Washington Law Review

Volume 12 | Number 2

4-1-1937

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WASHINGTON LAW REVIEW
and
STATE BAR JOURNAL

VOLUME XII. APRIL, 1937 NUMBER 2

RES GESTAE

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A multitude of cases creates chaos in this subject. Even so great a scholar and lawyer as Simon Greenleaf was unable to clarify the topic when the decisions were fewer and simpler. Mr. (afterwards Mr. Justice) Pitt Taylor, the author of *Taylor on Evidence,* copied Greenleaf word for word; but when in controversy with Mr. Chief Justice Cockburn over Bedingfield's case, had to confess that his text consisted of words "full of sound, signifying nothing". He insisted, however, that the definition which the Chief Justice had framed left him "enveloped in a fog, dense as that by which I am now, as I write, surrounded." James Bradley Thayer, after a consideration of the history of the phrase, worked out a very carefully reasoned theory which, it was said by his son, "stood the test of his many years of later study."[1] Mr. Wigmore, Mr. Thayer's most distinguished disciple, accepts Mr. Thayer's history but completely ignores his theory. And Mr. Chamberlayne, another of Mr. Thayer's scholarly pupils, only makes the "confusion worse confounded" in his voluminous work.

The phrase seems to have been introduced in the singular. Mr. Thayer says it was first used in connection with evidence by "Garrow and Lord Kenyon—two famously ignorant men", and to have been seized upon by bench and bar as an expression "which gave them relief at a pinch . . . did for them what the limbo of the theologians did for them, what a 'catch-all' does for a busy housekeeper or an untidy one—some things belonged there, others might, for purposes of present convenience, be put there."[2] Accordingly, it would be an impossible task to classify the numerous situations in which evidence has been treated as part of the res gesta or res gestæ, for the singular form very early gave way to the plural. There are, however, seven classes of cases in which the phrase is often used as a device for admitting or excluding evidence, some of them having no element of hearsay involved in

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[1] THAYER, LEGAL ESSAYS (1908) 207.

[2] *Id.* 244. The essay on Bedingfield's case is found on pages 207-304; the controversy between Mr. Pitt Taylor and Chief Justice Cockburn is described on pages 207-219. The essay was originally published in 14 AM. LAW REV. 817, 15 *Id.* 1, 71 (1880, 1881).

them; others clearly containing hearsay but declared by the courts to be free from it; and still others frankly recognized as including hearsay.

The first consists of cases wherein the words constitute an operative fact—that is, a fact which, by itself or in connection with others, operates to create legal relations between the parties. Thus, if words of offer are addressed to an offeree, he is thereby empowered by the offeror to create a legal duty by acceptance. The offeree by uttering words of rejection destroys his power to create such a duty. Here the words which are exchanged are important in themselves; they do not purport to be narratives; their significance in the case is unaffected in any way by the credibility or lack of credibility of the person who utters them. In the same way, in an action by a wife against her husband's father for alienation of the husband's affections, when the question is whether the father uttered words urging his son to continue to live with his wife or words urging him to desert her, the content of the utterance is material in and of itself. In such a case the New Hampshire Supreme Court said of such statements that they "were more than a part of the res gestæ, they were the *res gestæ*."[3] Numerous other examples, such as the words alleged to have been uttered in a slander or a libel, readily come to mind. And it requires no power of analysis to demonstrate that no hearsay is involved.

In the second group the words are used as circumstantial evidence of a material fact—that is, of an operative fact or a fact evidential of an operative fact. For example, the defendant desires to show that his killing of X was in the heat of an insane passion. He offers to prove that a few minutes before he fired the fatal shot, his wife had told him that X had ravished her.[4] He makes no offer to show that his wife's statement was true; he may even concede that it was false, but he insists that he believed it to be true. Obviously, one method of showing a man's state of mind is by showing what occurred in his presence. Again, a published declaration by a party that he is the owner of Blackacre, if offered to show only that he made the claim, and not that he was the owner, is circumstantial evidence of an open or notorious claim of title. As in the first class, the words here are important in themselves when once their utterance is shown; they are not being used testimonially; their legal effect does not depend in the slightest degree upon the credibility of the person uttering them. His perception, or memory, or narration, or veracity is in no way in-

[3]Caplan v. Caplan, 83 N. H. 318, 326, 142 Atl. 121 (1928).

[4]See People v. Wood, 126 N. Y. 249, 27 N. E. 362 (1891); *cf.* People v. Garfalo, 207 N. Y. 141, 100 N. E. 698 (1912).

volved. Hence, no hearsay problem arises. In a way, the words are the things done, the res gestæ; and the judges frequently so name them.

With cases in these two classes, the courts have no real difficulty. Those in the next category are not quite so simple. In them nonverbal conduct is accompanied by verbal conduct—a nonverbal act is accompanied by words—and the operative effect or the legal significance of the nonverbal conduct depends upon the words. To illustrate, when *A* hands over to *B* a chattel and *B* accepts it, the transfer may indicate a sale, a bailment, a gift or the return of a loan. The words accompanying the transfer may resolve the uncertainty. On the objective theory of legal transactions such as contracts, the words used are as operative as is the manual transfer of the chattel. They are not narrative; they are not even circumstantial evidence of the intent of the parties. If the transferor uses words of gift, the transfer will constitute a gift though he meant to use words of sale or bailment. The distinction between these cases and those of the first class is that here the words accompany nonverbal conduct, frequently called an act so as to distinguish it from the words. It was to be expected that the courts might call such words part of the res gestæ, since part of the things done consists of nonverbal conduct and part, of words.

