding's personal representatives sought payment on bank notes, but could not produce them. To prove the notes had been in his possession, they tendered a paper in his handwriting which contained a list of the notes received by him. The bank opposed admission. The plaintiffs said that the paper's contents were "proper and legal" evidence.[247] Hardwicke L.C. said there were cases where shop book entries and brewers' books made by servants accustomed to making them had been admitted, "they being dead."[248] However, he distinguished such cases from the one before him since the party himself had made the notes and there was a rule of evidence at the time disqualifying parties, but not their agents, as witnesses in their own favour.[249] Applying this rule, Hardwicke L.C. excluded the papers. These cases indicate that by the mid 1700s, if a writing's author could be formally examined, equity would not consider the unsworn written hearsay.

Turning to the second reason, the trend in the courts of equity at the start of the 17th century toward all witnesses testifying under oath[250] makes it unlikely that they continued to receive unsworn written hearsay when the witnesses could be examined on oath. When the common law courts began insisting that all testimony be sworn, they began to preclude unsworn written hearsay,[251] and there is no reason to believe the courts of equity did otherwise.

Regarding the reason for this rule's development in the courts of equity, the surviving material points toward judicial concern about the unreliability of unsworn written statements. In *Woodnoth*, Gilbert B. said that since the steward was dead, "[the books] ought to be read because no better evidence can be had."[252] Before his death in 1726, Gilbert B. is credited with writing "there is Faith and Credit to be given to the Honesty and Integrity of the credible and disinterested Witnesses, attesting any Fact under the Solemnities and Obligation of Religion, and the Dangers and Penalties of Perjury . . . ."[253] Obviously, a witness's testimony at an examination on interrogatories was perceived as more reliable than unsworn written hearsay since the former

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245. *Ibid.* at 640.
246. (1750), 2 Ves. Sr. 38, 28 E.R. 26 (Ch.) [*Glynn* cited to E.R.].
247. *Ibid.* at 27.
248. *Ibid* at 29.
249. *Ibid.* See also *Lefebure v. Worden* (1750), 2 Ves. Sr. 54 at 55, 28 E.R. 36 at 36 (Ch.) [*Lefebure* cited to E.R.].
250. See *supra* notes 39-48 and accompanying text.
251. See *supra* notes 225-243 and accompanying text.
252. *Supra* note 244 at 640.
253. Gilbert (attr.), *supra* note 109 at 3.

was given under the threat of religious and state sanctions for lying. Thus, when a witness with personal knowledge of an unsworn paper's contents was able to be examined on interrogatories, the paper's contents were excluded because they were seen as less reliable than the sworn answers.[254] Exclusion on this basis contradicts Wigmore's claim that equity adopted this aspect of the hearsay rule merely because equity followed the law.

X. CONCLUSION

The sources cited in this article indicate that there were five initial reasons for the development of seven rules excluding hearsay evidence, namely: (1) the evidence was unsworn; (2) the original maker of the statement was not under the threat of serious earthly punishment for perjury when they made it; (3) the evidence was derivative and thus there was a risk of inaccurate re-communication of it to the trier(s) of fact; (4) the admission of such evidence deprived the trier(s) of fact of the opportunity to observe the demeanour of a witness with personal knowledge; and (5), the party adversely affected by the evidence was deprived of an opportunity to cross-examine anyone with personal knowledge about the statement's contents.

Wigmore based his theory for the hearsay rule's development and his principled rationalization of the admission of hearsay evidence on only the fifth reason. Further, he linked its significance to a perceived tendency for only jurors to overvalue testimony untested by cross examination. Thus, his approach to the rule and the Court's new principled approach are not derived from the hearsay rule's true *raison d'être*. Therefore, what are the implications of this conclusion?

The first implication seems to be that Canadian judges are prepared to receive some hearsay evidence that their judicial predecessors would have excluded for being unsworn. The absence of the oath was believed to make hearsay evidence unreliable for two reasons; witnesses were significantly more inclined to lie when not under oath and, witnesses were less cautious and thoughtful about what they asserted. If 17th century judges had been confident that they could properly assess the level of reliability of unsworn hearsay evidence then there was no reason for them to preclude its admission, especially in equity where the triers of fact were judges. If these judges had been confident in their ability to accurately assess such unsworn hearsay, they would have received it, recognized the unreliability of individual pieces of it and, in the case of common law trials, commented to the jurors

254. See *Lefebure*, *supra* note 249 (Harwicke L.C. said that entries in business records kept by deceased servants of party litigants were allowed because they were "intrusted to make such entries by his master," *ibid.* at 36). The implication is that such records were perceived as being sufficiently reliable to admit when the servants were dead whereas other unsworn papers were not so perceived.

on the weight of it.[255] The fact that these judges instead chose to develop rules precluding the use of such evidence leads to the conclusion that they believed they would not be able to properly evaluate its reliability on a regular basis. Fearing that they could not properly assess its reliability, and realizing that an improper assessment held the potential to jeopardize rectitude of decision, 17th century judges chose to develop rules of evidence excluding types of unsworn hearsay evidence.

