NOTES

THE EFFECT OF THE ANCIENT DOCUMENT RULE ON THE HEARSAY RULE —Frequent statements may be found in the reports to the effect that a writing more than thirty years old, coming from proper custody,[1] and bearing no marks of suspicion is presumed to be valid,[2] or that it is admissible in evidence as an ancient document.[3] This so-called "ancient document rule," while not a parvenu in Anglo-American courts, has not undergone the usual process of clarification and refinement through the years from its unqualified original announcement.[4] The result is that today there still remains unsettled the basic question as to whether the rule simply dispenses with the usual modes of proving that the document is what it purports to be,[5] or whether in addition the doctrine permits the recitals in the instrument to be used as proof of the facts stated therein. Any generalization that the rule is confined to questions of authentication is immediately precluded by three well settled exceptions: recitals in an ancient deed of the contents of another deed which has been lost, of consideration paid, and of heirship [6] are almost universally held to be admissible as proof of the facts stated.[7] But how much further the rule goes toward admitting hearsay evidence which falls outside the group of recognized exceptions to the hearsay rule [8] is a matter upon which courts and scholars disagree.[9]

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1. No particular custody is *the* proper custody. If it comes from the custody of a person who might reasonably be expected to have possession of the document, that is sufficient. See the cases cited in 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2139; Note (1923) 33 YALE L. J. 412, n. 11.

2. For example see Jones v. Scranton Coal Co., 274 Pa. 312, 317, 118 Atl. 219, 220 (1922).

3. Burns v. United States, 160 Fed. 631, 633 (C. C. A. 2d, 1908).

4. Wright v. Sherrard, 1 Keb. 677 (K. B. 1666); Lynch v. Clerke, 3 Salk. 154 (C. P. 1696). The language of Cooper v. Williamson, 191 Ky. 213, 218, 229 S. W. 707, 709 (1921) is suggestive of the vagueness with which modern courts treat the problem: ". . . the fact that writing is to be treated as an ancient document does not affect its admissibility in evidence further than to dispense with proof of its genuineness *where it is otherwise admissible.*" (Italics are the writer's.) *Cf.* Wells v. New York Mining and Mfg. Co., 137 Va. 460, 119 S. E. 127 (1923).

5. It is too elementary to require citation that ordinarily a document must be proved authentic either by the testimony of an attesting witness or by proof of handwriting. It should be clearly understood that, in the absence of statutes, an ancient document is not conclusively presumed to be authentic; only these modes of proving genuineness are unnecessary. Its validity may be challenged. Guthrie v. Gaskins, 171 Ga. 303, 155 S. E. 185 (1930); Jackson v. Nona Mills, 61 Tex. Civ. App. 141, 128 S. W. 928 (1910). But compare the language of Appeal of Jarboe, 91 Conn. 265, 270, 99 Atl. 563, 565 (1917).

6. 3 WIGMORE, EVIDENCE (2d. ed. 1923) § 1573.

7. Note (1920) 6 A. L. R. 1437 lists recitals of source of title, recitals of extent of title, recitals of compliance with statute, and recitals of power of attorney as additional categories, but these do not seem to be as widely established as those noted in WIGMORE, *loc. cit. supra* note 6. Many of the recitals classified as recitals of pedigree do not assert family relationship but heirship, and are not, strictly speaking, comparable to cases falling within the pedigree exception to the hearsay rule although the court may treat them as such as was done in Fulkerson v. Holmes, 117 U. S. 389 (1886).

8. There is some difference of opinion as to the number and character of these exceptions, but the authorities are unanimous as to the large majority of them. In MORGAN AND MAGUIRE, CASES ON EVIDENCE (1934) the following are enumerated in the table of contents: (1) Reported Testimony, (2) Dying Declarations, (3) Declarations against Interest, (4) Admissions, (5) Declarations in Matters of Pedigree, (6) Ancient Documents, Other Ancient Matters, and Related Matters, (7) Official Written Statements, (8) Business Entries, (9) Declarations Evidencing Physical or Mental Condition, or the Causes or Results Thereof. Wigmore's list comprises the following: (1) Dying Declarations, (2) Statements of Facts against Interest, (3) Declarations about Family History, (4) Regular Entries, (5) Sundry Statements of Deceased Persons, (6) Reputation, (7) Official Statements, (8) Learned Treatises, (9) Commercial and Professional Lists, Registers, and Reports, (10) Declarations of Mental or Physical Condition, (11) Spontaneous Exclamations. This author does not include so-called "verbal acts" as an exception to the hearsay rule.