The distinction between these cases and the fourth group is in theory sharp and distinct, but in practice is often overlooked. Here the words accompanying the act of themselves determine its legal significance; in the fourth group the significance of the nonverbal conduct depends upon the intent with which it is done, and the words accompanying the nonverbal conduct are evidence of that intent. If they are a direct statement of the intent, they are, of course, hearsay, for they constitute an assertion not subject to cross-examination when made and are offered to prove the truth of the matter asserted. The credibility of the person uttering them is all-important. If, however, the words are not a direct statement of the condition of mind of such person but merely circumstantial evidence thereof, they may not be hearsay. For instance, the intent with which a will is torn, burned, or obliterated depends not at all upon the words which accompany it, but upon the intent with which it was done. If while tearing a will in which *X* is named as the sole legatee, the testator declares that *X* is a forger, a sneak, and a crook, the declaration will be circumstantial evidence that the testator has an unkindly feeling toward *X*, and this in turn will be circumstantial evidence of an intent to revoke the will. For this purpose, it will not be hearsay under the orthodox

definition. It may have an important element of hearsay in it, if the theory of the proponent is that the testator really believed what he was saying; but it will be quite as relevant if his theory is that the testator was making such accusations when he knew them to be untrue. If, however, the testator's words are, "I intend hereby to revoke this will," they will be offered for their truth and will be hearsay upon proper analysis under any definition of hearsay. Similarly, the intention of a person, when moving from one place to another, may be decisive upon the question whether he has changed his domicile. His words evidencing that intention may be hearsay or non-hearsay. In these situations the courts admit the words, frequently insisting, even when they are a direct statement of intention, that they are not hearsay because part of the res gestæ. Others, recognizing that the direct declarations of intention are hearsay, nevertheless admit them on the ground that they derive credit from the accompanying nonverbal conduct, thus acquiring the requisite guaranty of trustworthiness for an exception.[5]

These cases lead directly to that large number of decisions dealing with the admissibility of declarations which accompany nonverbal conduct, the legal significance of which is entirely independent both of the words and of the intention or other state of mind of the declarant. Furthermore, such a declaration usually has no relevance or materiality except as evidence of the truth of the matter asserted in it. And, in addition, the nonverbal conduct of the declarant himself may have no significance in the case; the conduct which his declaration accompanies may even be that of another. In myriads of cases such declarations are received. On what theory? Under what limitations?

Of course, an utterance does not derive any credit from the mere fact that the person making it is also doing something else at the same time. In a Connecticut case,[6] one question was whether a woman had funds sufficient to pay a mortgage which it was alleged that she had paid. Evidence was offered that she had moved a barrel sitting under the cellar steps and told her daughter that the money was buried in a pot in the ground and she wanted the daughter to know where it was. It was insisted that the words were admissible as part of the res gestæ of going down cellar and doing what she did there. They were rejected. On the other hand, in a Massachusettes case where plaintiff was suing the sheriff for

[5]See the discussion in Holyoke v. Estate of Holyoke, 110 Me. 469, 87 Atl. 40 (1913).

[6]Pinney v. Jones, 64 Conn. 545, 30 Atl. 762 (1894). See also Commonwealth v. Chance, 174 Mass. 245, 54 N. E. 551 (1899).

having converted plaintiff's goods by taking them in execution of a judgment against *X*, a manufacturer, *W* was permitted to testify that some time before the execution he was going through X's plant with *X* and asked *X* where plaintiff's property was and *X* pointed out to him the property in question. The Supreme Judicial Court held this properly admissible as part of the res gestæ.[7] Obviously, from this point of view, there is no distinction between these cases. In both, the pointing was of itself entirely irrelevant, as was the rest of the nonverbal conduct. The accompanying words gave to the conduct all the significance it had in the case. But in the Massachusetts case the words were admissible either as a vicarious admission or as a declaration against interest, and the court used the *res gestæ* language to avoid the necessity of thinking the matter through. In the Connecticut case no other exception to the hearsay rule was applicable. And generally, it will be found, the courts are in accord with the Connecticut view. The act which the words accompany must be independently relevant.

In the earlier cases the courts lay great stress upon the element of contemporaneousness. The words must be contemporaneous with the act or event and "qualify" or "explain" or "elucidate" or "reflect light upon" it. As Mr. Thayer put it: "The leading notion in the doctrine, so far as, upon analysis, it has anything to do with the law of evidence, seems to have been that of withdrawing from the operation of the hearsay rule declarations of fact which were very near in time to that which they tended to prove, fill out, or illustrate, being at the same time not narrative, but importing what was then present or but just gone by, and so was open, either immediately or in the indications of it, to the observation of the witness who testifies to the declaration, and who can be cross-examined as to those indications."[8] For an apparent application of the doctrine, consider *Heg v. Mullen*.[9] In that case defendant's car collided with plaintiff's car at a highway intersection. A witness, O'Brien, testified that he was a passenger in defendant's car. When the car was not far from the crossing, he got up in the machine, looked at the speedometer and, "I says to the boys, 'I am in no hurry.' I told them I was in no hurry to get to Redondo and I didn't think they were either." First, is this hearsay? Clearly it was not offered for the truth of the matter literally asserted in it. Whether O'Brien was in a hurry was entirely immaterial. But the proposition which he was trying to express

[7] Pool v. Bridges, 4 Pick. 377 (1826).
[8] THAYER, *op. cit. supra* note 1 302.
[9] 115 Wash. 252, 197 Pac. 51 (1921).

and which "the boys" doubtless understood, and for the truth of which it was offered, was, "You are driving at a very rapid, an excessive, rate of speed." And on this analysis, it is hearsay. This statement was exactly contemporaneous with the conduct upon which it throws light, the driving of the car along the highway. What he was talking about was then open to the observation of O'Brien and of his auditors. If an auditor reported the statement in the witness box, the auditor could be cross-examined fully not only as to the content of O'Brien's statement but also as to the objective facts concerning which O'Brien was talking. In evaluating O'Brien's statement as made in the car, the jury would not have to rely upon the credibility of the uncross-examined O'Brien alone: it would have also the credibility of the reporting witness. O'Brein's memory is not in any way involved. His narration is no more likely to carry error here than in any other exception to the hearsay rule. As to his veracity, that is subject to some check by cross-examination of the reporting witness. Of course, if O'Brien himself is the reporting witness, the cross-examination will be all the more effective. Besides, the statement is to a marked degree the spontaneous product of the occurrence, "operating," as Mr. Justice Somerville of Alabama phrases it, "upon the visual, auditory or other perceptive senses of the speaker." The declaration is "instinctive, rather than deliberative—in short, the reflex product of immediate sensual impressions, unaided by retrospective mental action. These are the indicia of verity which the law accepts as a substitute for the usual requirements of an oath and opportunity for cross-examination."[10]

