HEARSAY TESTIMONY IN SWEDEN

BY

ULLA JACOBSSON

Associate Professor of Procedural Law,
University of Stockholm

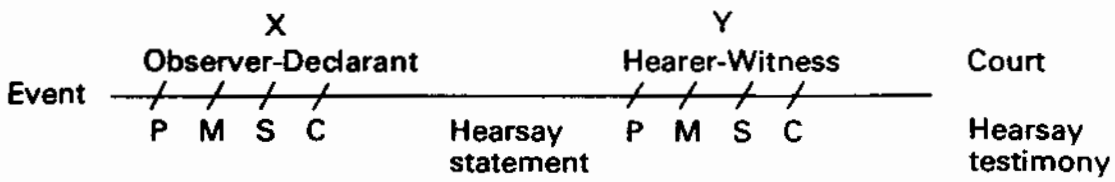
INTRODUCTION

A person, X, saw an accident and called a policeman, Y, to whom he related his observations. In the trial which followed, Y testified about X's observations. X's statement to Y out of court may be called a *hearsay statement* and Y's testimony in court hearsay evidence or, in order to stress its oral character, *hearsay testimony.*

Both X and Y have some knowledge about an event. X has observed the event and Y has heard a description of the event made by X. As the person who describes the event, X may be called the *declarant.* When testifying in court Y is called the *witness.*

Correctly, the term *observer of the event* ought to be used when dealing with the perception and memory of X and the term *declarant* of the hearsay statement when dealing with X's sincerity and way of communication with Y. The term *hearer of the hearsay statement* ought to be used when dealing with the perception and memory of Y and the term *witness* when the hearer appears as witness in court. However, such language is too burdensome. It is not common in any country. I shall therefore use the term *declarant* also when dealing with X's perception and memory with regard to his observations and the term witness, or *hearsay witness,* also when dealing with Y's perception and memory as a hearer of X's statement.

Fig. 1. Terminology



P = perception
M = memory
S = sincerity
C = communication

The example with X and Y represents an uncomplicated case. The matter observed by a declarant might be something other than an *event,* e.g. a person's out-of-court behaviour or the condition of a subject such as the state of a building or of a ship. The *hearsay statement* does not necessarily have to be made verbally but can be expressed by a certain behaviour. Therefore, the knowledge of the hearsay witness may come not only from what he has heard but also from what he has otherwise perceived. However, the terms *event, declarant, hearsay statement* and *hearsay witness* will be used with regard to such more complicated cases also.[1]

There have been different opinions as to whether the hearsay question ought to be considered by the court during the trial or in deciding a case, i.e. if the hearsay question should be treated as a question of admissibility or of evaluation of evidence. In Anglo-American law there has developed a system of admissibility rules on hearsay evidence. In Sweden, the hearsay question has been dealt with both as a question of admissibility and as a question of evaluation. Today, the principles of free presentation and free evaluation govern in the law of evidence in Sweden ; thus the hearsay question ought to be treated as a question of evaluation.[2]

Most legal writers seem to agree that the difference between considering the hearsay question as one of admissibility and treating it as one of evaluation is of great importance.[3] In my opinion,

[1] Compare the detailed definitions in American law. *Model Code of Evidence,* 1942 (cit. *Model Code*), Rule 501, pp. 224 ff. *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates,* 1969 (cit. *Rules of Evidence*), Rule 8-01, pp. 159 ff. The main characteristic of the American definitions is "offered as tending to prove the truth of the matter intended to be asserted or assumed to be so intended". *Model Code,* Rule 501. No definition of this kind seems to have been discussed in Sweden. Later I discuss in what way the American basic ideas on this characteristic are of interest to the evaluation process (see II.A, *infra*).

[2] There is one rule on exclusion of written accounts as hearsay evidence in the Code of Judicial Procedure of 1948, ch. 35, sec. 14. Cf. Ekelöf, *Rättegång IV,* 2nd ed. Stockholm 1968, pp. 45 f.

[3] See, for American writing, *Rules of Evidence*, pp. 153 ff., McCormick, *Handbook of the Law of Evidence,* St. Paul, Minn. 1954 (cit. McCormick), p. 634, Morgan, "Hearsay dangers and the application of the hearsay concept" in *Selected Writings on Evidence and Trial,* St. Paul, Minn. 1957 (cit. Morgan, "Hearsay dangers"), p. 792, James, "The role of hearsay" in *Selected Writings* (cit. James), p. 978 and p. 982. Among English legal writers, see Cross, *Evidence,* 2nd ed. London 1963, p. 23. From the German legal writing on evaluation of hearsay evidence there should be cited Döhring, *Die Erforschung des Sachverhalts im Prozess,* Berlin 1964 (cit. Döhring), p. 119.

however, the difference is only of limited relevance. It may be of importance in relation to some rules on procedure, e.g. rules concerning which authority has to decide, in the United States the judge alone during the trial or the jury in stating the verdict. Further, it makes a real difference which kind of legal consequence the court states. If treated as an admissibility question, the legal consequence is *either* to admit *or* to reject the evidence. If treated as an evaluation question, the legal consequence may be to give the hearsay evidence some value.

However, the different ways of treating the hearsay question ought not to be an obstacle to discussions on common questions concerning the prerequisites. The same psychological aspects have to be taken into consideration.[4]

There is one difference between the approach in the United States and that in Sweden which is of special interest to my investigation. The American admissibility rules concern the trustworthiness of *the declarant,* and there seem to be no rules concerning the trustworthiness of the hearsay witness in particular. The Swedish interest in hearsay matters, on the other hand, has centred on the trustworthiness of the *hearsay witness. The American approach* is quite understandable. For deciding a question of admissibility it seems to be enough to consider the circumstances concerning the hearsay statement and the declarant. However, one must not forget that in the United States much evidence of hearsay character is admitted. In all those cases the American court ought to consider the trustworthiness both of the declarant and of the hearsay witness in the evaluation process. *The Swedish approach* might be explained, but not excused, by the historical development. In my opinion, it is of greatest importance to the evaluation of hearsay testimony that the court should pay attention to the trustworthiness of the two persons involved, not only to the trustworthiness of the hearsay witness but also to the declarant's perception, memory, sincerity and communication.

In regard to the last-mentioned difference, there ought to be a mutual interest in exchanging ideas on hearsay matters between the two countries, although the Swedish material on hearsay is rather poorly developed in comparison with the law on hearsay in the United States.

[4] Cf., e.g., Döhring, p. 121, with the *Model Code,* Rule 512.

I. THE HISTORICAL DEVELOPMENT[5]

In Sweden there have always been special procedural rules concerning a declaration by a party to a suit, and the term witness does not cover a person who is a party to the suit. This must be kept in mind in order to understand the historical development of hearsay testimony in Sweden.

A. *Hearsay as a ground for disqualification in medieval law*

Writers on legal history have called the courts' proof system during the Middle Ages *the formal proof system.* The court—or in the very beginning the *ting*—a popular assembly—was not a trier of fact. The plaintiff alleged that he was entitled to a subjective right, such as ownership of a chattel or a creditor's right, and the court made no real investigation into the facts supporting the claim. Instead, a certain number of witnesses were required, in most cases six or two, as full proof.[6] The witnesses were not supposed to give any account of their own. The court dictated an oath formula in accordance with the alleged right, and to this the witness had to swear. If a sufficient number of witnesses had sworn upon the existence of the plaintiff's alleged right, the court established that the plaintiff had fulfilled his proof obligation.[7]

The stress was on the swearing itself. If a person took an oath, his statements because of the solemnity and sacredness of the oath were deemed a truth.

