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VERBAL DECLARATIONS OF DECEASED PERSONS AS EVIDENCE.

SEC. 1. *Importance of the rules of Evidence—View of Ellenborough, Mansfield, and Story—Erskine's High Eulogium.*

It is difficult to over-estimate or over-state the importance of the rules of evidence. In the celebrated case of *Higham* vs. *Ridgway*, 1 East 109, where the contemporaneous written entry of an *accoucheur* was admitted after his death to prove the date of the birth of the child, Lord ELLENBOROUGH, C. J., began his opinion

with the following observation:—"I should be extremely sorry if anything fell from the court upon this occasion, which would in any degree break in upon those sound rules of evidence which have been established for the security of life, liberty, and property."

An eminent American jurist of equal ability and yet more various learning and of large experience as a judge was, in a very analogous case, similarly impressed. In *Nichols* vs. *Webb*, 8 Wheat. 326, 332, where, following the early decision of the Supreme Court of Massachusetts in *Welsh* vs. *Barrett*, 380 (A. D. 1819) and *Doe* vs. *Turford*, 3 B. & Ad. 898, the Supreme Court of the United States sanctioned the reception as evidence of the books of a deceased notary, Mr. Justice STORY remarks:—"The rules of evidence are of great importance, and cannot be departed from without endangering private as well as public rights. Courts are therefore extremely cautious in the introduction of any new doctrines of evidence which trench upon old and established principles."

We have conducted the examination of the question we propose briefly to discuss fully impressed with the justness of these views, and are gratified in the belief that the conclusion which we have reached neither involves the introduction into the law of evidence of any new principle or the subverting of any old one. While it is dangerous to innovate, yet it must be admitted to be sometimes necessary to do so.

The law as a science is much indebted for its present symmetry to wise and cautious reformers—of whom Lord MANSFIELD is the type and model. The law of evidence has been very greatly liberalized and improved within the last century,—perhaps no branch of the law more so. Said the celebrated judge last named, speaking of this subject:—"We do not sit here and take the rules of evidence from Keble or from Siderfin." The present tendency of courts is to admit that light may come from many sources which were closed by the rigid and technical rules of the ancient common law. The whole doctrine of the admissibility of entries and declarations of deceased persons is of comparatively modern

origin, and indeed it is almost within our own day that the Law of Evidence has justly deserved the eloquent and exalted eulogium of Lord ERSKINE:—"The principles of the Law of Evidence are founded in the charities of religion—in the philosophy of nature—in the truths of history—and in the experience of common life:" 24 Howell's St. Trials 966.

SEC. 2.—*Subject stated, viz., Verbal declarations of deceased persons against interest as evidence.*

We do not propose to discuss the subject of the admissibility of *written* entries made by deceased persons.

These divide themselves into two general and well-known classes. One of these classes, of which *Price* vs. *Torrington*, Salk. 285, is the type, is where the entry is a contemporaneous one made by a person since deceased and in the *ordinary course of business*, whether official or private. The other class, of which *Higham* vs. *Ridgway*, *supra*, is usually cited as the type, is where the entry of the deceased person derives its admissibility from the fact that it was made *against* the *pecuniary interest* of the party at the time. Entries or statements reduced to *writing*, these requisites concurring, are generally if not universally both in England and in this country receivable in evidence after the death of the party making them, in actions between third persons. If it were within the purview of our subject we could very clearly show that the gifted and lamented HORACE BINNEY WALLACE is mistaken in point of fact when he says (note to *Higham* vs. *Ridgway*, 2 Smith L. Cas. 291), "that there is no adjudged case in the United States which establishes it as a *principle* that admissions or *entries* by a third person against his interest are admissible evidence after his death."

The object of this article will be to show that the English and American authorities sanction the reception as evidence, in actions between third persons, of *verbal admissions* when the following requisites concur:—1st. The declarant must be *dead* at the trial, and not simply beyond the jurisdiction of the state or country:—2d. The declaration or admission must be plainly against his *pecuniary interest* at the time it is made:—3d. It must be the

expression of a fact of which the declarant must be presumed to have had actual and personal knowledge, and with reference to which, 4th, no known or probable motive to falsify can be perceived.

SEC. 3.—*Opinion of Chief Justice Shaw, and of Cowen & Hill—Correctness of distinction between oral and written statements called in question.*

We have been led to examine the question whether verbal declarations stand upon the same footing *in principle* (though of course inferior in weight and value), in consequence of an observation of the late Chief Justice SHAW, and of the American editors of Phillipps on Evidence.