This examination of the implications of the oath as a historical rationale for excluding hearsay evidence raises the question of whether the situation is different today. In other words, is the oath still seen as affecting the reliability of testimony? If not, then obviously this historical rationale does not need to be included in a new principled approach to the admission of hearsay evidence. But, if we are unclear on the answer to that question, it brings us to the issue of whether or not we believe that modern judges and juries are able to properly evaluate the reliability of unsworn hearsay evidence when 17th century judges believed that they were not able to do so on a consistent basis. If we believe this to be the case then is this belief justified? These questions do not seem to have been explored by the Supreme Court in the case law addressing the new principled approach. Admission of unreliable hearsay evidence holds as much risk to rectitude of decision, if such reliability is not detected, as does the exclusion of reliable hearsay evidence. Thus, in the interests of rectitude of decision, these questions need to be examined.

Regarding the implications arising from the failure to address the second rationale in the new principled approach, namely, the lack of the threat of serious earthly punishment for perjury, the analysis applied to the oath seems equally applicable. The one potential difference is that while the oath may no longer be seen as an effective incentive for truthfulness, the same conclusion does not seem warranted so far as the threat of serious earthly punishment for perjury.

In terms of the third historical rationale, namely, the risk of unintentionally inaccurate communication of the original hearsay statement to the trier(s) of fact, this risk no longer applies to depositions because of modern methods for producing verbatim transcripts. However, the risk still seems applicable to other forms of written and oral hearsay. Seventeenth century judges saw this risk as a factor in favour of rules excluding such testimony. The perceived need by these judges for such exclusionary rules flowed from their fear that professional and lay triers of fact would not be able to detect all the situations where such miscommunication had occurred and thus, would not be able to properly assess the reliability of such evidence. If they did not hold such a view, then it seems that these judges would have allowed the hearsay evi-

255. Langbein has noted that during the period between 1700 and 1750 common law judges exercised an extensive power to comment on the evidence to the jury and, in fact, to inquire as to how juries reached their verdicts. See Langbein, "Trial Before the Lawyers," *supra* note 24 at 285-86; Langbein, "Historical Foundations," *supra* note 33 at 1190-1193.

dence to be considered by the trier(s) of fact and assigned the appropriate weighting. This again raises the issue of whether modern judges and juries are somehow better equipped to accurately assess this reliability factor. The argument can be made that modern cross examination techniques are far more effective than those in 17th century, especially in felony and treason trials where the accused of that era were unrepresented by counsel. In most cases where modern hearsay evidence is admitted, however, there is no opportunity for cross examination of someone with personal knowledge.

In terms of exclusion because of the lack of demeanour evidence, this reason goes to the ability of trier(s) of fact to accurately assess testimony's reliability in the absence of the opportunity to observe a witness's demeanour. Seventeenth century judges felt that the risk of inaccurate assessment was sufficiently great to be a ground for exclusion. What has changed in terms of the modern trial and trier(s) of fact that justifies a different approach today?

Finally, there is Wigmore's linkage of the fifth historical rationale for the hearsay rule, the lack of opportunity for cross examination, to the use of lay triers of fact in common law trials. This linkage played a role in Wigmore's rationalization of the exceptions to the rule which appears to have flowed through to the Court's new principled approach. He concluded that a jury could safely consider hearsay evidence if a substitute could be found for cross examination. His solution was for trial judges to assess the circumstances in which a particular hearsay statement had been made to ascertain if those circumstances suggested that the particular evidence was probably trustworthy, thus, involving judges in a preliminary assessment of the reliability of such evidence without the benefit of cross examination. This assessment is based on the assumption that judges, being trained and experienced triers of fact, are capable of properly assessing whether a piece of evidence meets some imaginary threshold of reliability without the aid of cross examination to expose potential sources of weakness. The belief that judges are capable of performing such a task stems from Wigmore's linkage of the significance of cross examination to the perceived shortcoming of jurors as evaluators of this kind of evidence. Unfortunately, the sources do not support the existence of such a judicial linkage before 1750.

The preliminary assessment of reliability in the absence of cross examination, which was built into Wigmore's rationalization of the admission of hearsay evidence, is also built into the Court's new principled approach. This point is confirmed by L'Heureux-Dubé J. in *Starr*.[256] She cited a comment from a 1994 article which indicated that displacing the categories of exceptions to the hearsay rule in favour of the new principled approach imposed the difficult preliminary task of pondering the reliability of a particular piece of hearsay evidence to determine its admissibility, on trial judges.[257] In most cases, such assessment will occur in the absence of cross

256. *Starr*, *supra* note 2.

examination because of the nature of hearsay evidence. If 17th century judges were reluctant to involve themselves in an assessment of such evidence, should modern judges have similar reservations?

The recent concerns with wrongful convictions based in part on the failure to properly appreciate the unreliability of testimonial evidence raises important flags with regards to the new principled approach to the admission of hearsay evidence, especially since the approach does not seem to be rooted in the hearsay rule's true *raison d'être*. The importance of this point raises the need to further examine the rule's roots, its evolution and the new principled approach. Such an examination may lead to the conclusion that the principled approach is the best one. However, it may also be found not to be the best one or to be in need of modification. The importance of the answers to these questions makes them worth the attention of Canadian judges, lawyers, and academics.

257. *Ibid.* at 181(L'Heureux-Dubé J. dissented from the majority of the Court in the case, but there is nothing to indicate the majority disagreed with her on the point cited here).