[5] The following works are cited by the author's name alone, or by the author's name and a descriptive word in the title of the publication: Afzelius, *Om parts ed,* Uppsala 1879, the same author, *Grunddragen af rättegångsförfarandet i tvistemål,* Stockholm 1882; Ekelöf, *Rättegång IV,* 2nd ed. Stockholm 1968, *Rättegång V,* Stockholm 1966; Engströmer, *Vittnesbeviset,* Uppsala 1911; Ginsburg and Bruzelius, *Civil Procedure in Sweden,* The Hague 1965; Kallenberg, *Svensk civilprocessrätt,* vol. 4, Lund 1931, vol. 5, Lund 1934; Kreüger, *Om indirect bevisning,* Lund 1861; Nehrman, *Inledning til then Swenska Processum Civilem,* Lund 1732; Trygger, *Om skriftliga bevis,* 2nd ed. Stockholm 1921; von Steyern, "Några anteckningar om bevisreformens historia", *Sv.J.T.* 1928, pp. 301 ff.

[6] Engströmer, pp. 48, 52, 55 f., 61 and 63. The highest number required seems to have been 15 witnesses, according to one of the provincial codes, Östgötalagen. See Engströmer, p. 65.

[7] Engströmer, pp. 32 ff., Ginsburg and Bruzelius, p. 29 with note 118. Sometimes the defendant was given the opportunity to prove his reply to the charge with a certain number of witnesses. An oath formula was then administered to his witnesses in accordance with his reply. See Engströmer, pp. 62 ff.

The oath was thought to have the effect of making the party's assertion true.[8]

However, the effect of the oath was dependent on the qualification of the person who was put on oath. Owing to this way of thinking the question of different grounds for qualification was considered as one of the greatest importance.

Most of the grounds for qualification concerned the person's general competence. Was he a free man, did he live in the district, was he a landowner?[9] Thus a person who was not a free man was disqualified from swearing. The requirement that the person should himself have observed the fact in issue—the event—was considered a special ground for qualification, or one might equally well say that the hearsay character was a ground for disqualification of the hearsay witness.

The hearsay character, as a ground for disqualification, was already observed in Sweden in one of the provincial codes,[1] and in the first two national codes from the middle of the 14th century.[2] In the beginning the requirement concerned only criminal cases. To be considered qualified to swear, a person should himself have observed the committing of the crime.

According to the formal proof system, only qualified witnesses who had sworn were counted by the court when deciding the case. There was a thinking in terms of *either–or*. The person was either found qualified, put on oath and counted as a witness or disqualified, not put on oath and not counted.[3]

According to the formal proof system the dealing with the hearsay question was not dependent on any examination of the witnesses concerning the fact in issue. The hearsay question was dealt with as a ground for disqualification, mostly before the swearing of the witness. Ordinarily he was considered disqualified and not allowed to swear. Only in cases in which a person was allowed to swear in spite of his lack of direct knowledge of the event might there have been a reason for considering the weaker effect of the oath in the judgment.

This way of thinking may be illustrated in the following way.

[8] Engströmer, pp. 34 f.
[9] Engströmer, pp. 35 and 80.
[1] See Engströmer, pp. 48, 81 and 83.
[2] See Engströmer, pp. 81 and 83.
[3] During this period, sometimes the courts seem to have declared the witness's oath invalid *afterwards* because of the existence of a ground for disqualification. See Engströmer, pp. 78–80 and p. 86.

Fig. 2.A. Non-Hearsay

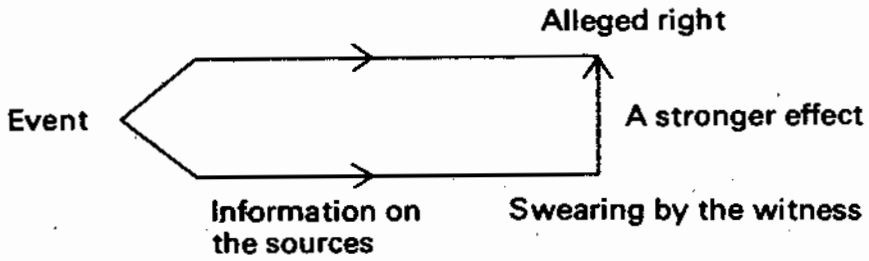


Fig. 2.B. Hearsay

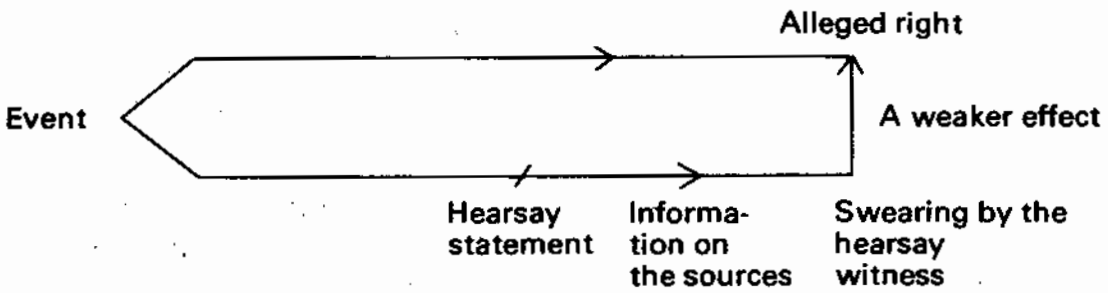


Fig. 2. A. The sources of the witness's knowledge were the witness' own observations of the event. The court therefore considered the swearing by the witness to have a stronger effect as a manifestation of the alleged right than in case 2. B.[4]

Fig. 2. B. The sources of the hearsay witness' knowledge were the hearsay statements, and the court considered the swearing by the hearsay witness to have a weaker effect as a manifestation of the alleged right. The court's questioning on the sources was used merely to establish what effect the swearing should be given.

Engströmer, a Swedish legal writer active at the beginning of this century, made a strong point of the idea of the oath as direct proof of the alleged right.[5] He was of the opinion that this idea was fundamental to the Swedish way of dealing with the hearsay question for a long time. I will return to this idea later on.

[4] The idea of the strong effect of an oath taken by a witness who had himself observed the fact was stressed in a drastic way. According to some of the provincial codes, in some cases so-called *skärskjutningsvittnen* were required, i.e. persons who had observed a criminal act or its result and were asked by the plaintiff to remember that a crime had been committed. See Engströmer, pp. 37 ff., especially pp. 40 f.

[5] Engströmer, pp. 109 f., 122 ff., 230 f.

B. *The "nämnd" as a trier of fact*

Besides the formal proof system there were other tendencies in the Swedish law of evidence during the Middle Ages. The *nämnd,* a board of community representatives, functioned as a body separate from the court (the district judge or lawman of the provincial council) and applied other rules of evidence.[6] In order to stress the difference between the formal proof system and the system used by the *nämnd,* Swedish legal writers have called the last-mentioned system the informal proof system.[7]

When the court could not come to a decision, there was a possibility of referring the case to the *nämnd,* which was supposed to discover the truth and make a statement to the court. The *nämnd* as a trier of facts was not bound by any restrictions in dealing with the evidence. It questioned people without putting them on oath. Nothing is known about exclusion of hearsay. The *nämnd* could consider all kinds of facts and therefore it probably gave hearsay some value.[8]

There are pieces of information available about dealing with witnesses according to the informal proof system. The national Rural Code, as revised in the middle of the 15th century, dealt rather thoroughly with the evidence before the *nämnd.* The rules on testimony, however, were partly influenced by the formal proof system.