In all the cases where the statement is exactly contemporaneous with the event in question, this reasoning will justify its admission. In such situations, the less exciting or disturbing the event, the more trustworthy the declaration because, as the psychologists assure us after abundant investigation, the greater the excitement or other mental perturbation, the less accurate the operation of the perceptive faculties.[11] Contemporaneousness, not spontaneity, is the test. Indeed, Mr. Thayer, after an exhaustive examination of the authorities up to the time he first wrote in 1880, seems to have been convinced that there was no other theory which would explain the decisions; and that the questionable decisions were due to an unwarranted expansion of the meaning of contemporaneousness. Of course, he had to concede that it would be impracticable

[10]Illinois Central R. R. Co. v. Lowery, 184 Ala. 443, 448, 63 So. 952 (1913).

[11]See Hutchins and Slesinger, *Spontaneous Exclamations* (1928) 28 COL. L. REV. 432.

to insist on exact contemporaneousness—he says "*very near in time* to that which they tended to prove, fill out or illustrate," importing that which "was open, *either immediately or in the indications of it,* to the observation of the witness who testifies . . ." But any appreciable interval would wreck the guaranties of trustworthiness. And in numerous modern opinions there is such an insistence upon substantial contemporaneousness that Mr. Thayer's theory will still explain the vast majority of cases.[12]

But not all. There are a few cases where testimony like that in *Heg v. Mullen* has been excluded.[13] *Heg v. Mullen* seemed to be a demonstration that there were a few judges who could use the doctrine of res gestæ without being led into the obvious error of believing, in accident cases, that the res gesta was the accident itself; who knew that for purposes of evidence, an evidential fact might well be a res gesta. Of course, the Washington Court did not cite Thayer, but they seemed to be applying the very same reasoning which he found to run through the decisions half a century earlier. In 1926, however, it wrecked that demonstration. It then declared in *Barnett v. Bull,*[14] that in *Heg v. Mullen* the res gesta was the collision and that the declaration was practically contemporaneous with it for, so the court said, it was made just a moment before by a person who was in one of the colliding cars; and that even so the court had gone pretty well toward the limit in admitting it.[15] The opinion does not explain just why O'Brien's statement at a time when, so far as appeared, he did not apprehend a collision and was totally unaware that he was approaching the scene of an accident in which he was to participate as an innocent passenger, could be made any the more trustworthy by the subsequent occurrence. The court was no doubt influenced by the fact that in most cases the declarations are made after the accident; but it did not note that in most of them the

[12]Upon this theory words "elucidating" or "reflecting light upon" an object or external static condition, uttered while the speaker was viewing or otherwise exercising any of his senses with reference to the object or condition, should be admissible. May DuBost v. Beresford, 2 Camp. 511 (K. B. 1810) be thus explained? See the following cases, where the court's ruling contained no suggestion of such a theory; Chase v. City of Lowell, 151 Mass. 422, 24 N. E. 212 (1890), admitting contemporaneous statements as to exposed and decayed condition of roots of tree; Lund v. Tyngsborough, 9 Cush. (Mass.) 36 (1851), excluding contemporaneous statements by a physician as to condition of ankle; The Gresham Hotel Company, Limited v. Manning, I. R. 1 C. L. 125 (Q. B. Ireland, 1867), excluding contemporaneous statements of prospective guests as to dark condition of room.

[13]Wrage v. King, 114 Kan. 539, 220 Pac. 259 (1923), (1924) 22 MICH. L. REV. 843; Gouin v. Ryder, 38 R. I. 31, 94 Atl. 670 (1915).

[14]141 Wash. 139, 250 Pac. 955 (1926).

[15]The court made a similar remark as to the evidence admitted in Mathewson v. Olmstead, 126 Wash. 269, 218 Pac. 226 (1923).

theory of decision is not contemporaneousness, that there is no consideration given to the fact that the truth of the statement of the declarant can be checked up by cross-examination of the witness who reports it in court. By its reasoning it seems to make contemporaneousness with the accident the test of admissibility of a statement, which does not have to do with the accident but with the events preceding it and which was not produced by the accident. Thus it seems to erect a theory which harmonizes neither with Thayer nor with Wigmore.

Mr. Wigmore's theory makes contemporaneousness important only as evidence of spontaneity. He founds it upon the case of *Thompson v. Trevanion,*[16] a *nisi prius* case decided in 1694, in which Lord Holt ruled in an action for assault and battery of plaintiff's wife, "that what the wife said immediate upon the hurt received, and before that she had time to devise or contrive anything for her own advantage might be given in evidence." Herein Mr. Wigmore finds all the requisites for his exception. (1) There is a startling occurrence. This means an occurrence which startles the speaker, puts him under a stress of nervous excitement. (2) The statement is made before there is time to fabricate. That is to say, while the speaker is still laboring under the stress of the nervous excitement. In this connection, Mr. Wigmore describes all requirements of contemporaneousness as spurious limitations, due to a confusion between these cases and those above described as the third and fourth classes—those where the legal significance of the nonverbal conduct depends either upon the words accompanying it or upon the intent of the person exhibiting the conduct. (3) The statement must concern or relate to the startling occurrence.