In treating of the general subject of the admissibility of "declarations by deceased persons against their interest," these learned editors remark:—"We believe not one (case) has yet gone the length of saying that the *oral* declaration of a person, however much it may militate against his interest, shall be received merely upon the ground that he is dead:" 3 Phil. Ev., Cow. & Hill's Notes, 260. It was held in *Lawrence* vs. *Kimball*, 1 Met. 524, which was an action by the plaintiff against the assessors for ordering his property sold for taxes which he claimed were in fact paid, that a deceased collector's statements in a conversation with a third person that the tax in question had been paid were not admissible in evidence, not being part of the *res gestæ* and not being in writing. "It is argued," says Ch. J. SHAW, in delivering the opinion of the court in this case, "that the evidence was within another exception to the rule respecting hearsay, viz., being an admission against his interest at the time: *Higham* vs. *Ridgway*, 10 East 109. But we think this *has been* confined wholly to cases of entries made in books, &c., by a person deceased in relation to a matter contrary to his interest at the time." The "looseness and uncertainty of mere verbal statements" compared with the "clearness and certainty of written memoranda" is made the ground of the alleged distinction. See also *Framington* vs. *Barnard*, 2 Pick. 532, for a similar view.

We may remark in passing that this infirmity attaches to *all*

verbal admissions, but the law does not for that reason wholly reject them. We are not now considering whether the law *ought* to confine the declarations of deceased persons hostile to their interests to *written* statements, but whether, as a matter of fact, it "*has* so wholly confined" them.

With great deference we are constrained to the conclusion that the authorities and cases do not establish any distinction *in principle*, though they concede of course the difference in value, between oral and written admissions. We will take a brief view first of the English and then of the American authorities.

SEC. 4.—*English text-books—Phillipps, Starkie, and Best—and cases referred to and cited.*

Mr. PHILLIPPS treating of this subject (Ev. Vol. I., p. 310) says:—"In the cases which have been referred to it will have been noticed that the declarations have in most instances consisted of memoranda or entries, but from several of the examples it may be collected that *verbal declarations* are admissible though unaccompanied by any writing or by any act done." In the note he remarks:—"Verbal declarations may be thought of inferior value to those written, as being more carelessly made and being often unfaithfully reported; they are besides less frequently connected with any course of business.'

Mr. STARKIE regards "the rules by which the reception of this class of evidence is governed as not being very strictly defined:" 1 Ev. 44: yet considers it as an established principle of evidence that if a party who has peculiar knowledge of the fact by his written entry, *or even his declaration concerning it*, charges himself or discharges another upon whom he would otherwise have a claim, such entry is admissible evidence of the fact after the death of the party: Id. 355: "and *oral* declarations depend partly upon the same principles with written entries, but are far weaker in degree:" Id. 365, note *p*, 7 Am. Ed.

The most recent English author on Evidence is Mr. BEST. He lays down the rule that declarations against interest made by deceased parties are receivable in evidence in proceedings between third persons, at least when made against their pecuniary interest.

Best on Ev. 577, sec. 483–5, 2 Lond. Ed. 1855. He thus continues:—"In both classes of cases, viz., declarations against interest and declarations in the ordinary discharge of duty, the evidence commonly appears in a written form, and it has even been made a question whether this is not essential to its admissibility: *Furston* vs. *Clogg*, 10 M. & W. 572. The inclination of the authorities, however, is rather to the effect that *verbal declarations*, answering of course the requisite conditions are equally receivable, and it seems difficult to establish a distinction in principle between the cases:" Id. sec. 485.

The general doctrine and the exception under consideration was thus stated by PARKE, J., in *Middleton* vs. *Melton*, 10 B. & Cr. 317, which was, however, a case of a written entry, but the *ground* of the reception of the evidence applies equally to oral declarations:—"The general rule undoubtedly is that facts must be proved by testimony on oath. This case falls within the exception necessarily engrafted upon that rule, viz.: that an admission of a fact by a deceased person which is against the interest of the party making it at the time, is evidence of that fact between third persons."

It would transcend the prescribed limits of this article to refer with minuteness to the English cases where verbal admissions have been received. We will allude briefly to one or two, and must then content ourselves with a simple citation of others.