In this context, two characteristics are of special interest, namely that the witnesses actually testified, i.e. the witness gave an account of his own, and that few grounds for disqualification were prescribed in the code.[9]

By and by the cooperation between the Swedish judge and the *nämnd* grew closer. At the end of the 16th and the beginning of the 17th centuries the *nämnd* merged with the judge into a single deciding body.[1] The proof system of this deciding body was influenced both by the formal and by the informal proof system. Gradually, the task of the court passed from that of stating that certain conditions were fulfilled to that of trying the

[6] Engströmer, pp. 94 ff., Ginsburg and Bruzelius, p. 31.
[7] Engströmer, *ibid.*
[8] Engströmer, pp. 94 ff.
[9] See Engströmer, pp. 95, 98 ff., 102.
[1] Cf. Ginsburg and Bruzelius, p. 31. The coordination began as early as the 15th century. See also Engströmer, pp. 96 ff.

facts. The witnesses were asked to give an account of their observations. However, most of the grounds for disqualification were maintained.

C. *The period before the introduction of the Code of Judicial Procedure of 1734*

At the beginning of the 17th century the informal proof system still played a leading part, but its importance waned at the end of the century. The doctrine of full proof, which was borrowed from Germany, fitted in quite well with the national formal proof system. This foreign influence increased the formalism of the proof system of Sweden.[2]

What remained from the informal proof system, however, gave a touch of dualism to the law of evidence. Side by side in the same code one can find rules that clearly show the dual influence. Two sections of a Military Ordinance from 1683 may serve as an illustration. In sec. 24 the hearsay character was prescribed as a ground for disqualification of the witness; this is something characteristic of the formal proof system and of the doctrine of full proof. Sec. 26 of the same ordinance, however, provided that the witness should give a report, but only of what he had seen or heard himself. To allow the witness to give an account of his own is characteristic of the informal proof system and a condition for instructions about which pieces of information he must not give to the court.[3]

In my opinion, the influence from the informal proof system had several consequences for the matter of hearsay. The courts could deal with the hearsay question informally. The hearsay question did not necessarily concern the whole testimony but could concern only pieces of the testimony. The courts did not always dictate the oath formulas to the witnesses according to the alleged right.

At least from the beginning of the 17th century, the courts dealt with certain grounds for disqualification in a preparatory hearing before the main hearing.[4] Probably, the courts did not

[2] There was a connection between the organization of the Courts of Appeals in Sweden in the 17th century and the foreign influence. See Engströmer, p. 118, and Ginsburg and Bruzelius, p. 85.

[3] Engströmer seems to have failed to observe this dualism in one and the same code. Engströmer, p. 122 with note 7 and p. 230 with note 2.

[4] The preparatory hearing should have touched on the witness's general trustworthiness. See also Engströmer, pp. 112 and 130.

treat the hearsay question in such a preparatory hearing.[5] When the witnesses had begun to report their observations and to give a real account as a testimony, the question of hearsay seems to have followed this development and was dealt with as a question of examination in the main hearing. Such provisions as sec. 26 of the Military Ordinance speak in favour of this assumption.

As a question concerning the examination of the witnesses, hearsay seems to have been treated much more informally than as a question of disqualification. There is a considerable quantity of material presented by legal writers concerning disqualification of hearsay witnesses but very little concerning exclusion of pieces of information during the examination. The reason may be that informal exclusions were not put on record. Engströmer, who among Swedish legal writers has shown the most interest in hearsay problems, has presented a large number of cases from the Middle Ages but hardly any from later periods. As a matter of fact, the source material upon which legal writers have based their opinion on hearsay questions from the 17th century onwards has consisted of statutes and contemporary legal writing. Assumptions about the case law do not seem to be founded directly on case material.[6]

The hearsay question, as a question of examination, did not necessarily concern the witness and his knowledge as a whole. It became possible for the court to exclude only those pieces of information which were of hearsay character.[7]

D. *A question of admissibility or of evaluation in the Code of Judicial Procedure of 1734*

The Code of Judicial Procedure of 1734 did not bring any dramatic change in the field of evidence. The doctrine of full proof had strongly influenced the courts and the legislature during the previous century. A certain number of witnesses were required according to the code, but only two for full proof and one for

[5] See the Swedish cases cited by Engströmer, p. 109 note 1.

[6] Engströmer, p. 122 with note 7 and pp. 123 f.

[7] It is uncertain to what extent the courts actually disregarded pieces of information because of their hearsay character. See Engströmer, p. 109 with notes 1, 2 and 4, and p. 110.

half proof.[8] In the legal procedure there were strong inquisitorial traits, especially as regards the way of examining the witnesses. The court questioned the parties to the suit and the witnesses as much as it liked, whereas the opportunities of the parties to question the witnesses were rather limited.

In the code there were a great number of grounds for disqualification of the witnesses, which were denominated *jäv*. But hearsay testimony was not dealt with as one of these grounds. Hearsay testimony was treated only as a question concerning the examination of the witnesses. The main rule of ch. 17, sec. 24, provided:

> A witness shall relate what he has seen or heard himself and not what he has come to know from other people. . . .

There was no legal consequence prescribed in the section. If, contrary to sec. 24, a witness reported a hearsay statement in court, should the court exclude the statement of the witness or consider it in the evaluation?

The Swedish professional judge and the lay assessors (*nämndemännen*) constituted the court. Thus they were competent jointly to decide procedural questions as well as questions of law and questions of evidence. Therefore, there was no need to make any distinction between questions of admissibility and questions of evaluation in order to divide the authority between the professional judge and the *nämnd*.

Further, one has to remember the rigidity of the proof system. According to the doctrine of full proof, the courts *either* accorded relevance to a witness as half a proof *or* gave it no relevance. Only when courts began to consider proofs of slight value as also relevant was there a need to make a distinction between questions of admissibility and questions of evaluation with regard to the effect.[9]

In my opinion, however, it became important that the legis-

[8] The Code of Judicial Procedure, 1734, ch. 17, sec. 29. See in this context Engströmer, pp. 219 f.

[9] However, as early as the beginning of the 18th century the hearsay question was treated in different ways. On the one hand, there was a Draft Code from 1717 which provided—in sec. 7—that direct testimony should be given a higher value than hearsay testimony, i.e. the hearsay question should be treated as one of evaluation. On the other hand, Nehrman, a Swedish legal writer with great influence on the legislative work in the 18th century, used the expression *förkasta,* repudiate, the hearsay testimony, an expression which seems to fit quite well with the idea that hearsay testimony should be excluded. See Nehrman, p. 237.

lators had not laid down any provision with regard to the legal consequences in the event of a witness' happening to relate what he had come to know from other people.

At the beginning of this century the Swedish legal writers in this field seem to have taken for granted that the legal consequence implied in sec. 24 was to give hearsay testimony no value.[1] So they discussed the hearsay question as one of evaluation. There have been conflicting opinions as to whether the courts dealt with the hearsay question as one of evaluation or as one of admissibility.[2] Legal writers have held the former opinion but the present author has been told by judges that during this period the courts *excluded* hearsay testimony.[3]

Possibly differences of opinion might have been caused by the dual meaning of the Swedish word *hörsägen,* hearsay. There appears to have been an unawareness between the legal writers and the courts of each other's way of treating the hearsay testimony. This can be explained by the informal way in which the courts dealt with the matter. There seem to have been no formal decisions on hearsay testimony. Such decisions could have initiated a discussion that would have revealed the existence of controversial ideas. I shall return to this subject later on.[4]

E. *The hearsay statement and the declarant in the Code of Judicial Procedure of 1734, ch. 17, sec. 24*

Sec. 24 reads as follows:

> A witness shall relate what he has seen or heard himself and not what he has come to know from other people; except when information is wanted about events which happened long ago; in such case the judge shall decide what reliability (*vitsord*) may be attached to the declarant.