Since the publication of Mr. Wigmore's first edition, this theory has been widely adopted so that it can now be said to represent the overwhelming weight of authority. This is not to say that there is such great harmony in its application.[17] There is a trend toward unanimity in requiring the startling occurrence. This seems a decided mistake, for it insists upon an element which has a positive tendency to produce inaccurate observation—and inaccuracy of observation is one of the greatest obstacles to the discovery of facts in litigation. To the requirement that the speaker shall be laboring under the stress of nervous excitement, some courts add the

[16]Skin. 402 (K. B.). In like manner in R. v. Foster, 6 C. & P. 325 (1834), a statement, made by an injured man immediately after he was knocked down, as to what struck him was admitted. But this was doubted by Cockburn, C. J. in R. v. Bedingfield, 14 Cox. C. C. 341 (1879).

[17]Compare People v. Del Vermo, 192 N. Y. 470, 85 N. E. 690 (1908), with Greener v. General Electric Co., 209 N. Y. 135, 102 N. E. 527 (1913).

limitation that the speaker must himself have been a participant in the occurrence, as the actor or the victim. The role of mere bystander will not suffice. This may likewise be due to a borrowing from cases of our third and fourth classes. The majority are now receiving declarations of bystanders.[18] The third requisite, that the statement must concern the startling occurrence, is usually accepted. In most cases there is no attempt to introduce matter irrelevant to the occurrence. The issue is raised where the statement concerns a previous event, which has considerable bearing upon the occurrence producing the excitement under which the speaker is laboring. Thus, in an English case[19] where a plaintiff passenger was injured by a tramcar leaving the track, another passenger exclaimed that the driver ought to be reported, and the conductor replied that the driver had been reported, for he had "been off the line five or six times that day." It was held that the conductor's statement was inadmissible because it had nothing to do with the startling occurrence. There are other cases to the same effect. Mr. Chamberlayne says that the courts are more liberal in this respect in poisoning cases. With this the Louisiana court expressly disagreed.[20] A United States Circuit Court of Appeals, however, has gone far toward justifying Mr. Chamberlayne's statement. In an action upon a life insurance policy defendant alleged a conspiracy to defraud by procuring the insurance and murdering the assured. After introducing evidence which would justify the jury in finding a conspiracy between plaintiff, Jack, and one Dr. Lipscomb, and evidence that Dr. Lipscomb had handed the assured a capsule with directions to take it later and that some hours thereafter assured swallowed the capsule and became ill, the defendant offered testimony that while assured was suffering intensely, he said: "Dr. Lipscomb killed me with a capsule he gave me tonight; and Guy Jack had my life insured, and hired Dr. Lipscomb to kill me." The trial court admitted the declaration and the Appellate Court affirmed.[21] Occasionally, also, there is a case where a statement by an injured man that he had done frequently before without mishap the act which on this occasion caused his

[18]See cases collected in 20 L. R. A. (N. S.) 133 (1909); 76 A. L. R. 1129-1131 (1932). There is a conflict of authority as to the admissibility of a statement which is in form an opinion or conclusion although in fact a mere shorthand method of describing the speaker's personal experience. See Cromeenes v. San Pedro, etc., R. Co., 37 Utah 475, 109 Pac. 10 (1910), admitting; Field v. North Coast Transportation Co., 164 Wash. 123, 2 P. (2d) 672 (1931) rejecting. A few cases are collected in 42 L. R. A. (N. S.) 917, 932, 938 (1913).

[19]Agassiz v. London Tramway Co., 21 W. R. 199 (1873).

[20]State v. Bussey, 162 La. 393, 110 So. 626 (1926).

[21]Jack v. Mutual Reserve Fund Life Assn., 113 Fed. 49 (C. C. A. 5th, 1902).

injury is received in favor of him or his administrator.[22] There are, however, not enough cases to justify any generalization for an exception to this generally accepted requisite.

One question of growing importance concerns the necessity of laying a foundation for the statement by showing by extrinsic evidence that the exciting event occurred. In one of the earliest and leading cases in this country,[23] the dissenting judge insisted, among other things, that the statement itself was the only evidence of the exciting occurrence. More recently, particularly in Workmen's Compensation cases, the claimant has had to rely upon the statement of the deceased workman as the sole evidence of the startling occurrence—which, also, was the only evidence that the injury was received in the course of employment. Cases from Colorado, Kentucky, Michigan, Minnesota, and North Carolina receive the statement.[24] Illinois rejects it.[25] On theory, of course, the foundation should be laid by independent evidence unless the judge in deciding preliminary questions is not bound by the rules of evidence.[26] But theory may well have to give way to practical considerations and to the policy which regards every injury that occurs while a man is employed as *prima facie* compensable.

In the seventh class, the res gestæ terminology is applied to declarations of a state of mind. This is probably due to two groups of cases: (1) Those in the fourth class in which the legal significance of conduct depends upon the intent or other mental condition which motivates it; (2) those in which the state of mind of a person may be independently relevant and the court regards the words or other sounds uttered by him on the same basis as other physical manifestations, such as blushing or turning pale, or otherwise exhibiting by facial expression involuntary symptoms of a subjective condition like pain, anger, pleasure, fear, or surprise. In the former group the courts may insist upon contemporaneousness. Thus some jurisdictions, for example, Maine, reject declarations of intent to abandon an old or to acquire a new domicile unless they accompany nonverbal conduct which is independently relevant upon the issue.[27] In most such cases, the intent with

[22]Chapman v. Bimel-Ashcroft Mfg. Co., 263 S. W. 993 (Mo. S. Ct., 1924).

[23]Insurance Co. v. Mosley, 8 Wall. 397 (1869).

[24]Industrial Commission v. Diveley, 88 Colo. 190, 294 Pac. 532 (1930); National Life & Accident Ins. Co. v. Hedges, 233 Ky. 840, 27 S. W. (2d) 422 (1930); Young v. Stewart, 191 N. C. 297, 131 S. E. 735 (1926); Bunker v. Motor Wheel Corp., 231 Mich. 334, 204 N. W. 110 (1925).

[25]Selz-Schwab & Co. v. Industrial Commission, 326 Ill. 120, 156 N. E. 763 (1927).