9. In the texts little can be found indicating that such an exception exists. See, for example, 1 GREENLEAF, EVIDENCE (16th ed. 1899) § 575 b; 3 WIGMORE, EVIDENCE (2d ed.

While there is little articulate authority of an unambiguous character on this point, small doubt can remain as to the court's meaning in such cases as *Thompson v. Buchanan*[10] where it is said:

> "The hearsay rule gives way to the ancient document rule and is admissible [sic] ordinarily at least as *prima facie* evidence of the truth of its contents."[11]

Equally explicit is the contrary holding of *Gwin v. Calegaris*[12] in which the court refuses to consider the ancient document rule as extending beyond a means of authenticating the writing. For the rest, reliance must be placed largely on inferences from statements in the opinions or upon cases in which no inference can be made from a judicial expression but from which a conclusion can be reached because of the factual situation involved.

A case of the first class is *Budlong v. Budlong*.[13] There the brothers and sisters of the deceased, contending that one Finnerty, another claimant to the estate, was not a legitimate daughter, introduced a book purporting to be the register of a poor farm and asylum, and containing a notation of the birth of a child to one of the inmates. The brothers and sisters contended that the child referred to was Finnerty, and that she was raised in deceased's home as a foster child. The lower court admitted the book to prove the fact and date of birth on the ground that it was an entry made in the regular course of business. On appeal by Finnerty, the brothers and sisters argued for affirmance of the lower court's judgment on this ground, and also on the ground that the entry was within the pedigree exception. The upper court disagreed with both contentions and held the book inadmissible. The consideration by the court of the exceptions to the hearsay rule and its conclusion that the controversial evidence fell within none of them might imply that in Rhode Island a recital in an ancient document is admissible to prove the fact stated therein only if it falls within one of these generally recognized exceptions. But the court expressly says:

> "The test seems to us to be, if the private document is more than thirty years old, would the writer, if in court, have been allowed to testify to the fact appearing in the writing"[14]

and excludes the entries in issue because the entrant was unknown and it did not appear whether his information recorded in the book was hearsay or not. If it could be shown that the declarant had personal knowledge of the facts embodied in the writing and he were available, he could testify as to them and his testimony would not be hearsay. When his statements are embodied in an

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1923) §§ 1572, 1574; 4 *id.* § 2128 ff. The more recent comments found in the periodicals recognize that there is a new exception, or at least a tendency towards it, although divergent views are expressed as to its propriety and value. See Wickes, *Ancient Documents and Hearsay* (1930) 8 TEX. L. REV. 451; Note (1923) 33 YALE L. J. 412.

10. 195 N. C. 155, 141 S. E. 580 (1928).

11. *Id.* at 161, 141 S. E. at 583. The persuasiveness of this case is impaired by the fact that the court relies on 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2143 in which the view is urged that where an ancient original is lost, an official record made more than thirty years before is a sufficient guarantee of the *genuineness* of the ancient original. In other words, the court confused that phase of the ancient document rule dealing with authenticity with that phase of the rule treating of ancient documents as an exception to the hearsay rule. However, there is nothing to show that the court would not have held the same way if it had realized the two-fold nature of the problem.

12. 139 Cal. 384, 73 Pac. 851 (1903). See also Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072 (1908).

13. 48 R. I. 144, 136 Atl. 308 (1927).

14. *Id.* at 149, 136 Atl. at 311. Compare the similar language of Butterfield v. Miller, 195 Fed. 200 (C. C. A. 6th, 1912).

ancient document they are hearsay.[15] Nevertheless, by inference from the quotation above they are admissible when offered in this form since, by hypothesis, the declarant could testify personally to them. And this result follows, although the court does not specifically so state, regardless of whether the recital comes within a recognized exception to the hearsay rule. In re *Barney's Will*[16] is another case in which the court only by implication adopts the view that the recital need not fall within a recognized exception to the hearsay rule. The probate of a will was contested on the ground that the testatrix was mentally incompetent. The ancient records of an insane asylum in which the testatrix had been confined were offered in evidence. These records contained diagnostic remarks and descriptions of the inmate's actions. The evidence was excluded on the ground that the recitals were merely the opinion of the entrant and because it clearly appeared that at least parts of the records were not made from the personal observation of the entrant. While it would seem from this reasoning that the court would admit ancient records which were not merely opinion and which were based on personal knowledge, regardless of whether or not the recitals fell within a recognized exception to the hearsay rule, too much reliance cannot be placed on the decision to support such a proposition because of statements like the following in the opinion:

> "It was not shown that there was any rule or regulation of the asylum requiring that such records be kept, or prescribing who should obtain and enter the data, and there was no proof of the handwriting."[17]

Furthermore, the court cites Massachusetts cases admitting hospital entries to show sanity where the records are made in the usual course of duty, and concludes that the Massachusetts result is achieved "under the ancient document rule."[18] In such passages there are intimations that even if the evidence was not based solely on opinion, it would be admissible only if made in the usual course of business or duty (a broad, unqualified descriptive term for a recognized exception to the hearsay rule). However, if the ground upon which the decision was placed is any criterion, there is ample justification for the belief that this court takes the view that recitals in ancient documents should not be so restricted.[19] A case in which it is especially difficult to infer the court's view from its language is *H. C. Cole Co. v. William Lea & Sons Co.*[20] That

15. But see *id.* at 209. The court's conception of what constitutes hearsay evidence would seem to be clearly erroneous. *Cf.* Trainor v. Buchanan Coal Co., 154 Minn. 204, 191 N. W. 431 (1923), and State v. Terline, 23 R. I. 530, 51 Atl. 204 (1902), which, taken together, clearly illustrate the nature of hearsay testimony.

16. 185 App. Div. 782, 174 N. Y. Supp. 242 (1st Dep't 1919).

17. *Id.* at 800, 174 N. Y. Supp. at 255.

18. *Id.* at 799, 174 N. Y. Supp. at 255.

19. Other cases of this class are: Bunger v. Grimm, 142 Ga. 448, 83 S. E. 200 (1914) (ancient survey treated as falling within reputation exception); Layton v. Kraft, 111 App. Div. 842, 98 N. Y. Supp. 72 (1st Dep't 1906) (ancient church records of baptism treated as public records); Coleman v. Bruch, 132 App. Div. 716, 117 N. Y. Supp. 582 (1st Dep't 1909); Sydnor v. Texas Savings and Real Estate Inv. Ass'n, 94 S. W. 451 (Tex. Civ. App. 1906) (statement in deed treated as declaration against interest); Keppler v. City of Richmond, 124 Va. 592, 98 S. E. 747 (1919) (ancient deed mentioning existence of alley treated as falling within reputation exception); King v. Watkins, 98 Fed. 913 (C. C. W. D. Va. 1899) in which the court holds that the ancient document rule is concerned solely with authenticating the document and states that it is not admissible on the ground that it is an ancient document *alone*. From this an inference that if the statement fell within a recognized exception to the hearsay rule it would be proof of the facts therein asserted is permissible. Similarly, the court, in Washington Female Seminary v. Washington Boro, 18 Pa. Super. 555 (1902), in speaking of an ancient map, says at 566: "This was not an official paper, nor was it on file in the proper place, it was not a survey adopted by the land office, and it does not appear to have been made by any regular officer," implying that the recital in this case would have been admissible had it been an official record.

20. 35 App. D. C. 355 (1910).

was a suit to establish the prior use of a trademark by the plaintiff. Ancient account books used by the plaintiff in its business and showing that the plaintiff had shipped flour with the disputed trademark thereon in 1855 were introduced. In addition, a disinterested witness testified that he had seen the mark used by plaintiff in 1852. The entries were admitted to show the use of the mark on the date noted, the court saying:

> "The book was more than thirty years old, was found in the proper custody, and was free from all grounds of suspicion. It therefore proved itself. [Citing cases] *In the circumstances of this case, such entries are to be considered a part of the* res gestae, *rather than as a mere recitation of past events.*" [21]

Whether the italicized portion of the quotation means that the recitals were admissible as within the *res gestae* exception to the hearsay rule, or whether the court considered the entries to be within the business entry exception, or whether corroborative evidence such as the disinterested witness gave affects the result, are all questions impossible of determination from the opinion. On the basis of this and similar cases [22] no clear statement of the limitations of the ancient document rule can be made.

Fortunately, however, a formulation of the rule need not be based solely on the scanty and inconclusive material found in decisions like those noted above. The largest body of cases involving the ancient document rule are those in which the relevant conclusions must be deduced by the student from a consideration of the facts on which the ruling is based.