It follows from sec. 24 that the court had to ask the witness

[1] Engströmer, p. 230. Engströmer stressed the requirement that the witness should himself have observed the fact at issue; otherwise, he said, the testimony had no value according to the Code of Judicial Procedure of 1734. See also Afzelius, *Grunddragen,* p. 82 with note 1, Engströmer, p. 126, Kallenberg, vol. 4, p. 575, Trygger, pp. 68 ff.

[2] Kallenberg, vol. 4, p. 674, Trygger, p. 70.

[3] See I.H., *infra.*

[4] See I.H., *infra.*

about the sources of his knowledge and reveal that the witness was a hearsay witness and that what he had observed was a hearsay statement. According to the exception, the court should allow the hearsay witness to give information about events which happened long ago and in such cases decide what competency should be attached to the declarant. This exception was of practical importance when the ownership to a piece of land was contested. There was a rule that ownership of the possessor could be defended as a right of immemorial usage.[5] Theoretically, the court could have considered any matter concerning the declarant's perception, memory, sincerity and communication with the witness. But in such cases, in the nature of things, the declarant was dead at the time of the trial and had made the statement long before the examination of the hearsay witness. Further, there might have been a series of declarants making the statement one to the other. There are reasons for believing that attention was focused upon the declarant's ability in general and not on the circumstances in which he gave the statement. Was the declarant a well-known person, had he a good reputation, was he familiar with the circumstances of his district? These are questions probably put to the hearsay witness by the court.

Engströmer was critical of the main rule of ch. 17, sec. 24, as influenced by the formal proof system, and he regarded the later part of the section as an exception from an incorrect rule and thus unnecessary.[6] In the present author's opinion the exception is of great interest as it also provides that the courts have to consider the reliability of the declarant. The exception is in line with the method I shall present in the next section.

F. *The hearsay statement as circumstantial evidence in the legal writing of the early 20th century*

In the early 20th century, Engströmer and Kallenberg developed the idea of classifying the hearsay statement as circumstantial

[5] The Swedish Code of Land, 1734, ch. 15, ch. 12, sec. 4. A summary of the history of the Swedish rule on right of immemorial usage is given in *Lagberedningens förslag till jordabalk*, III, Stockholm 1909, pp. 288 f. The rule on ownership of real property by the right of immemorial usage was in force until 1970.

[6] Engströmer, pp. 254 ff.

evidence.[7] They argued that as a consequence of such a classification hearsay testimony ought to be accorded some value. In order to help the reader to understand their way of reasoning, a few words should be said about circumstantial evidence in Sweden up to their time.

Swedish courts had long admitted circumstantial evidence and assigned some value to it.[8] There had, however, been a great deal of uncertainty concerning the evaluation of this kind of evidence.[9] The Code of Legal Procedure of 1734 included only one section concerning circumstantial evidence applicable to both criminal and civil cases, namely ch. 17, sec. 30.[1] The basic idea of this section was that circumstantial evidence was too weak to be counted as full proof but not weak enough to be entirely disregarded. Sec. 30 therefore provided that when circumstantial evidence made the defendant's guilt probable, the court might give him the opportunity to affirm upon his oath that he was innocent.[2]

Swedish legal writers at first discussed the idea of giving circumstantial evidence relevance as supplementary evidence and as counter-evidence.[3] Two questions were principally discussed, namely on what terms the court should consider circumstantial evidence established and on what terms the court should consider the circumstantial evidence relevant to the fact at issue.

Most legal writers were of the opinion that a piece of circumstantial evidence must in general be proved in exactly the same way as the fact in issue, i.e. by testimony or by other circumstantial evidence.[4] The last-mentioned evidence was called *in-*

[7] Engströmer, pp. 231 f., 254 f., Kallenberg, vol. 4, pp. 567 f. with note 26. According to Trygger, however, to treat hearsay testimony as circumstantial evidence was contrary to the Code of Procedure, 1734. See Trygger, pp. 68 ff. with note 1.

[8] Engströmer, pp. 108, 113, 126, 232, 245, Kallenberg, vol. 4, pp. 654 and 674, Trygger, p. 70.

[9] Kallenberg, pp. 652 ff. with note 37, Trygger, pp. 65 ff.

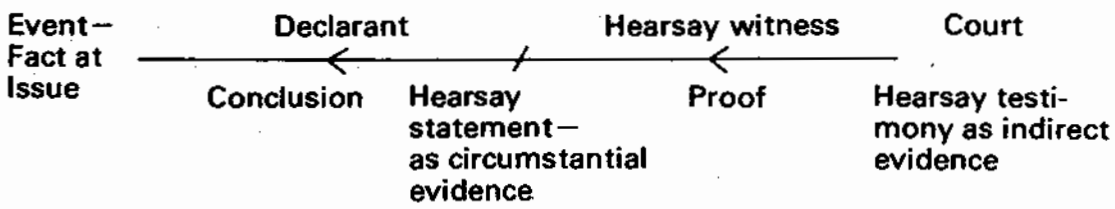
[1] Kallenberg stressed the connection between the doctrine of full proof and the circumstantial evidence. The development of the principle of free evaluation after 1734 diminished the interest in this particular kind of evidence. Kallenberg, pp. 578 f. with note 46.

[2] Kallenberg, vol. 4, pp. 651 f., and *Sv.J.T.* 1928, pp. 306 f.

[3] Engströmer, pp. 236 f., and *S.O.U.* 1926: 32, p. 25.

[4] Afzelius, *Om parts ed,* note 1 at p. 5, Kreüger, pp. 63–74. Nehrman had already held this opinion, see Nehrman, p. 276, sec. 1. Cf. Engströmer, pp. 136; 248, and Kallenberg, vol. 4, pp. 566–9, 579 and 642.

Fig. 3. The Hearsay Testimony



direct evidence, because it was relevant to the fact at issue only indirectly, by proving the circumstantial evidence.[5]

Most legal writers also agreed that the court had to decide about the relevance of the circumstantial evidence by drawing a conclusion from the circumstantial evidence to the fact at issue.[6] Thus the relevance was thought to be established by a logical reasoning.

These ideas were transferred to the hearsay question by Engströmer and Kallenberg in the following way.

As the hearsay witness could only relate the hearsay statement, his testimony should be given a value as proof of the hearsay statement. From the hearsay statement as circumstantial evidence the court had to draw a conclusion to the fact at issue. Thus, the hearsay testimony was treated as indirect evidence.

According to Engströmer and Kallenberg, the hearsay testimony might be as strong a proof of the hearsay statement as ordinary testimony of the fact at issue.[7] In their opinion a court finding the hearsay statement established and relevant to the fact at issue had to accord the hearsay testimony some value.

My objection to Engströmer's and Kallenberg's ideas concerns their method for establishing the relevance of the hearsay statement to the fact at issue. Neither Engströmer nor Kallenberg gave any special recommendations as to how to draw a conclusion from the hearsay statement to the fact at issue. They merely referred to the ordinary way of drawing conclusions from circumstantial evidence, and thereby failed to discuss the perception, memory, sincerity and communication of the declarant with the witness, matters to which in my opinion attention should be paid.

Engströmer and Kallenberg took part in the legislative work on the new Code of Judicial Procedure, Engströmer being a mem-

[5] Kallenberg, vol. 4, pp. 541 and 569.

[6] Afzelius, *Grunddragen,* p. 90, Kallenberg, vol. 4, pp. 573 f., p. 569 with note 29.

[7] Engströmer, p. 232, Kallenberg, p. 569 with note 29.

ber first of the expert investigation commission and then of the expert drafting committee. This is possibly one reason why the new code contains no special provision concerning hearsay testimony.