[26]See Maguire and Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility* (1927) 36 YALE L. J. 1101, 1122-1125.

[27]See note 5, *supra*.

which the nonverbal act is done is decisive. In others, the reason which induces the act, rather than the intent, may be important. Thus, where receivers of poultry refused to sell poultry to marketmen, it was essential to know whether the refusal was made because the marketmen were selling to unapproved retailers. The declarations of the receivers to the marketmen explaining why they were refusing to sell were admitted.[28] Again in two Alabama cases,[29] the plaintiff was suing the defendant for wrongfully causing *X* to discharge plaintiff from *X's* employ. Evidence was offered that *X*, when discharging plaintiff, stated that he was doing so because defendant, in one case, had threatened to boycott *X*, and, in the other, had threatened to cancel *X's* liability insurance, unless *X* discharged plaintiff. Now, plainly, this was unadulterated hearsay, if offered to prove that defendant had made any such threats, and would not come within striking distance of any recognized exception. If, however, it was otherwise shown that defendant had made the threats and that *X* had discharged plaintiff, *X's* statements as to his reason for discharging plaintiff, made in the process of discharging him, were declarations of *X's* then existing state of mind. They were relevant to show the relation between defendant's threats and *X's* action to be that of cause and effect. They accompanied *X's* action and determined its legal significance. And for this purpose they were admissible, although subject to the danger of misuse by the jury.

The same danger of misuse is found in numerous cases where the speaker's state of mind is important although the statement evidencing it accompanies no otherwise relevant action. In actions for alienation of affection the words of the person whose affections have fled may indicate their abiding place or flight before defendant entered the scene, or their transfer and resting place thereafter. Sometimes the statement will be a direct assertion of the speaker's affection or hatred for either plaintiff or defendant or both; or it may be a narrative of past events which indicate a present state of mind. If the latter, there is always danger that they may be regarded by the trier of fact as evidence of the happening of the events. Thus, where the wife told the husband that she had gone automobile riding with defendant, had dined with him, received flowers from him, and intended to keep on accepting the attentions and favors which he was able to give and plaintiff

[28]Greater New York Live Poultry Chamber of Commerce v. United States, 47 F. (2d) 156 (C. C. A. 2d, 1931).

[29]Hill Grocery v. Carroll, 223 Ala. 376, 136 So. 789 (1931); United States Fidelity & Guaranty Co. v. Millonas, 206 Ala. 147, 89 So. 732 (1921).

was not, this statement could not be received as evidence of the happening of these events; but it was admissible as evidence of the wife's mental or emotional attitude at the time toward both plaintiff and defendant.[30] If thus limited the statements of fact, whether she believed them or not, would show lack of proper marital affection for the husband; if she believed them, they would tend to show an improper emotional attitude toward the defendant. In either event they would be just as admissible as her direct assertion of her intent. And all the modern cases are tending to admit direct assertions of a state of mind if they are made naturally and without circumstances of suspicion.

One subdivision of this group has a separate history, namely, declarations of pain. Some courts have made the practically impossible distinction between so-called animal utterances and coherent statements, on the theory that the former are involuntary. Some restrict admissibility to declarations made to a physician for the purpose of treatment; and Minnesota has declared that the only coherent statements of subjective symptoms that can be received are those which (1) are made to a physician for purposes of treatment, (2) relate exclusively to the then existing condition, and (3) are accompanied by expert opinion testimony of the physician based in part upon them.[31] The Minnesota court takes the position that in all such instances there is so much likelihood that the statement will be consciously false or exaggerated that it must be subject to the double check of (1) expected medical aid based upon it, and (2) the opinion of the physician, open to cross-examination, as to the correspondence between the declarant's statement of subjective symptoms and his objective symptoms observed and observable by the physician. Almost all the courts, however, are satisfied to receive all declarations of present subjective symptoms when made to a physician for purposes of treatment; and a very heavy majority receive such statements to whomever made, except when made for the purpose of qualifying a witness to testify. There are a goodly number of states which admit statements of past symptoms when made to a physician for purposes of treatment. Indeed, in the *Kraettli* case[32] the court said:

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[30]Adkins v. Brett, 184 Cal. 252, 193 Pac. 251 (1920). The jury must on request be cautioned not to use it for any other purpose, and when the danger of misuse obviously outweighs the value of legitimate use, the evidence may well be rejected. Wendell v. Brown, 142 Wash. 391, 253 Pac. 452 (1927).

[31]Sund v. Chicago, Rock Island & Pacific Ry. Co., 164 Minn. 24, 204 N. W. 628 (1925).

[32]Kraettli v. North Coast Transportation Company, 166 Wash. 186, 6 P. (2d) 609, 80 A. L. R. 1520 (1932).

"In no decision or test that we have been able to find . . . has it ever been held that physicians called for the purpose of effecting a cure of a patient are not permitted to testify as to statements of the patient's past pain and suffering made to them by the patient." The court could not have been expected to be acquainted with *Atlanta, Knoxville and Northern Railway Company v. Gardner,*[83] where declarations of both present and past pain were held inadmissible even when made to a physician for the purposes of treatment; but it must have had Mr. Wigmore's text at hand, for it cited sections 667 and 668 in support of another proposition. In Section 1719, Mr. Wigmore in speaking of the requirement in some states that statements of present pain, to be admissible, must be made to a physician, says that the Massachusetts case upon which the limitation is based applied it "merely to statements of past 'conditions and suffering' (which, as we shall see, are not admitted except in Massachusetts and a few other states)." And in Section 1722 he says that statements of past pain "are no better than statements of any other past events . . . There is in Massachusetts (and a few other jurisdictions) a modification of the preceding rule where the statements are made to a physician." Of course, no implication is intended that the discovery of these authorities would have caused the Washington court to reach a different result, for in the later portion of the decision they adhered to a rule upon which they conceded they were opposed by the United States Supreme Court and most of the federal courts. They held it proper to permit the physician, who had been called as an expert and who got his information from an examination made solely to qualify him to testify as an expert, to relate the history of past subjective (and, indeed, objective) symptoms as part of the basis upon which he formed the expert opinion concerning the patient's condition. The patient's statement is concededly not admissible for its truth; and the jury is to be instructed that it must consider it only as part of the data to be used in their evaluation of the physician's opinion testimony. No doubt this ruling is theoretically correct. No doubt, also, the opposing rulings amount to nothing as protective devices if the patient is available as a witness, for, as Mr. Justice Rossman of Oregon has said: ". . . the skirmishes back and forth to exclude, or admit, such testimony are largely in the nature of sham battles, for if the testimony should be excluded by the application of the rule suggested by the defendant it would promptly make its appearance in the form of a hypothetical question accompanied by the physician's opinion-

