Wigmore cites three cases and one tract for the proposition that in the years 1675 to 1690 there was a "clearly recognized" doctrine "that a hearsay statement may be used as confirmatory or corroboratory of other testimony." But they provide weak evidence at best for the existence, *even at that time*, of such a doctrine. And they provide none at all for the broader doctrine advocated by the Nessons, that if the prosecution produces a barely adequate case, dependent in large part on circumstantial evidence, that the confrontation right poses no limitation at all on prosecution's ability to present out-of-court testimonial statements.

The first case, as noted in the main post, is *Knox's Trial*, 7 How. St. Tr. 763, 790 (1679), in which, as reported by Wigmore, the statement at issue was a prior statement of a witness who testified in court. So that provides no support at all for a doctrine that out-of-court testimony may be used to corroborate evidence other than the live testimony of the witness who made the statement.

The second case, *Lord Russell's Trial*, 9 How. St. Tr. 577 (1683), was a notorious treason prosecution in connection with the so-called Popish Plot. A witness, West, recounted conversations with two people, Ferguson and Rumsey. *Id.* at 613. For several reasons, the case has no significance for our purposes. (1) Rumsey had already testified, so to that extent the case is similar to *Knox's Trial*. (2) The prior statements to which West testified appear to have been statements made during and in furtherance of a conspiracy; in any event, it would be very difficult to characterize them as testimonial. (3) The Lord Chief Justice challenged the use of the evidence and ruled that "the giving of evidence by hear-say will not be evidence; what colonel Rumsey or Mr. Ferguson told Mr. West, is no evidence." (4) The Attorney General (Sir Robert Sawyer) attempted first to avoid the problem by making what would now be recognized as an argument that the evidence was not admitted for the truth ("now we go about to prove the under-actors did know . . ."). (5) After Sawyer made the argument that Wigmore quotes ("it plainly confirms what the other swears"), he receded, by saying "but I think we need no more", and the leader of the prosecution, Serjeant George Jeffreys (spelled Jefferies in the State Trials), said accommodatingly, "We have evidence without it, and will not use any thing of garniture [i.e., of extra adornment]; we will have it as it is, we won't trouble your lordship any further. I think, Mr. Attorney, we have done with our evidence." (6) As Mike Macnair has pointed out, as part of research we have done together, West's evidence was not mentioned in the arguments or in the closing summation by the Lord Chief Justice. (7) As Mike has also pointed out, the conduct of the trial, in particular the treatment of hearsay, was frequently criticized afterwards. *See, e.g.,* remarks of Sir John Hawles, 9 How. St. Tr. 794, 812; *see also* letter by Sir Robert Atkyns, 9 How. St. Tr. 722, 723 (noting that West's testimony "was no proof at al lin law").

I haven't bothered to read more of the third case, *Cole's Trial*, 12 How. St. Tr. 876 (1692), than is reported in Wigmore, because on the face of that report it provides no support for the idea that out-of-court testimony is proper proof if it is corroborative of properly presented evidence. The statement in question, made to the witness by her late husband (implicating Cole and himself in a murder), is not clearly testimonial (and some would say it is clearly not testimonial). Beyond that, Wigmore reports that the presiding judge said, "That is no evidence at all. . . . This will stand for no evidence in law." Wigmore points out that the judge let the wife relate more of what the husband said. But then he charged the jury, referring to the wife's testimony as "no evidence in law . . . *especially* when it is single, without any circumstance to confirm it" (emphasis added). The last appears to be a tack-on.

Finally, Wigmore quotes a passage from an account by Laurence Braddon of what he claimed was the murder of the Earl of Essex. The account was published in 1725; the incident in question occurred in the 1680s; Braddon and one other had been tried in 1684 for suborning perjury to prove that Essex had been murdered rather than committed suicide. (Brannon was convicted on all counts.) So as I understand it, this is a political tract that assembles evidence from various sources to prove a case of murder. His bare, unsupported assertion that hearsay testimony " hath been used to corroborate what else may be sworn" cannot be entitled to much weight.

Beyond all this, as pointed out in the main post, Wigmore says that within decades the doctrine for which he contends had worn away, replaced by a more limited doctrine that the witness's own prior statement could be used in corroboration of what the witness had said from the witness stand.

Bottom line with respect to the present post: There's nothing here that provides any support forthe Nessons' theory.