G. *The Code of Judicial Procedure of 1948*

From the beginning of the 19th century until 1942, when the Code of Judicial Procedure was adopted, there was intense legislative work on the law relating to legal procedure. At first, the Government had a general revision of the code in mind, but after 1887 the activity was directed to special parts, e.g. the law of evidence. Several bills on the law of evidence were introduced into Parliament but none of them was passed. The harsh climate was to a great extent caused by the differing opinions on the matter of how to evaluate the evidence. While the principle of free evaluation was much in dispute, the principle of free presentation was not especially controversial.[8]

In the code, which came into force in 1948, both principles were established in ch. 35, sec. 1, which reads:

> The court shall, after evaluating everything that has occurred in the proceeding in accordance with the dictates of its conscience, determine what has been proved in the case.

Much of the early debate on the principle of free presentation had concerned the grounds for disqualification.[9] Since hearsay testimony had not been dealt with as a ground for disqualification in the code of 1734, it did not attract much interest. It seems as if the basic idea of free presentation was used as one argument for asserting that there was no need for specific rules on hearsay testimony.[1] Another kind of argument was presented by Engströmer and Kallenberg, as discussed above.

Three sections of the new code are of special interest for the hearsay question, namely ch. 35, sec. 7 and sec. 14, and ch. 36, sec. 17, subsecs. 1 and 2.

Ch. 35, sec. 7, provides:

> If the court finds that a circumstance which a party desires to prove is without importance in the case, or that a claimed item of

[8] *Sv.J.T.* 1928, pp. 301 ff.
[9] *Sv.J.T.* 1928, pp. 305 f.
[1] *S.O.U.* 1926: 32, p. 26, *S.O.U.* 1941: 7, pp. 273 f.

> evidence is unnecessary or evidently would be of no probative effect, the court shall reject that proof. The court may also reject an offered item of evidence if the proof may be presented in another way with considerably less trouble or cost.

Thus, if evidence—although not extremely weak in itself—is expected to have no effect in the case, because the total mass of evidence is very great, the court may reject this evidence.

Ch. 35, sec. 14, reads:

> Neither a written statement made by a person by reason of a pending or contemplated proceeding, nor a recorded account of a statement given to a prosecutor or police authority, or otherwise made out of court by reason of a pending or contemplated proceeding, may be admitted as proof unless admission of the statement or recorded account is specifically authorized by law, or the court finds admission justified on the ground of special circumstances.

Ch. 35, sec. 17, deals with the examination of witnesses. The examination may be conducted by the judge or by the parties, i.e. their counsel. In any case, the judge has to give the parties the opportunity to put questions to the witnesses, both their own and those of the adversary.[2] Thus, the "adversary" doctrine of litigation, as opposed to the "inquisitorial" principle traditional in Continental procedural law, has been established in Sweden for the purpose of examination of witnesses. The opportunity of cross-examining the witnesses of the other party is of special interest because of the possibility it provides of revealing the hearsay character of the evidence. The section also lays down that the witness ought to be questioned about the sources of his knowledge.

H. *Case law and legal writing after 1948*

In the foregoing I have stressed the difference between the case law and the legal writing and the unawareness of both sides about this difference.[3] This characteristic feature of hearsay testimony is still true, at least in part. The legal writers have continued to hold the view that the courts admitted hearsay testimony

[2] Ekelöf, *Rättegång V*, pp. 67 ff., Ginsburg and Bruzelius, p. 288. Cf. *Sv.J.T.* 1928, p. 306.

[3] See I.D., *supra*.

at least from the last decades of the 19th century—and that they still admit it; yet in the opinion of judges who served for a considerable time before and also after 1948 the courts have continued to exclude hearsay testimony.[4]

My preliminary studies on the hearsay question were published in 1970 and they were reviewed that year by Mr Hadding, a Judge of Appeal.[5] At that time, I had never heard that exclusion of hearsay testimony was practised in Swedish courts. Much to my surprise, Mr Hadding stated that Swedish courts do exclude hearsay testimony and he took it for granted that everyone was familiar with this way of treating hearsay today. He expressed the opinion that the main task in dealing with hearsay testimony was to discuss the borderline between exclusion and admission.

The discordance between these different opinions may, however, be non-existent. Both of them may be true. In Sweden it has never been discussed where to draw the boundary between hearsay and non-hearsay. In my opinion, the courts and the legal writers have used the Swedish word *hörsägen*, hearsay, with different meanings, at least during the 20th century.[6] The judges seem to use the word *hörsägen* as a synonym for gossip and rumour, i.e. when the hearsay witness has not been able to tell the name of the declarant (or of the person who perceived the fact in issue, if the declarant did not himself make the observations). The legal writers have used the word *hörsägen* or *testes de auditu* largely when the hearsay witness could at least tell the name of the declarant (and of the person who perceived the fact in issue, if the declarant did not himself make the observations). The courts may exclude hearsay testimony as gossip and rumour, in line with the judges' opinion, and at the same time admit hearsay testimony in a wider sense, in line with the legal writing.

If the courts actually excluded hearsay testimony of great value, it would probably have occurred now and then that a party to a suit laid claim to a formal decision of the court on the question

[4] Ginsburg and Bruzelius, p. 289, Ekelöf, *Rättegång IV*, pp. 41 f. Ekelöf has treated the hearsay testimony as a question of the rule of best evidence. The author relies upon Hadding in *Sv.J.T.* 1970, p. 657, and on a personal communication from the former Chief Justice of the Appellate Court of Göta, Mr Laurin.

[5] Jacobsson, *Hearsay rules i USA—Värdering av hörsägen i svensk bevisrätt*, Lund 1970; Hadding, *Sv.J.T.* 1970, pp. 656 ff.

[6] *Ord för ord*, Stockholm 1960, pp. 288 and 541.

of hearsay.[7] No such decisions have been discussed in the legal writing and most likely they are very rare. The explanation above therefore seems plausible.

An important question, however, is whether the court's exclusion of hearsay testimony as gossip and rumour is in accordance with the present Code of Procedure. It is not authorized in the code. It would be against the principle of free presentation to apply by way of extensive interpretation the provision on exclusion of written accounts in ch. 35, sec. 14.

The only way to justify the court's exclusion of hearsay testimony as gossip and rumour seems to be by invoking ch. 35, sec. 7. If the hearsay witness is not able to tell the name of the declarant, the hearsay testimony might be considered as irrelevant evidence and excluded. Such an exclusion ought to be made only if the hearsay testimony is obviously irrelevant. In my view, the boundary asked for by Mr Hadding ought to be drawn between obviously irrelevant and possibly irrelevant hearsay testimony. Thus, much hearsay testimony of low value should be admitted. I do not find it justifiable to exclude hearsay testimony of some value solely for the reason that it is supposed to have no effect on the ultimate decision.

In my opinion, the question of a borderline for exclusion and admission of hearsay testimony is not very important. Since the courts ought to admit and probably do admit hearsay testimony of some value, the pertinent question is how to evaluate hearsay testimony. For such an evaluation what is needed is not a dividing line but a method which allows subtle variations to be estimated.

My information concerning the courts' exclusion of hearsay testimony is derived from two judges only. Although they are both very experienced, one cannot be quite sure that they have given a true picture of Swedish case law on this question. However, regardless of what kind of hearsay testimony Swedish courts may admit, they do not seem to be aware of the special problems related to the evaluation of hearsay evidence. I have come across only one case in which it is clear from the finding that the Supreme Court has observed the hearsay character of the testimony.[8]

[7] As an alternative, one might assume that Swedish courts used a dividing line for admitting and excluding hearsay testimony that was in accordance with the American one: intended to prove the truth of the matter asserted. If so, however, it is even more remarkable that there seem to be no formal decisions on exclusion of hearsay testimony.