In 1767 Lord CAMDEN, Ch., admitted verbal declarations of a deceased devisee to prove that certain property devised to her was in trust for her daughter, though no trust was expressed in the will: *Strode* vs. *Winchester*, 1 Dick. 397. In *Ivat* vs. *Finch*, 1 Taunt. (1808) 141, the verbal admissions of a deceased former owner of personal property (Mrs. Watson), though *accompanied by no act*, that she had sold it to the plaintiff were held admissible to his favor against a third person, because made against her interest. Ch. J. MANSFIELD after remarking that the weight depends upon circumstances, said:—"The admission of Mrs. Watson was against her own interest. Had this been an action between Mrs. Watson and the present plaintiff, her acknowledg-

ment that the property belonged to him might clearly have been given in evidence."

See also *Doe* vs. *Williams*, 1 Cowp. (1777) 621, per Lord MANSFIELD; *Doe* vs. *Pettett*, 5 B. & Ald. (1821) 223; *Davies* vs. *Pierce*, 2 D. & E. 53; *Davis* vs. *Lloyd*, 1 C. & K. 275 (47 Eng. Com. L. 273); *Doe* vs. *Jones*, 1 Camp. 367; *Barker* vs. *Bay*, (A. D. 1826) 2 Russ. 63, per Lord ELDON, whose only doubt was whether the declarations are not to be received even if not against interest. *Peaceable* vs. *Watson*, 4 Taunt. 16. And see opinions of Lords BROUGHAM and CAMPBELL in the celebrated Sussex Peerage Case, 11 Cl. & Fin. 85, 111, 113, seemingly ignoring any distinction between *verbal declarations* and *written statements;* also brief of Mr. Heald, 2 Russ. 63.

SEC. 5.—*American Authorities—Prof. Greenleaf's opinion—Cases cited—Illustrations of doctrine in White* vs. *Choteau, Coleman* vs. *Frazier, and Hinckley* vs. *Davis.*

Mr. Greenleaf thus states the doctrine and the ground upon which it rests:—"But declarations of the other class are *secondary* evidence and are received only in consequence of the death of the person making them. This class embraces not only entries in books, but all other declarations or statements of facts, *verbal* or in writing, and whether they were made at the time of the fact declared or at a subsequent day. But to render them admissible it must appear that the declarant is deceased; that he possessed competent knowledge of the facts or that it was his duty to know them; and that the declarations were at variance with his interest. When these circumstances concur the evidence is received, leaving its weight and value to be determined by other circumstances: 1 Greenlf. Ev. sec. 147. The ground upon which this evidence is received is the *extreme improbability of its falsehood:*" Id. sec. 148; and (it might be added) the necessity of the case.

It is noticeable that Mr. Greenleaf supports his text wholly by reference to English decisions. And the truth is, the question as to verbal admissions has not arisen in our courts as frequently as might have been supposed, and in general it does not appear to

have been very accurately examined or thoroughly considered. Without going into the American cases at large, with the exception of two or three of the most pointed and best considered of them, we may state that the reception of *verbal* admissions of deceased declarants against their interest is more or less strongly supported by the following cases: *Coleman* vs. *Frazier* (1850), 4 Rich. (S. C. Law) 147; *Hinckley* vs. *Davis*, 6 N. H. 210; *White* vs. *Choteau*, 10 Barb. 202 (A. D. 1850); S. P. & S. C., 1 E. D. Smith 493; *People* vs. *Blakely* (A. D. 1859), 4 Park. Cr. Rep. 176; *Gilchrist* vs. *Martin* (1831), 1 Bailey's Eq. 492; *Halliday* vs. *Littlepap*, 2 Munf. 316; *Prather* vs. *Johnson*, 3 H. & Johns. 487; *Trego* vs. *Huzzard*, 19 Pa. St. 441; S. C. 35 Id. 9. See also 25 Id. 334; *Respub.* vs. *Davis*, 3 Yeates 128; *Simonton* vs. *Boucher*, 2 Wash. 473; *Mahaska County* vs. *Ingles*, 15 Iowa.

White vs. *Choteau*, *ubi sup.*, well illustrates the doctrine. Briefly the case was this:—The plaintiff, a broker, sued in his own name for goods sold, the owner being dead. It became material for the plaintiff to prove his interest in the matter to entitle him to maintain the action, and for this purpose he offered to prove—1st, the deceased owner's *verbal* declarations that he had received the broker's guaranty; 2d, his declaration that the broker had made a sale, and that he had received the money as the broker's guaranty. It was decided that the former declaration, not being opposed to the owner's interest, was inadmissible, but that the latter was at variance with his interest, and therefore competent, citing *Ivat* vs. *Finch*, 1 Taunt. 141; 4 Id. 16; 1 Greenl. Ev. § 147. "Such declarations," says EDWARDS, J., "*need not be in writing:*" S. C., 1 E. D. Smith 493, where the same ruling was followed, and where it is held that the other requisites concurring, the admission is receivable whether made at the time the facts occurred or afterwards.