Illustrative of this type of case is *McCreary v. Coggeshall.*[23] The action was for the recovery of a tract of land, and the defendant relied upon the adverse possession of his predecessor in title. To negative the hostile nature of the possession on which defendant relied, plaintiffs offered an ancient letter written by defendant's predecessor to plaintiff's predecessor in which the former referred to the land as "your land". The letter was admitted and its recitals used to sustain plaintiff's contention. While the court nowhere intimates that such a recital to be proof of the fact stated therein must fall within a recognized exception to the hearsay rule, it should be remarked that this recital does in fact fall within the exception to the hearsay rule generally denominated "declarations against interest". The case affords some ground, therefore, for maintaining that a recital in an ancient document is only admissible to prove the fact stated therein when the recital comes within one of the categories generally recognized as exceptions to the hearsay rule.[24]

More numerous are the cases in which the recitals were admitted to prove the facts stated therein although the factual situation was such that it was apparently of no importance to the decision whether or not the recital was within such an exception.[25] While the full implications of the result achieved

21. *Id.* at 357.

22. State for Use of Common School v. Taylor, 135 Ark. 232, 205 S. W. 104 (1918); Cooper v. Williamson, 191 Ky. 213, 229 S. W. 707 (1921); Magee v. Paul, 110 Tex. 470, 221 S. W. 254 (1920); see Laclede Land & Improvement Co. v. Goodno, 181 S. W. 410, 413 (Mo. 1915).

23. 74 S. C. 42, 53 S. E. 978 (1906).

24. Other cases in which the factual alignment reveals that the statement admitted would fall within a recognized exception to the hearsay rule are: Commonwealth v. Ball, 277 Pa. 301, 121 Atl. 191 (1923) (entry in ancient minute book might come within the business entry exception, the entries being verified by the ancient document rule as a mode of authentication); Horgan v. Town Council of Jamestown, 32 R. I. 528, 80 Atl. 271 (1911) (recitals within exception for declarations against interest of predecessor in title).

25. The case of recitals in ancient documents which, from the factual situation, seem to fall within the established categories in which recitals in ancient documents are evidence of the fact therein stated (such as recitals of pedigree) mentioned p. 246 *supra* is not dealt with here since they are unhesitatingly recognized.

are often obscure,[26] no doubt whatsoever surrounds the decision of *Wacaser v. Rockland Savings Bank*.[27] In that case plaintiff's ancestor executed a deed of trust in land to secure a note. The trustee, in default of payment of the note, was to sell the land "at the Courthouse door . . . complying in all respects with the requirements of the law in selling under execution issued out of the district court." The trustee sold the land, his deed reciting in detail that he had given the required notice of the time, place, and terms of sale. There was no evidence of violation of the terms of the trust in this respect. Defendants, claiming under this deed in reply to plaintiff's petition to recover the land, offered it to prove that the title had been properly conveyed out of plaintiff's predecessor. The court held it admissible to prove the facts stated therein saying:

> "As an ancient instrument, and not showing a violation of the terms of the trust, all circumstances necessary to the legal validity of the conveyance will be assumed [sic]." [28]

The recitals relied on are not of that class which, when found in ancient documents, are universally accepted as proof of the facts asserted therein, *e. g.*, recital of consideration or the contents of a lost deed,[29] nor do they come within any recognized exception to the hearsay rule.

The support which such cases give to the proposition that recitals in ancient documents constitute a new exception to the hearsay rule, is not, of course, lessened by the failure of the courts to deal expressly or impliedly with the question. It is probable that, because of a commendable economy of time and effort, a court in writing an opinion, consciously or unconsciously confines its statements to those facts which it deems legally operative. As a result, all the facts may not be set out in the opinion. While it is possible that a particular recital would fall within an exception to the hearsay rule if all the facts were known, the failure of the court to set forth these facts is a good indication that as far as that jurisdiction is concerned it is immaterial whether the recital falls within a recognized exception to the hearsay rule or not; if the requirements of the ancient document rule are met, that is sufficient to make the recital evidence of the fact recited. Hence cases like *Wacaser v. Rockland Savings Bank* are almost as persuasive as those actually announcing this broad interpretation of the doctrine.[30]

It may be concluded, then, that the present state of the authorities indicates a trend in favor of a new exception to the hearsay rule,[31] although conscious