[8] 1953 N.J.A. 409.

The way the Supreme Court dealt with the hearsay testimony in this case may look like an evaluation. As far as can be seen from the finding, however, the hearsay statement was not discussed in relation to the declarant's perception, memory, sincerity or communication with the witness. The hearsay character was noted and the hearsay testimony was then kept outside the evaluation. Thus the dealing of the Supreme Court seems akin to exclusion, and so even this single case cannot be cited as an example of evaluation of hearsay testimony in Swedish courts.

The Code of Judicial Procedure has been in force for twenty-five years, but the adversary doctrine of procedure seems to have been of no importance for the hearsay question. I am afraid that the opportunity to cross-examine has not yet stimulated Swedish attorneys to any activity in the hearsay question.

II. SUGGESTIONS ON EVALUATION OF HEARSAY TESTIMONY

A. *The chain of hearsay testimony*

As long as the doctrine of full proof prevailed in Sweden, methods for evaluation of evidence were seldom discussed, probably because the interest was centred on justifying the use of certain kinds of evidence, such as circumstantial evidence. But since 1948, when the principles of free presentation and free evaluation were established, questions of methods for evaluation have received some attention. The Swedish scholar Ekelöf has presented a model for evalution of testimony, here called the chain of evidence.[9] Such models—including the model I shall propose in this paper —are constructed as aids in the evaluation process and have no other purpose.

The chain of evidence is intended to show the importance of each part of the evaluation process. Each part is a *factum probans* for the next, the *factum probandum,* in the way shown below:

The judge's perception of the witness' testimony—the witness' verbal report—what the witness actually intended to report— the picture of the event in the witness' memory—the

[9] See Ekelöf, *Rättegång IV,* pp. 11 f. See also Trygger, pp. 51 ff.

witness' observation of the *factum probandum,* i.e. the fact at issue.

The point is to show the relation between a single link and the testimony as the whole chain. If one link is found to be untenable, then the whole chain is untenable. A weakness of one of the links affects the whole testimony.

In order to use the chain of evidence for illustrating the hearsay testimony, one has first to exchange the last two links in the chain and then to add further links. The chain will then be as follows:

The judge's perception of the witness' testimony—the witness' verbal report—what the witness actually intended to report—the picture of the event in the witness' memory—the witness' perception of the declarant's statement or behaviour—the declarant's verbal statement or demeanour—what the declarant actually intended to state—the picture of the event in the declarant's memory—the declarant's observation of *factum probandum,* i.e. the fact at issue.

If the court accords some value to the hearsay testimony after having tried only those links of the chain which concern the witness, the evaluation process is only taken half-way.

The greater the number of links, the weaker the chain of evidence, since in attributing value to the whole testimony one has to evaluate each separate link. Generally, therefore, the hearsay testimony is already of smaller value than ordinary testimony because of the length of the chain.

In Sweden, the question where to draw the dividing line between hearsay and non-hearsay is not so pertinent as it is in the United States, since there is no need to decide what evidence ought to be admitted and which ought to be excluded. This does not mean, however, that the American basic ideas on determining this kind of boundary are without interest for the evaluation process.

In American common law a dividing line is drawn between hearsay and non-hearsay. Thus the line is drawn between the testimony offered to prove the truth of what the declarant had to tell about the fact at issue—such testimony is hearsay and as a general rule is disregarded—and the testimony where the fact at issue is that the declaration was made. Such testimony is non-hearsay and is admitted. Assume that a person X has called another person Z a thief. Then the testimony is hearsay if the *factum probandum* is a theft and non-hearsay if it is a slander.

However, for the purpose of evaluating a piece of evidence there

is no need to draw a strict line between hearsay and non-hearsay. There are many cases in which a statement of a declarant is offered neither to prove the truth of the matter asserted nor to prove the statement itself. This is the case, e.g., when the fact at issue is the mental state of the declarant, e.g. the testator's intention to destroy his will.[1]

The present author recommends that when hearsay evidence is produced the judge should try both the trustworthiness of the witness and that of the declarant. In other words, he should base his evaluation on an examination of a chain of evidence of the kind presented above. A piece of evidence classified as hearsay by an American judge in most cases ought to be illustrated by a complete chain of hearsay testimony and given a low value, a piece of evidence classified as non-hearsay, on the other hand, by a shorter chain and given a comparatively high value.

B. *The hearsay test schedule*

A schedule built on the four factors, the declarant's perception, memory and sincerity, and his communication with the witness, would seem to be useful in a discussion on the evaluation of the declarant's trustworthiness.[2] The judge should proceed step by step. (i) The four factors mentioned are not all necessarily relevant. The judge's first step will therefore be to select those factors which should be evaluated.[3] (ii) The court should be on the lookout for circumstances which might be worth taking into consideration during the evaluation of those factors which the court has found relevant. (iii) The court has to assess the value of the statement as a piece of evidence, having paid regard to each of the factors selected as relevant.

[1] See Morgan, "Hearsay dangers", especially pp. 792 f. In what follows the present author relies heavily on Mr Morgan's opinion that the ground for exclusion ought to be "the presence of substantial risks of insincerity and faulty narration, memory and perception". Mr Morgan's view that "classification of evidence as hearsay, furthermore, should not result in its automatic exclusion" is of interest. Transferred to the evaluation process, there is no reason to treat hearsay testimony automatically.

[2] Cf. *Rules of Evidence,* p. 152. In the Draft Code only three of the factors are pointed out. Sincerity is excluded for the reason that "in fact it seems merely to be an aspect of the three already mentioned".

[3] The method for selecting factors is the same as that recommended by Morgan in "Hearsay dangers".

The hearsay test schedule will look as follows:

The Hearsay Test Schedule

Factors	(i) *Need for Evaluation*	(ii) *Available Facts Affecting the Weight of Evidence*	(iii) *Evaluation*
Perception			
Memory			
Sincerity			
Communication			

a. *Factors in the evaluation process*

In order to find out which factors ought to be dealt with, one has to start by defining the theme of evidence. Of course, generally the theme of evidence is the same as the fact at issue. In a more detailed discussion, however, it seems necessary to introduce the term *theme of evidence.*

The linguistic form of the statement is not of basic importance in narrowing down the definition of the theme of evidence. Whether the statement is a declaratory sentence or an interrogative sentence is not of primary importance. An interrogative sentence may be presented to prove that the declarant has a certain knowledge and thus also to prove the existence of the fact known by the declarant. This is also valid for exclamations, nonverbal behaviour and even silence itself. The court has to define the theme of evidence in line with the intention of the parties to the suit, but according to the principles of free evaluation the court may also try other themes of evidence.

For the purpose of illustrating the suggested hearsay test schedule I propose to use the fact situation in three cases decided by the Swedish Supreme Court. My claim that the Court ought to have thought in one way or the other should not be understood as a criticism of its handling of the hearsay question, as the Court does not seem to have considered the hearsay evidence in any of the cases—at any rate hearsay is not explicitly mentioned in the findings.

The trotter Fabel.[4] A horse named Fabel was killed by a car on a road near the pasture, which was enclosed by a stone wall,

[4] 1966 N.J.A. 18.

where he had been kept. He could not possibly have reached the road without jumping over the stone wall.

The owner of Fabel brought an action in tort against the landowner, who was in charge of the horse, for alleged negligence in maintaining a safety fence. A stableman, engaged by the landowner, had been responsible for the stone wall.

A policeman testified that the stableman had made certain statements to him the day after the accident. The stableman had been repairing the stone wall, when the witness went up to him and spoke to him. The stableman told the witness that there had been a depression in the wall for some time.