Coleman vs. *Frazier*, above cited, and which was decided the same year (1850), may be profitably referred to. The defendant, a postmaster, was sued for negligence for permitting money to be stolen from the office by one Meigs. Meigs admitted that he stole the money, and the court sanctioned the reception of this

testimony to charge the defendant on the ground that "it was the admission of an act committed by the party against his interest, and subjecting him to infamy and heavy penal consequences, and who was dead at the trial." Says the court: "The admission of such testimony arises from necessity, and the certainty that it is true from the want of motive to falsify." The infamy and penal consequences alone, we may add, would not constitute grounds for its reception, but are simply circumstances adding to its weight: *Davis* vs. *Lloyd*, 1 C. & K. 275. *Infra*, sec. 7.

Hinckley vs. *Davis*, 6 N. H. 210, was decided by a court of high respectability, and is strikingly apposite. The action was against a surety on a note. The defence of the surety was that Blood, the principal, had paid the note by keeping sheep for the plaintiff. It became material to ascertain the price of the keeping. The plaintiff introduced a witness who swore that Blood, while he was keeping the sheep, *said* he was to have only $1 per year for each sheep. It appearing that Blood was dead, the evidence was adjudged rightly received. Per RICHARDSON, C. J.: "The admissions of Blood were made at a time when no motive to misrepresent the matter can be conceived. They were admissions against his interest. He is now dead and cannot be called as a witness, and his admissions related to a matter with which he must have been well acquainted. The evidence results in such a case from the improbability of a man's admitting as true what he knows to be false against his interest," and the court cites some of the English cases before referred to. It is observable that the declarations of Blood were no part of the *res gestæ*, for the *res gestæ* would be the actual contract between Blood and the plaintiff.

SEC. 6.—*Analogies of the law favor the reception of this evidence.*

The analogies of the law favor the admissibility of oral declarations, for there are cases where the *admissions of strangers* to the suit are receivable. Thus the verbal admissions of a party, whom the sheriff permitted to escape when confined on civil process, are evidence in an action against the sheriff, to show the extent of liability of the party escaping: *Rogers* vs. *Jones*, 7 B. & C. 86;

Pugh vs. *McRae*, 2 Ala. 393; *Strong* vs. *Wheeler*, 5 Pick. 410; and see 1 Greenl. Ev., § 181, for similar cases.

SEC. 7.—*Recapitulation—Essential prerequisites of this species of evidence.*

To sum up: This species of evidence being somewhat anomalous in its character and standing on the *ultima thule* of competent testimony, is not highly favored by the courts, and the tendency is rather to restrict than enlarge the right to receive it, or at least to require the evidence to be brought *clearly* within *all* the conditions requisite for its reception. From the unbroken current of English, and the decided preponderance of American authority, we think the present state of the law is, that verbal declarations are receivable when accompanied by the following prerequisites:

1st. The declarant must be *dead*. To this we believe the English cases make no exception.

Mere absence from the jurisdiction will not answer: *Brewster* vs. *Doane*, 2 Hill (N. Y.) 537, and cases; *Moore* vs. *Andrews*, 5 Port. (Ala.) 107. Although by the course of decisions in some of the states, with reference to *written* entries, absence might possibly be treated as equivalent to death. See 1 Greenl. Ev. § 163, and note; *Alton* vs. *Berghaus*, 8 Watts 77; 1 Smith's L. Cas. 340 (top). As to *insanity*, see *Union Bank* vs. *Knapp*, 3 Pick. 96. Unless it might be in the case of confirmed insanity, we are of opinion that the *decease* of the declarant should be held an indispensable condition to the admissibility of oral declarations.

2d. The next prerequisite is, that the declaration must have been *against the interest* of the declarant at the time, and that interest must be a *pecuniary* one. It is not sufficient that the declaration would subject the party to penal consequences: *Davis* vs. *Lloyd*, 1 C. & K. 275 (47 Eng. C. L. Rep. 273); *Sussex Peerage Case*, 11 Cl. & Fin. 85, 111, 113.

But these consequences would add to the weight of the testimony. The conflict of the declaration with the pecuniary interest of the declarant must be *clear* and *undoubted*, as this is the main ground of the reception of this species of evidence.

3d. The declaration must be of a *fact* or *facts*, in relation to a