26. The leading case of Wilson v. Snow, 228 U. S. 217 (1913) offers an illustration. While the recital there (that the grantor was authorized by will to convey land as executor and had qualified as executor) seems to fall within no recognized exception to the hearsay rule, the court was apparently greatly influenced by the fact that the probate records had been destroyed and no other evidence was available. Whether the rule of the case is restricted to such a situation or whether the recitals would be admissible regardless of the unavailability of other evidence is not clear. Some ground is supplied for urging the latter conclusion by the court's citation of Baeder v. Jennings, 40 Fed. 199 (C. C. D. N. J. 1889) in which it was held that recitals in an ancient administrator's deed were evidence of the contents of a court order not produced. Nothing appears in the latter case to lead to the conclusion that the deed was the only evidence obtainable. The exact meaning of Wilson v. Snow is further complicated by Wigmore's criticism of the court's failure to distinguish the hearsay exception for deed-recitals and the rule for authenticating ancient deeds. 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2144, n. 4.

27. 172 S. W. 737 (Tex. Civ. App. 1914)

28. *Id.* at 739.

29. See p. 246 *supra*.

30. Similar cases in which the facts seem to bring the recital within no recognized exception to the hearsay rule are: Inhabitants of Ward v. Inhabitants of Oxford, 25 Mass. 476 (1829); Jones v. Scranton Coal Co., 274 Pa. 312, 118 Atl. 219 (1922); Sandmyer v. Dolijsi, 203 S. W. 113 (Tex. Civ. App. 1918).

31. The same conclusion is reached in Wickes, *loc. cit. supra* note 9.

recognition of it has not as yet been accorded by many courts.[32] In justification of the new rule various considerations have been urged. The ground upon which such evidence is most frequently admitted is necessity.[33] By the time litigation arises upon a matter in which a document old enough to be denominated ancient is involved, the witnesses to the instrument and to the facts recited are equally unavailable. The recital, therefore, is very often the best evidence which the nature of the case permits, and a party relying thereon should not be penalized for failure to produce more direct and credible[34] evidence when his failure is not a matter within his control. On the other hand, an occasional decision supports the rule on the "circumstantial guarantee of trustworthiness".[35] A court might reach different conclusions on the same facts, depending upon its choice of one or the other of these two grounds. An ancient document may be clearly admissible on the ground of necessity and yet the facts may be such that no reasonable man would say that there was any circumstantial guarantee of trustworthiness or absence of motive to fabricate.

Admitting the persuasiveness of the "necessity" argument, it should be observed that there is no general rule sanctioning the admission of one type of evidence because of the unavailability of another type. No special consideration is given a litigant whose witnesses die. He may, if he can, present their testimony by other media, but the law narrowly restricts this type of evidence and requires definite guarantees of credibility.[36] Ancient documents are likewise subjected to judicial scrutiny of their integrity before the jury may evaluate them.[37] It is true that this judicial examination is not manifested in such strictures as, for example, surround the admission of dying declarations or business entries, but the number of cases in which the courts recite and appraise other evidence in the case tending to prove what the recitals in the ancient document assert,[38] suggests that an ancient document might not be admitted to prove

32. While there is some confusion in the decided cases, there can be little doubt that in England the doctrine has not received as liberal treatment as it has in the United States. Fort v. Clarke, 1 Russ. 601 (Ch. 1826) (recital of heirship held inadmissible where no possession under the deed and no corroborative evidence); Blandy-Jenkins v. Earl of Dunraven, [1899] 2 Ch. 121 (recital held admissible by Lindley, M. R., as showing an "act of ownership"; by Sir F. H. Jeune as a statement by deceased against his pecuniary interest; and by Romer, L. J., on the same ground and for the additional reason that if the declarant were alive he could testify to the facts stated); Attorney-General v. Horner, [1913] 2 Ch. 140 (ancient maps excluded because no evidence that they were made from reputation of boundaries).

33. King v. Watkins, 98 Fed. 913 (C. C. W. D. Va. 1899); Butterfield v. Miller, 195 Fed. 200 (C. C. A. 6th, 1912); Bunger v. Grimm, 142 Ga. 448, 83 S. E. 200 (1914); Goodwin v. Jack, 62 Me. 414 (1872); Dougherty v. Welshans, 233 Pa. 121, 81 Atl. 997 (1911); Humphreys v. Green, 234 S. W. 562 (Tex. Civ. App. 1921); Carter & Bro. v. Bendy, 251 S. W. 265 (Tex. Civ. App. 1923); see Laclede Land & Improvement Co. v. Goodno, 181 S. W. 410, 413 (Mo. 1915); *cf.* Burger v. Siegman, 9 Ohio App. 84 (1917); Ullman Bros. v. State, 16 Ala. App. 526, 79 So. 625 (1918); Ketchum v. Boggs, 194 S. W. 201 (Tex. Civ. App. 1917).

