HEARSAY DANGERS AND THE APPLICATION OF THE HEARSAY CONCEPT

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There is one situation where the courts are prone to call hearsay what does not in fact involve in any substantial degree any of the hearsay risks. When the declarant is also a witness, it is difficult to justify classifying as hearsay evidence of his own prior statements. This is especially true where declarant as a witness is giving as part of his testimony his own prior statement. The courts declare the prior statement to be hearsay because it was not made under oath, subject to the penalty for perjury or to the test of cross-examination. To which the answer might well be: "The declarant as a witness is now under oath and now purports to remember and narrate accurately. The adversary can now expose every element that may carry a danger of misleading the trier of fact both in the previous statement and in the present testimony, and the trier can judge whether both the previous declaration and the present testimony are reliable in whole or in part." To this Mr. Justice Stone of the Minnesota Supreme Court, speaking of evidence of prior contradictory statements, has framed this reply:

The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.

He adds the "practical reasons" that receipt of such evidence would create temptation and opportunity to manufacture evidence and entrap witnesses, and would require admission of prior consistent statements. Why does falsehood harden any more quickly or unyieldingly than truth? What has become of the idea that truth is eternal and, though crushed to earth, will rise again? Isn't the opportunity for reconsideration and for baneful influence by others even more likely to color the later testimony than the prior statement? Furthermore, it must be remembered that the trier of fact is often permitted to hear these prior statements to impeach or rehabilitate the declarant-witness. In such event, of course, the trier will be told that he must not treat the statement as evidence of the truth of the matter stated. But to what practical effect? Wasn't Judge Swan right in saying, "Practically, men will often believe that if a witness has earlier sworn to the opposite of what he now swears to, he was speaking the truth when he first testified"? Do the judges deceive themselves or do they realize that they are indulging in a pious fraud?...

In these situations it is unquestionably true that the trier is being asked to treat the former utterance as if it were now being made by the witness on the stand. But whether or not the declarant at the time of the utterance was subject to all the conditions usually imposed upon witnesses should be immaterial, for the declarant is now present as a witness. If his prior statement is consistent with his present testimony, he now affirms it under oath subject to all sanctions and to cross-examination in the presence of the trier who is to value it. Perhaps it ought not to be received because unnecessary, but surely the rejection should not be on the ground that the statement involves any danger inherent in hearsay. If the witness testifies that all the statements he made were true, then the only debatable question is whether he made the statement; and as to that the trier has all the witnesses before him, and has also the benefit of thorough cross-examination as to the facts which are the subject matter of the statement. If the witness denies having made any statement at all, the situation is but little different, for he will usually swear that he tried to tell the truth in anything that he may have said. If he concedes that he made the statement but now swears that it wasn't true, the experience in human affairs which the average trier brings to a controversy will enable him to decide which story represents the truth in the light of all the facts, such as the demeanor of the witness, the matter brought out on his direct and cross-examination, and the testimony of others. In any of these situations Proponent is not asking Trier to rely upon the credibility of any one who is not present and subject to all the conditions imposed upon a witness. Adversary has all the protection which oath and cross-examination can give him. Trier is in a position to consider the evidence impartially and to give it no more than its reasonable persuasive effect. Consequently there is no real reason for classifying the evidence as hearsay....