In this case one may construct two alternative themes of evidence, viz. (i) the fact that there had been a depression in the wall for some time and (ii) the fact that the stableman had known for some time that there was a depression. However, only the first theme was discussed in the case.

The will in the sewing machine.[5] Andersson made a will, which was registered with the court immediately afterwards in accordance with Swedish procedural rules. At his death six years later the original will could not be found. The legatees claimed that the will was valid. The heirs-at-law alleged that Andersson had revoked his will.

A housekeeper of a maternal relative of the deceased, who had not testified earlier in the litigation, was examined as a witness in the Supreme Court. She described how she had borrowed a sewing machine from Andersson, who lived only about a hundred metres from her employer's house. When she was cleaning the machine, she found in a drawer an envelope containing documents. She spoke to Andersson, who was passing by, through a window. When Andersson saw the envelope he entered the room, snatched the envelope, tore the documents into pieces and burnt them in the oven, exclaiming that now that Karl-Erik (a young paternal relative who had been a favourite of Andersson's) was dead nobody would get anything as a legatee.

Not only Andersson's exclamation but also his act of destroying the documents by tearing them into pieces and burning them must be regarded as relevant. There are two possible themes of evidence: (a) the fact that Andersson tore an evelope containing his *will* into pieces and (b) that Andersson showed an intention to revoke his will.

[5] 1960 N.J.A. 227.

Payment in part.[6] Lindberg died in July 1955 and after his death his family found a bill of exchange among his papers. The bill was for 1,000 Swedish kronor and was drawn on the Laplander Sjaunja, the due date being May 5, 1955. When Sjaunja was sued for the debt he contested his liability for payment, alleging that he had paid Lindberg 700 kronor in cash on April 11 and also that he had made an agreement with him to pay the rest by delivering two reindeer. In what follows I shall deal only with Sjaunja's payment of the 700 kronor in cash.

Several witnesses were examined in court on the issue of the payment. None of them had been present when payment was supposed to have taken place. All referred to statements made by Sjaunja and Lindberg. One witness, Grym, had seen Lindberg produce the bill in the presence of other persons. At first Lindberg had claimed payment from Sjaunja, but later he admitted that he had already received 700 kronor. The witness had explained to Lindberg that what he had in his hand was a bill of exchange and not a receipt, as he supposed, but Lindberg did not return the bill.

Two alternative themes of evidence may be construed concerning Lindberg's behaviour: (1) Sjaunja had made the alleged payment in cash; (2) Lindberg did not understand the meaning of the fact that Sjaunja had by his signature accepted a bill of exchange. Such evidence could be useful as counter-evidence to the presumption of debt because of the presence of the bill in the deceased's estate.

In these three cases, which factors should be selected for evaluation?

In "the trotter Fabel" case all four factors should be subject to evaluation. The sincerity of the stableman and his communication when he talked to the witness are not the only factors of interest. It is also relevant to form an opinion as to the way in which the stableman had noticed the condition of the wall and how well he remembered what he had observed.

In "the will in the sewing-machine" case one of the themes of evidence was the question whether Andersson, the deceased, had destroyed his will enclosed in the envelope. Concerning this theme of evidence the court has to try three factors, the perception, the sincerity and the communication of Andersson. The other possible theme of evidence was Andersson's intention to revoke

[6] 1961 N.J.A. 7.

his will. In that case the court has to try only his sincerity and his communication.

In the "payment in part" case the court should consider all four factors concerning Lindberg as a declarant, if the theme of evidence is that Sjaunja had made the alleged payment. Had Lindberg actually received some money from Sjaunja, and, if so, had he correctly perceived the transaction? What did Lindberg remember when he admitted the payment? Was Lindberg perhaps urged to admit a payment which might not have taken place? Did Lindberg express himself quite clearly?

If the theme of evidence is Lindberg's unawareness of the true meaning of a bill of exchange, the court has to consider the factors in a different way: for, with this theme, Lindberg's perception and memory of the payment in issue are factors of no interest. The relevant question is whether, at the moment when he drew the bill, he understood what this meant. His memory of the true meaning of the bill is involved. Of course, his sincerity and the question of communication ought to be considered.

b. *Circumstances affecting the weight of evidence*

The next stage in the evaluation process is to look for circumstances useful for the evaluation, i.e. facts affecting the weight of evidence. It is significant of hearsay testimony that there is usually a lack of facts upon which the court can judge the declarant's credibility. There are no answers given in court by the declarant under cross-examination. The court cannot observe the declarant's demeanour when making the statement. However, a hearsay witness may have information about the declarant's sincerity and communication, more seldom about his memory and perception.

Circumstances affecting the weight of evidence may be of two different kinds. They may concern the *general capacity* of the witness or his *actual possibility* of making use of his capacity.

Naturally, there is ordinarily very little information to collect about the declarant's general capacity when the declarant is not himself present in court. However, the hearsay witness may have some information to give. But it is worth noticing that in the USA there seem to be no hearsay rules which provide that the court has to consider such information.

Information available largely consists of facts concerning the declarant's actual possibilities of making observations. Upon information about, e.g., distances, light and acoustics, the court can

find out whether the declarant had the possibility of making accurate observations by making comparisons with the observations of an ordinary person under the given circumstances.

There are in American common law and in American draft codes a number of rules constituting exceptions to the principle that hearsay is not admitted. These rules are said to be very heterogeneous. But most of them seem to be based on commonsense reasoning as in the case of, e.g., Rule 509 of the *Model Code of Evidence* which says ". . . that a reasonable man in his position would not have made the declaration unless he believed it to be true".

There are, however, two characteristics of the American exception rules which one must keep in mind when trying to transpose concepts to the evaluation process. The rules do not systematically deal with the four factors perception, memory, sincerity, and communication. Wigmore has emphasized that the exception rules are substitutes for the questioning under oath at court and has called them guarantees of trustworthiness.[7] Most of the rules describe circumstances under which the declarant is supposed to speak the truth. Their main emphasis being on sincerity, there is little on the declarant's perception, memory and communication. The psychological aspects seem to have appeared somewhat at random when the rules have developed in case law. It is therefore not to be expected that the prerequisites of the rules should comprise a consistent consideration of the aspects of witness psychology.[8]

Furthermore, the American rules of exception mostly include such circumstances as speak *in favour of* the declarant's perception, memory, sincerity and communication. At the final evaluation of evidence, however, it is necessary to consider both facts which speak *in favour of* the credibility of the declarant and facts which speak *against* his credibility. Therefore such type situations as have been indicated in the rules of exception should be balanced by type situations in which the average person does not speak the truth, lacks the ability to express himself clearly, could not have perceived the course of events or may be assumed to have only a slight memory of what happened.

[7] *Model Code,* p. 38; *Rules of Evidence,* p. 153, Blume, *American Civil Procedure,* 1955, p. 114. See also Baker, *The Hearsay Rule,* London 1950, pp. 25 ff.

[8] *Model Code,* pp. 222 ff.

What circumstances affect the weight of evidence in the three Swedish cases?

The will in the sewing machine. The first task is to find circumstances useful for evaluation of the deceased Andersson's sincerity and communication. In American common law one pays attention to any excitement which is aroused at the moment the statement is made or just before.[9] The idea seems to be that a person tells the truth in such a state of excitement. Obviously, Andersson was very excited when he happened to see the documents. I believe his excitement has to be taken into account when evaluating his sincerity. In my view his excitement is also of importance for the evaluation of his communication with the witness. What Andersson shouted to the housekeeper when he destroyed the document in the envelope might be used for an evaluation of his perception.