34. "Credible" is used here in the sense that if the testimony were presented *in propria persona* and withstood the test of cross-examination greater reliance could be placed on it.

35. Inhabitants of Ward v. Inhabitants of Oxford, 25 Mass. 476 (1829). See 3 WIGMORE, EVIDENCE (2d ed. 1923) §§ 1420-1422.

36. The exceptions to the hearsay rule are illustrations in point although the requirement is not uniformly strict for all the exceptions. It is not sufficient, for example, that a recital should concern family relationships. It must also be made *ante litem motam.* Similarly, dying declarations are admissible because in the crisis of the moment they are not likely to be false. The same is true of spontaneous exclamations.

37. *I. e.,* they must be over thirty years old, the document must come from proper custody, it must appear to be genuine, the recitals must be based on personal knowledge of the facts, and, in the case of deeds, possession is required thereunder in some jurisdictions.

38. Deery v. Cray, 5 Wall. 795 (U. S. 1866); Fulkerson v. Holmes, 117 U. S. 389 (1886); H. C. Cole Co. v. William Lea & Sons Co., 35 App. D. C. 355 (1910); Rollins v. Atlantic City R. R., 73 N. J. L. 64, 62 Atl. 929 (1906); Dougherty v. Welshans, 233 Pa. 121, 81 Atl. 997 (1911); McMahan v. McDonald, 51 Tex. Civ. App. 613, 113 S. W. 322 (1908); Magee v. Paul, 110 Tex. 470, 221 S. W. 254 (1920); *cf.* Carter & Bro. v. Bendy, 251 S. W. 265 (Tex. Civ. App. 1923).

the facts asserted therein without corroborative evidence or that it would be admitted only under careful instructions to the jury as to its probative value. This is probably a wise precaution. It is not intended to urge here an unqualified acceptance of this new exception to the hearsay rule even when there is corroborative evidence. Other considerations are important. The variety of the writings admitted in the past [39] with no articulate discrimination by the courts as to the character of the writing reveals that the nature of the document offered has not entered into judicial deliberations on the question, although this element should be a prime determinative factor. For example, a deed coming from proper custody and under which land has been held without question for a long period is surrounded by more convincing guarantees of trustworthiness than is a marriage certificate old enough to be an ancient document.[40] Such a writing is of little concern to anyone except the immediate parties and there is little about it to attract public notice or to induce a test of the veracity of its statements as is the case with a dispositive document dealing with a subject of some public interest. However, such considerations should go to the probative value of the evidence rather than to its admissibility.

Another factor which should influence the development and application of the new rule is the nature of the forum in which the evidence is presented. Most of the rules of exclusion which constitute the body of our evidence law were developed with reference to the supposed inability of the lay jury to discriminate between types of evidence.[41] Accordingly, where the trial is to a court without jury, there is no reason to apply the safeguards carefully developed by the common law for jury trials, and greater freedom should characterize the admission of ancient document recitals in this situation. No court has yet drawn this distinction.[42] Of course, this argument applies with equal validity to all exclusionary categories. But the courts should find it easier in developing this new exception to the hearsay rule to be influenced by this novel consideration.

In no case has the court's determination of the admissibility of ancient document recitals been controlled by the factor of age alone. This is as it should be. Men were as great liars thirty and more years ago as they are today and the lapse of time without more can add nothing to the veracity of their statements.[43] Moreover, an appearance of age is easily simulated and it would seem, therefore, that of all the factors offering guarantees of the reliability of recitals in ancient documents, the age of the document is of the least weight.

The recognition of the ancient document rule as a new exception to the hearsay rule is clearly desirable.[44] To say to litigants that the burden of prov-

39. For a compilation of the various kinds of documents and recitals which have been admitted see Wickes, *loc. cit. supra* note 9.

40. Lunger v. Sechrest, 186 Ill. App. 521 (1914).

41. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898) Introduction.