[83]122 Ga. 82, 49 S. E. 818 (1904).

answer.''[34] The difficulty with this sort of evidence is, at its root, a difficulty that cannot be solved by any exclusionary rule. As long as persons can be found able to qualify as medical experts and willing to testify to anything necessary to the case of the party calling them, and as long as litigants desire to distort the facts, no rules excluding assertions of pain, suffering, anxiety, or other subjective conditions will be effective.

Usually where words accompanying a nonverbal act are offered to show the speaker's state of mind, his state of mind at the instant of the utterance is an issue. In many cases, however, his state of mind at that time is material only as the basis for an inference that it existed at some other time theretofore or thereafter, and in some cases as a basis for a further inference to an objective fact or condition. For example, if in a will contest it is important to show that at the date of the alleged will the testator had either affection or hatred for a person named therein as legatee or entirely omitted therefrom, the testator's relevant utterances on occasions prior to that date, if received to show his then existing state of mind, will be useless to the proponent unless the trier can infer that the state of mind at the moment of the utterance continued up to the time of executing the will. Likewise, the expression of a threat or plan by *X* to kill *Y* will have no tendency to show that *X*, rather than defendant, did kill *Y* unless the trier first concludes that *X's* state of mind at the time of the threat continued up to the time of the killing, and further, that *Y* acted in accordance with that state of mind. The cases in which this double inference is permitted are legion. There is a deal of nonsense contained in the books in attempts to show that in such instances no hearsay is involved. For instance, the Chief Justice of Pennsylvania in 1923 was dealing for the Court with a declaration by a slain woman made ''shortly before the day of the fatal encounter'' that she intended ''to shoot the accused and then kill herself.''[35] The trial court had rejected the evidence though defendant's defense was that the woman had carried out her intention, and had shot the accused in the head. In reversing, the Chief Justice said: ''. . . the existence of such a design becomes material and evidence tending to prove it is admissible.

''Testimony of the kind under discussion—when not introduced to prove directly the truth of matters therein asserted, but merely to show declarations alleged to be relevant as a basis of an inference to be drawn therefrom—is admissible without regard to

[34]Reid v. Yellow Cab Company, 131 Ore. 27, 45, 279 Pac. 635, 67 A. L. R. 1 (1929).

[35]Commonwealth v. Santos, 275 Pa. 515, 119 Atl. 596 (1923).

the hearsay rule . . . For instance, in this case the evidence in question is admissible because suicidal intent, like any other purpose, is a mental condition, which can manifest itself, primarily, only through some act or word of the person in question; hence, relevant acts or words may be proved as the basis of an inference that the state of mind, or intention did in fact exist from which fact and others in the case, the conclusion may be drawn that the design contended for had been carried into execution." Does the learned Chief Justice mean that any fact, the existence of which is only circumstantial evidence of an ultimate fact in issue, can be shown by hearsay? If so, he stands alone. Or does he mean that when offered to prove the existence of a given state of mind in *X*, a statement by *X* directly asserting the existence of that state of mind is not hearsay? If so, he rejects every definition of hearsay that has ever been framed. Does he mean that the statement of *X* is not offered to prove directly that *X* has such a state of mind but only as circumstantial evidence that he believes he has it, from which belief it may be inferred that he really has it? If so, this is sheer foolishness. Certainly hearsay is involved in the assertion. The rule under discussion admits as an exception to the hearsay rule the declaration of a presently existing state of mind made naturally and without circumstances of suspicion; and the obscuring phraseology of the Chief Justice is an attempt to reach the desirable result without appearing to do violence to previous unwise pronouncements.

Once the state of mind existing at the time of the utterance is established, is the process of inferring its continuance and later action in accord therewith any but a logical process? Does it involve untested perception, memory, narration, or veracity, from the dangers of which cross-examination may protect? Obviously, none of these, except perhaps something analagous to memory. Memory is the retention in the mind of past sense impressions, and is in a way a continuation of a once existing condition of mind; here the trier is asked to make a deduction of the retention or continuance of a particular state of mind without giving the adversary any opportunity to test by cross-examination the retentive quality of that mind or the strength of purpose or the effect of intervening events. To object on this ground, however, seems rather fanciful. Consequently, it seems reasonable to conclude that in cases of this character there is one and only one hearsay step, and that is covered by a recognized exception.

Suppose, however, the planned or contemplated action requires the co-operation of another. In the famous *Hillmon* case,[36] one

[36] 145 U. S. 285, 12 S. Ct. 909 (1892).