Payment in part. In dealing with *the payment in part as a theme of evidence* one has to look for circumstances useful for the evaluation of all four factors. Concerning the memory of the declarant it may be recalled that Morgan discusses the importance of the period of time elapsing between the event and the declarant's statement.[1] Sjaunja had asserted that he had paid Lindberg 700 kronor on April 11, and as Lindberg died in July of the same year, Lindberg must have made the statement related in court by the witness within a shorter period than four months after the supposed payment. As regards the perception, there seem to be no circumstances available upon which the court can base a judgment on the weight of Lindberg's statement as a piece of evidence. In accordance with the American case law an American judge would have to consider whether a statement is against the declarant's interest.[2] If so, the declarant is supposed to be speaking the truth. When Lindberg admitted that he had been paid in part, the fact that this statement was contrary to his economic interest may be a circumstance affecting the weight of evidence.

Concerning Lindberg's communication with the witness, it might be important that there were many people talking together and that this might have obstructed the communication. Concerning Lindberg's perception and memory, one may also

[9] *Model Code,* Rule 512 ; *Rules of Evidence,* Rule 8-03 (2).
[1] Morgan, "Hearsay dangers", p. 783.
[2] *Model Code,* Rule 509 ; *Rules of Evidence,* Rule 8-04 (4).

consider his possible disabilities, his age and the fact of his illness.

Dealing with Lindberg's *comprehension of the function of a bill of exchange* as the theme of evidence, there is available the same kind of circumstances concerning Lindberg's sincerity and communication.

The trotter Fabel. Having the fact that *the depression in the stone wall had existed for some time as a theme of evidence,* the court may look for circumstances concerning all four factors. In this case, however, the stableman was himself present in court as a witness and had made a statement in court contrary to his out-of-court statement.[3] Therefore, the court could have asked the stableman and obtained information of use for an evaluation. It should be mentioned that the Swedish Supreme Court dealt with the stableman's out-of-court statement as a circumstance to be taken into consideration when evaluating the trustworthiness of his testimony in court.

c. *According to what principles shall each of the four factors be evaluated?*

Even if one tries to find circumstances affecting the weight of the declarant's perception, memory, sincerity and communication with the witness, it may certainly happen that little or no information is available. In such cases, the question is whether one has to give up altogether trying to accord some value to the testimony or whether there is a way of dealing with the situation.

The typical situation seems to be that there is material available for carrying out the evalution concerning some of the four factors but not in the case of all of them. This situation is not unique to evaluation of hearsay testimony but it does not seem to have been dealt with thoroughly in Swedish legal writing. As a logically tenable calculation cannot be made, one has to be content with some guidelines.

One has to consider how important it may be to carry out the evaluation of the different factors. If the result is that it seems to be of great importance to carry out an evaluation where there is a lack of material, the whole hearsay testimony has to be accorded a very low value. A gap on a crucial point must not be ignored.

[3] *Rules of Evidence,* Rule 8-01 (2), pp. 163 ff.; Morgan, "Hearsay dangers", pp. 774 ff.

When dealing with a statement of a declarant, the issues of sincerity and communication should not be dealt with in the same way as when dealing with the sincerity and communication of a witness. Even disregarding the fact that the witness makes his testimony under oath, there is a difference in the attitude toward sincerity before the court and out of court.[4] In daily life there occur many situations which people in general may regard as excusing what are called white lies. A false statement may then be made because it is considered that the matter is no business of the person who is asking, or because it is desired to add an extra touch to a story or to cut short an embarrassing conversation. There is also the fact that many people are in the habit of using language as a tool for reaching certain aims without scruples concerning the truth of the statements. According to the circumstances of the case, the evaluation may concern such questions as whether the declarant did exaggerate or did want to make a joke or shock his listeners. When considering the communication between the witness and the court,[5] the court has to compare the language used by the witness with that used by the members of the court. When considering the communication between the declarant and the witness, the court has to compare the language used by the declarant with that used by the witness. The court has to bear in mind that the declarant might have used words which are not common and could therefore have been mistaken by the witness. In evaluating the declarant's communication, the court has to pay attention to differences in environment and education. If the statement is non-oral there is the question of accordance between the intention of the declarant and the interpretation of the witness.

C. *The credibility of the hearsay witness*

If a low value is obtained in the evaluation of the declarant's perception, memory, sincerity and his communication with the witness, no purpose will be served by testing the credibility of the witness. Even if there is a very high probability that the witness reported the statement correctly, this cannot increase the final probability value of the testimony.

[4] Morgan, *op. cit.*, pp. 780 f.
[5] Morgan, *op. cit.*, pp. 778 f.

If the court comes to the conclusion that the declarant was trustworthy, it has to proceed to accord a value to the witness's credibility. The court then has to consider the relations between the two persons, the declarant and the witness, as well as the verbal form of the out-of-court statement.

All kinds of dependence should be taken into account, e.g. that the declarant is a superior of the witness. Differences in environment and education may affect the report of the witness. The court has to pay attention to the possibility that the witness may have paraphrased and reworded the statement with the effect of distorting the declarant's meaning.

When the hearsay testimony concerns a verbal statement, the court has to focus the test of the witness's perception upon his hearing powers and the acoustic circumstances and his auditory memory (as distinct from his visual memory).

Ordinarily it would seem appropriate to test the declarant's credibility first. But, if it is suspected that a witness has committed perjury, the court should adopt the reverse order. This may be preferable in other cases, too, e.g. when the credibility of the witness seems to be very slight.

D. *The evaluation of the declarant's credibility taken together with the evaluation of the hearsay witness' credibility*

The probability values of the different links of the chain of hearsay testimony must, of course, be very uncertain. Nevertheless, even if it may seem unrealistic to make calculations on such values, such a procedure has the advantage of illustrating how much lower is the value of hearsay testimony than direct testimony.

The greater the number of links that form a chain of evidence, the lower will be the value that should be attached to the piece of evidence concerned. Thus when there is a need to try all four factors of the hearsay test schedule, ordinarily the value of the chain will become very low. A characteristic of hearsay testimony is the lack of circumstances which can be used for evaluating the factors concerned. In addition, the value of the declarant's statement has to be taken into consideration together with the value of the witness' statement. If one accords a fictive value of

15 per cent probability to the declarant's credibility and 70 per cent probability to the witness' credibility, the hearsay testimony would have so low a total value as 10.5 per cent probability.

SUMMARY

Part I. In Sweden there has been little awareness of the problems concerning the declarant's perception, memory, sincerity and communication with the witness. This is so for historical reasons. In the beginning, the interest was focused on the effect of the witness' swearing, which was considered slight if the witness had not himself perceived the event. Later, the stress was on the trustworthiness of the hearsay witness. Early in this century, Swedish legal writers classified hearsay testimony as indirect evidence and the hearsay statement as circumstantial evidence. According to these authors the courts should—when they had found the hearsay statement established—draw a conclusion from the statement to the fact in issue. It seems that this way of reasoning became a new barrier to considering the declarant's perception, memory, sincerity and communication.

The investigation has shown that there are reasons for supposing that Swedish courts exclude hearsay testimony of low value. In any case, they very seldom discuss hearsay problems in their findings.

Part II. Here the author introduces a hearsay test schedule in order to show that it is possible to try hearsay testimony methodically in the evaluation process. The test has three stages. The first stage is to select which of the four factors, perception, memory, sincerity and communication, ought to be dealt with in the process of evaluation. The second stage is to look out for circumstances useful for evaluating those factors which were selected. The third stage is to assess a value to each of the various factors. In this part, there are also discussed special questions concerning the trustworthiness of the hearsay witness, as well as the question of ultimately according a value to the hearsay testimony.