42. *Cf.* Geary St. P. & O. R. R. v. Campbell, 39 Cal. App. 496, 179 Pac. 453 (1919); Appeal of Jarboe, 91 Conn. 265, 99 Atl. 563 (1917); Bunger v. Grimm, 142 Ga. 448, 83 S. E. 200 (1914); Laclede Land & Improvement Co. v. Goodno, 181 S. W. 410 (Mo. 1915); Coleman v. Bruch, 132 App. Div. 716, 117 N. Y. Supp. 582 (1st Dep't 1909); Kanimaya v. Choctaw Lumber Co., 147 Okla. 90, 294 Pac. 817 (1930); Dorff v. Schmunk, 197 Pa. 298, 47 Atl. 113 (1900); Jones v. Scranton Coal Co., 274 Pa. 312, 118 Atl. 219 (1922); Budlong v. Budlong, 48 R. I. 144, 136 Atl. 308 (1927); Humphreys v. Green, 234 S. W. 562 (Tex. Civ. App. 1921); Ardoin v. Cobb, 136 S. W. 271 (Tex. Civ. App. 1911).

43. Budlong v. Budlong, 48 R. I. 144 at 149, 136 Atl. 308 at 311 (1927).

44. The concurrent development of new recording devices and this growing exception to the hearsay rule may raise problems (since some of these devices are now old enough to bring records made thereby within the requirements of the ancient document rule) which will test the evolving legal accretion in new situations. What, for example, would be a court's ruling if a phonograph record thirty years old, coming from proper custody, and containing a recital of consideration paid were offered in evidence? The possibility of the extension of the doc-

ing the authenticity of their documentary evidence will be lightened, because of the unavailability of witnesses, where the document is "ancient", and then to refuse to permit the use of the recitals to prove the facts therein stated is, in most cases, a hollow mockery. The evidence to prove the facts recited in an ancient document is usually as unobtainable as the evidence to prove the document is what it purports to be. In addition, it would seem that none of the safeguards which impart reliability to the other exceptions to the hearsay rule is lacking in this one.[45] The declarations are usually *ante litem motam;* the document must come from such custody as does not generate suspicion of its genuineness;[46] there is usually apparent no motive in the declarant to fabricate; and, in addition, the courts have shown a strong tendency to require corroborative evidence. Other protections could supplement those already existing.[47]

Furthermore, the very fact that this new exception has not yet crystallized offers the courts an opportunity to do more than merely add to the list of exceptions to the hearsay rule. Our law of evidence is too little concerned with the relevancy of evidentiary matter and too much concerned with its origins and intrinsic character. This defect is explainable, of course, in the light of the history of trial by jury,[48] but it is time for the bench and legislature to realize that rules developed with reference to the juryman of two or three hundred years ago no longer have their ancient validity. Particularly is this true in the case of writings, since the present day jury is no longer quite so impressed with them as was the jury of a day when literacy was a comparatively esoteric art. However, it would perhaps be difficult at this late date for a court to abandon the well-established categories of exclusion and to base its rulings thereafter by reference to the relevancy of the evidence. But in cases of ancient documents we have an undeveloped field in which crystallization has not precluded the possibility of taking this forward step; and because of the change in the character of the jury noted above, it can no longer be urged that the fact-finding body will give undue weight to testimony in this form. In view of these two considerations the courts can, in this particular field, begin a re-orientation of the law of evidence with relevancy as the point of departure without doing violence to entrenched canons of exclusion.[49] It is to be hoped that the opportunity will not pass unseized.

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trine to such untried situations and the desirability of such a result is some test of the value of the rule as a fixed and definite principle. In almost every case involving the doctrine there is little other evidence available except such as corroborates the document but which standing alone would not be convincing.

45. See Wickes, *loc. cit. supra* note 9; Note (1912) 26 HARV. L. REV. 544. A contrary view is expressed in Note (1923) 33 YALE L. J. 412.

46. O'Neal v. Tennessee Coal Co., 140 Ala. 378, 37 So. 275 (1904); Schmitt v. City of Carbondale, 257 Pa. 451, 101 Atl. 755 (1917); Morgan v. Tutt, 52 Tex. Civ. App. 301, 113 S. W. 958 (1908).

47. See the suggestion *supra* p. 253 that some distinction be made on the basis of the nature of the document offered.

48. THAYER, *op. cit. supra* note 41.

49. There is even less objection to such a view if, as Professor Thayer maintained, relevancy was the central principle of the laws of exclusion and the hearsay rule was, in fact, not the rule but the exception. See *id.* at 522.