Walters had written to his sweetheart and relatives letters stating that he intended to leave Wichita, Kansas, with Hillmon, on a trip through Colorado and the West. These were offered as evidence that he was with Hillmon at Crooked Creek and that the person killed there was Walters and not Hillmon. The Supreme Court held it reversible error to reject the letters after other evidence tending to show that Walters went with Hillmon had been introduced. The letters were held to be competent "as evidence that shortly before the time when the other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention." The court said that the declaration was as direct evidence of his intention as his own testimony that he had then had that intention would have been, thus making the hearsay character of the declaration as clear as possible. It quoted, however, from the *Mosley* case:[37] "Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury." Now, it must be too apparent for argument that all utterances are verbal acts; and the phrase, as commonly used by the courts, has only less "convenient obscurity" than res gestæ because it happens to be English instead of Latin. In *State v. Power,*[38] the Washington court indulges in similar verbiage. There the statement of a woman just before leaving Idaho for Spokane, that "she was in trouble, and was going to Spokane to be treated by Dr. Power" was received against Dr. Power in a prosecution for manslaughter by abortion. The court said that it was certainly proper to show that she went to Spokane and placed herself under Dr. Power's treatment. "The preparation she made for going, her condition of health at that time, and her conduct and demeanor, were likewise matters properly admissible in evidence, as a part of the history of the case and necessary to its general understanding. On the same principle, her declarations made at the time she was preparing for the journey could be shown. They were in the nature of verbal acts, explanatory of what she was doing and of her object and purpose, and are part of the *res gestæ* of this particular part of the entire transaction." What does all this mean except that her intention may be shown by her words, and that her intention is relevant upon the issue of her own later conduct? In what way can it have the remotest bearing upon the defendant's con-

[37]Insurance Company v. Mosley, 8 Wall. 397 (1869).

[38]24 Wash. 34, 63 Pac. 1112 (1901), cited and quoted from with approval in State v. Paschall, 182 Wash. 304, 47 Pac. 15 (1935).

duct, except to show that he probably had an opportunity to treat the declarant? As Chief Justice Start of Minnesota put it in *State v. Hayward,*[39] where the murdered person's statement of an intention to meet the defendant was admitted: "But it was relevant to the issue to show that she did meet the defendant, and evidence of her declarations of an intention and purpose to meet him was admissible as original evidence to prove that she did in fact intend to meet him . . . To sustain it on the ground that the statement of the deceased was part of the res gestæ is, in my judgment, to assign a wrong reason for a correct conclusion, which may lead to complications in future cases." The Supreme Court of Connecticut expressed it even more clearly:[40] "The existence of a plan or intention to do a thing is relevant to show that the act was probably done as planned. The plan or intention, being a condition of mind, may be evidenced, under an exception to the hearsay rule, by the person's own statement as to its existence. A declaration indicating a present intention to do a particular act in the immediate future, made in apparent good faith and not for self-serving purposes, is admissible to prove that the act was in fact performed. It is admissible, not as a part of the res gestæ, but as a fact relevant to a fact in issue." It should, of course, be noted that such declarations are practically never sufficient in and of themselves, to prove the intended conduct. In practically all the cases there has been other evidence of which the declared intention is corroborative. And in many of them the courts have emphasized this fact.

It will be observed that in the situations just discussed, the inference is from a state of mind at a given date to a state of mind at a later date, thence to action or other conduct. May the process be reversed? Consider *Rawson v. Haigh.*[41] In this early English case the question was whether a debtor had committed an act of bankruptcy. This depended upon whether he departed the realm in order to avoid his creditors. It was shown that on the evening of a day in which he was negotiating with them in London, he took the night boat for Paris. He wrote or left word that his son would continue the negotiations. Some two weeks later he wrote a letter in which he expressed the fear that his creditors might seek his arrest; and about two weeks thereafter another letter in which he stated that he dared not return to London for fear of his creditors. These letters were received as tending to show that he left the realm with the intent to avoid his creditors. Mr. Justice Park (not the renowned Baron Parke) held that these letters were part

[39] 62 Minn. 474, 497, 65 N. W. 63, 70 (1895).
[40] State v. Journey, 115 Conn. 344, 161 Atl. 515 (1932).
[41] 2 Bing. 99 (C. P., 1824).

of the res gestæ of departing the realm, that they were contemporaneous with the departure, for in this connection the courts had not tied down the notion of contemporaneousness to any strict or definite period of time. This is, of course, a plain abuse of language in an attempt to bring the decision within the terms of a formula. All that is necessary under this technique is to think in geologic periods; then any utterance made within historic times can be called contemporaneous with any other known event. The explanation of the case by modern commentators is very simple. The declaration of fear some thirty days after the departure, though hearsay, is admissible evidence of his fear at that date. The like is true as to the declaration of fear two weeks earlier. Taken in conjunction with the circumstances of his departure, his state of fear at these two dates justifies the inference of fear of his creditors at the time of departure, and this warrants an inference of intention to avoid them by departing. Logically, there is nothing to prevent the inference that a specific state of mind had its origin at a time prior to its manifestation by action or words. It all depends upon the circumstances. They may be such that the memory of the person in question will be heavily involved, and the dangers of relying upon the quality of memory of a person who has not been subject to cross-examination may be considerable. In most cases there is little danger, but in a few, the court has gone to doubtful extremes in reversing for the exclusion of such evidence. For example, in *Mower v. Mower*,[42] the trial judge was reversed because he rejected self-serving declarations made two and seven years after the act in question when offered to show (1) declarant's state of mind at the times when the declarations were uttered and (2) the same state of mind at the time of the earlier act. The most frequent application of this rule is in will contests where the statements of the testator made after the date of a will or after the date of an alleged revocation are offered to show (1) that at the time of the declaration he had such a state of mind as to be more than normally subject to undue influence, or had either an *animus revocandi* or a belief in the continued existence of his will, and (2) that at the date of execution or physical destruction of the document, he had the same state of mind. Here, too, many courts are careful to charge that the testator's declaration that undue influence was exercised on him or that he had revoked his will or that his will was then in

[42] 65 Utah 260, 228 Pac. 911 (1924).

existence is not to be taken as evidence of the fact stated, but only as evidence of his then condition of mind.[43]

