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Italy

Paul B. Rava

Comparative Study of Hearsay Evidence Abroad

(Editor's Note: As shown by each of the three papers, which follow, consideration of hearsay evidence abroad could not be isolated and carved out of the broader areas of proof-taking and general principles of procedure. The exclusionary hearsay rule, so deeply embedded in Anglo-American tradition, finds its ultimate rationale in the system of trial by jury, which necessitates a concentrated trial, and in the principle of cross-examination, which is the foundation of many of our procedural techniques. Neither of these critical features is present in Continental Europe where the jury system has never had application in civil cases, and has played a limited and diminishing function in criminal procedure. Without the climax of the trial, and the attending and collateral needs of protecting the lay jury from unbalancing influences, European proof-taking procedure found no need for anything comparable to the rigid exclusionary rules which restrict the scope of the evidence admissible in American trials.
Hence, hearsay, as such, is not excluded from the ears of the courts of Continental Europe, but its weight is subject to closer judicial scrutiny and evaluation than other forms of proof. The court's discretion is determined in the light of all other facts and circumstances obtaining in each given case.)

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The basic features of Italian procedure are so analogous to those of the French system that reference may be made to the presentation of that system which is offered in Dr. Freed's article.

The fundamental principle of Italian civil procedure, with which this paper is more directly concerned, is known as the "dispositive" principle of the parties as to the facts of the case.[1]

As required by the code, the court must rule on the evidence adduced by the parties and cannot supply its own knowledge or source of information, other than facts of common experience.[2] Although the code contains cer-

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*Member of the Missouri Bar, formerly Lecturer at the School of Law, Padua University, Italy.

[1]Carnelutti, La prova civile (2nd ed., 1947), pp. 16 ff.

[2]Article 115 Code civil procedure of 1940. This rule is often stated in the maxim: "Notoria non egent probatione." In theory, analogous rules exist in common law countries, but the extent of their realistic adherence on the part of the jury is a vexing question. Some penetrating comments on the underlying implications of political and social significance of this difference between the civil and the common law are offered by A. Pekelis, *Legal Techniques and Political Idealogics* (1943) 41 MICH. L. REV. 665, l.c. 683.

tain other exceptions, whereby the court may take the initiative in eliciting evidence in a number of ways,[3] in actual practice these judicial initiatives are rarely resorted to, in the absence of a party's request.

Likewise, although the questioning of the witnesses is exclusively a judicial prerogative and cross-examination by counsel is not known in Italy,[4] judges, by and large in phrasing their questions, adhere to the written interrogatories submitted by opposing counsel.[5]

Hence, it has been poignantly stated that, on the facts, the judge is bound by what facts are shown in the evidence adduced by the litigants, rather than by the truth itself.[6]

Within this general frame of reference, it is not surprising that heresay (known as testimony "de relato") in and by itself is not subject to any exclusionary rule of general applicability. Some comments will follow on the theory and on the jurisprudence involved. As to the theory, there is a striking similarity between the position of George Santayana and that of Francesco Carnelutti, one of the leading Italian authorities on civil procedure. Said the American philosopher: "every perception . . . involves an act of judgment, nay is an act of judgment." Carnelutti states that the witness never relates what he has done, but merely what he perceives having done. Hence, Carnelutti contends that the witness should be also entitled to testify as to his own deductions, which are part of the same process of perception.[7]

The next step logically follows: the witness may also testify as to what others have said.[8] Although admissible in principle, hearsay testimony (de relato) is not entitled to equal probative value as direct testimony because the fact to be proven is to be perceived through the fact to which the witness testified.

On the subject of the probative weight to be attributed to the testimony

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[3]Articles, 118, 240, 213 Code civil procedure and Article 2736 par. 2 civil code.

[4]Article 253 Code civil procedure specifically forbids the examination and cross-examination of the witness by opposing counsel.

[5]Article 244 Code civil procedure. *See* CAPPELLETTI & PERILLO, CIVIL PROCEDURE IN ITALY (1965) 224.

[6]Carnelutti, *Supra,* note 1 at 13. Other writers, as Salvatore Satta, Commentario al Codice di Procedure Civile, (Milano, 1960) Part 1, p. 276, and some American writers describe the Italian system as "inquisitorial" because of the lack of examination and cross-examination of the witnesses by counsel. *Compare* CAPPELLETTI, MERRYMAN & PERILLO, THE ITALIAN LEGAL SYSTEM (1967), 136. The issue appears one of relative juxtaposition. As compared with the common law procedure, the Italian system is certainly far less "adversary" in nature; but as compared with the German, Swiss and Austrian counterparts, the Italian system is less "inquisitorial." Hence, both definitions contain some element of truth, but need to be clarified through their respective frames of reference.

[7]Carnelutti, *supra,* note 1 144 *et seq.*

[8]*Id.* at 173.

de relato, there are some well-established judicial guideline rules. Incidentally, even though "stare decisis" is not a rule of law in Italy, because the judges are bound only by statutory law,[9] in actual practice the need for uniformity in judicial interpretation of the law is keenly felt by Italian judges in the interest of predictability. Another human factor cannot realistically be ignored: the promotions of judges are in the hands of their superiors, and conformity may be more appreciated by the higher courts than persistent independence of judgment on the part of a trial judge.

Three rules emerge from the decisions of the Italian Supreme Court (Corte di Cassazione):

(a) Hearsay testimony (de relato), which amounts to a self-serving statement of a party, is not normally entitled to any probative weight.[10]

(b) Hearsay testimony (de relato) standing alone has no probative value, even as a scintilla of evidence.[11]

(c) Hearsay testimony (de relato) may acquire probative value and be used to support a judicial finding of fact whenever there is some corroborative evidence aliunde.[12]

Hence, the discretion of the Italian judge in weighing the probative value of hearsay evidence is subject to definite criteria established by the Supreme Court in what appears to be a constant body of precedents. Within the limits of this judicial self-restraint, Italian judges and practicing lawyers feel that hearsay testimony fulfills a useful function in providing an additional vehicle whereby the parties may furnish to the trier of the facts as much of the relevant available information as is possible to do in any particular case.

In view of these well-defined judicial restrictions upon the probative value of hearsay evidence, the common qualification of the Italian system, as one which freely allows hearsay testimony, appears inaccurate. The absence of the all-embracing exclusionary rule of the common law is mitigated and balanced by definite judicial limitations. Within this restricted scope, and considering the different basic features of Italian procedure, no criticism is found among Italian lawyers and judges with regard to the absence in their system of the exclusionary rule of general applicability which characterizes the trial under the common law.

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[9]Italian Constitution of 1948, Article 101. Analogous in substance was Art. 73 of the old constitution of 1848.

[10]Cassazione 8/10/1966 N. 2171, Torsiello v. Fallimento Malanga.

[11]Cassazione 7/6/1966 N. 1770, Esposito v. Esposito.

[12]*Id.* and Cassazione 1/24/1962 N. 121, Beruini v. Gasperoni; Cassazione 3/9/1966 N. 662 Fei v. Della Casa.