The Kansas Supreme Court does not stop there. It seems expressly to adopt Mr. Wigmore's theory. In holding that a post-testamentary statement directly asserting execution or content is admissible to show either execution or content, or both, of a lost will, it places its decision not upon a separate exception to the hearsay rule for such statements, but says: "Each (such statement) shows the testator's state of mind, from which we may naturally infer the existence of the fact or the doing of the act which produced that belief or state of mind."[44] Examine this reasoning. Begin with a situation where the speaker's assertion is not a direct assertion of the fact to be proved. Take an actual English case in another field, which in 1914 was decided by the House of Lords. One Alice Lloyd gave birth to an illegitimate child after *X*, its alleged father, had been killed in the course of his employment. In a proceeding to recover for the child under the Workmen's Compensation Act, evidence was admitted that Alice gave birth to the child, that before *X's* death she informed *X* that she was pregnant, and that *X* then promised to marry her. There was also evidence that he had expressed to other witnesses his intention to marry Alice after knowing of her pregnancy. Obviously the conversation between Alice and *X* was not hearsay when offered as evidence of *X's* knowledge of the fact of her pregnancy; and the contract to marry was not hearsay for the words were offered merely to show the exchange of promises. The direct declarations of intent were receivable under an exception to the hearsay rule. This evidence was all clearly relevant to show that *X* intended to marry her; it was likewise relevant and of strong probative value to show *X's* belief that he was the father of her unborn child, for it is a rare occasion, outside of romantic novels and dramas, when a man promises to marry a woman whom he knows to be with child by another. Since none of *X's* statements was a narrative and none was intended to express the proposition that he was the father of the child, his veracity is not involved after we have once accepted his direct assertions of his intent, as we must under the recognized exception for declarations of a present state of mind. Errors as to narration are no more likely than in any situation where a witness on the stand is repeating words used by another. *X's* perceptions and memory are, of course, heavily involved. It is clear that *X* could not have known that he was the father; but it is too clear for argument that he must have known

[43]See Re Wayne's Estate, 134 Ore. 464, 291 Pac. 356, 294 Pac. 590 (1930), and cases collected in 79 A. L. R. 1427, 1447 (1932).

[44]Atherton v. Gaslin, 194 Ky. 460, 239 S. W. 771 (1922).

whether he had intercourse with Alice. Granted that his veracity is not in question, the only risks lie in possible mistakes in perception and memory. Of the former there is no reasonable possibility. Though the statement was made some months after the act, there is under the circumstances practically no danger of errors in memory. Consequently, the evidence is much more trustworthy than that received under many, if not most, of the recognized exceptions to hearsay. And the House of Lords held it admissible.[45] The same analysis will show the value and trustworthiness of a testator's conduct or his declarations of intent circumstantially indicating his belief in the existence or revocation of his will, though in some instances the testator's mental condition may make reliance upon his memory rather hazardous.

But what of the Kansas case where the utterance is a narrative of a past event, and the theory of its reception forbids the trier to accept it directly but requires the trier first to consider whether the speaker believed what he was saying, and if that is answered in the affirmative, whether his belief was induced by the actual happening of the event? Of course, it would be ridiculous to expect a jury to go through any such thought processes; and even a learned judge would find some difficulty in doing so. In *Shepard v. United States,* the Circuit Court of Appeals for the Tenth Circuit seems to have sanctioned some such notion. The trial judge had admitted Mrs: Shepard's declaration, "Dr. Shepard has poisoned me." The Court of Appeals held that it was not admissible as a dying declaration, as the trial judge had thought, but on another theory. The defense had introduced declarations of Mrs. Shepard showing or tending to show an intent to commit suicide. The line of inference which the appellate court thought justifiable seems to be thus: From Mrs. Shepard's declaratiton that defendant poisoned her, to her belief that defendant poisoned her, thence to her belief that her condition was not due to her own act, thence to the fact that she had done nothing to cause her condition. The Supreme Court of the United States,[46] however, reversed the conviction. It first held that the statement was inadmissbile as a dying declaration, that it had been received as such, and that the Government should not now under the circumstances seek to justify it on a ground of which defendant was not apprised at the trial. It then went on to say that the Government might by proper evi-

[45]Lloyd v. Powell Duffryn Steam Coal Company, Limited, L. R. 1914 App. Cas. 733 (1914). The Court of Appeals had rejected the evidence. L. R. (1913) 2. K. B. 130. The Court of Appeals considered the case as involving only a declaration against interest. The grounds upon which the House of Lords held it receivable are a bit difficult to discover from the reported opinions.

[46]290 U. S. 96, 54 S. Ct. 22 (1933).

dence show a persistence of her will to live, but not by such a declaration. "It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed." Of course, this is a striking case and one too extreme to furnish a basis for generalization; but the court went on to consider the precedents and concluded: "Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backward to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored."

It seems safe to conclude, then, that a declaration of a presently existing state of mind is generally admissible when the state of mind (1) is relevant and material of itself without the accompaniment of any inference to be drawn from it; or (2) is to be used as the basis for a relevant and material inference that it continued to exist for a reasonable time after the declaration; or (3) is to be used as the basis for such an inference of its continuance and action of the declarant in accord with it, even though such action requires the co-operation of a third person; or (4) is to be used as the basis for a relevant and material inference that it existed for a reasonable time prior to the declaration. There is also both authority and reason for admitting a declaration of intention when the intention is to be used as the basis for a relevant and material inference that a certain belief caused the intention and the further inference that the belief was created by a given external event. It is doubtful on authority (and on reason, so long as the hearsay rule is accepted) whether the declaration of a state of mind other than that of intention is to be received if the state of mind is to be used as the basis for a deduction that it was created by a given external event; and the cases which receive the post-testamentary declaration of a testator as evidence of the facts therein stated on the theory that it is circumstantial evidence of the belief of the testator in its truth, which in turn is evidence of the happening of the event narrated, threaten the destruction of the hearsay rule. That may be a consummation devoutly to be wished, but it should be accomplished by more forthright methods.†

†One of a series of papers upon the law of evidence presented by Professor Morgan to the Seattle Bar in July, 1936, revised by the author for publication. The first of this series appeared in the January, 1937, issue of the REVIEW; others will appear in subsequent issues.