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# Declarations in the Course of Duty Herein of Refreshing Recollection

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# DECLARATIONS IN THE COURSE OF DUTY—HEREIN OF REFRESHING RECOLLECTION.

THE law of evidence is largely a law of exceptions. Lawyers and judges are not so frequently troubled with the question as to whether a certain bit of testimony is relevant, as they are in determining whether a certain bit of relevant testimony is admissible. In other words, the bulk of the law of evidence is concerned with exceptions to the general proposition that everything that is relevant is admissible. It should be noted that relevant is used as meaning "logically probative." The hearsay rule, various rules with reference to opinion evidence, real evidence and evidence of character and the rules governing the admission of documentary evidence, are illustrations of exceptions to the general proposition stated above.

We may go further and say that a considerable portion of the law of evidence is concerned with exceptions to exceptions. There are some dozen or more well-defined exceptions to the hearsay rule. Questions involving these exceptions are arising every day in our trial courts. They are so common, in fact, that the lawyer makes use of the rules governing them without thinking just what position such rules logically occupy in the law of evidence. To this circumstance is doubtless due in great measure the fact that many lawyers confuse the terms relevancy and admissibility. Dying declarations, declarations concerning pedigree, declarations against interest, admissions, entries in account books, res gestae, and declarations in the course of duty, are some of the common exceptions to the hearsay rule.

If we desired further refinement, we might say that in the law of evidence we find many exceptions to exceptions to exceptions. In a case in which the family history of B becomes important, a witness is willing to testify that C, a brother of A, told the witness a month ago that B was A's son. C is now dead. The evidence is objected to on the ground of hearsay. That objection is met by the exception as to statements concerning pedigree. Then the further objection is raised that the controversy arose more than a month ago, and so the statement should be ruled out as being post litem motam.

But it is not the purpose of this article to present an outline of the law of evidence, but rather to discuss one of the well known exceptions to the hearsay rule, namely, the exception as to declarations in the course of duty. We do not purpose to enter into the

history of the exception, or to show how it grew up along with the exception concerning account books. These matters are admirably treated by Mr. WIGMORE in his treatise on evidence.[1] This article will be confined to a brief discussion of the exception itself, as it exists today, which necessarily involves a discussion of some alleged extensions of the doctrine, one of which may be explained by the doctrine of refreshing recollection. It has long been established that declarations in the form of written entries, made in the course of duty by a person now deceased, are admissible, assuming such entries are relevant. The cases on this subject hark back to the case of *Price* v. *Earl of Tarrington,*[2] and since that time the decisions are so numerous that only two or three later cases will be cited as typically illustrating the doctrine.[3] The elements of necessity and trustworthiness are sufficiently evident here. It might be said that the death of the declarant is not necessary. Unavailability is the necessary prerequisite, and absence from the jurisdiction, insanity, or even serious illness, may suffice to let in such entries.[4] It is also true in America that the statement must be in writing, and must be contemporaneous with the transaction recorded.[5] Granting the admissibility of such entry, only that portion of it is admissible which it was the duty of the entrant to record, for example, if it were A's duty to record all deliveries of grain to a certain warehouse and such record had to contain the amount delivered and the name of the owner, and A made this entry, "100 Bu. belonging to T. J. delivered by J. S.," the entry would not be admissible after A's death to show that J. S. was present at the time and place of this delivery. The entry may not be used to evidence any collateral matter.[6] Whether or not the absence of an entry may be testified to in this connection, is an interesting query. *State* v. *McCormick,*[7] apparently answers the query in the affirmative.

Thus far, we have not defined the phrase "course of duty." It is not necessary that there be a legal duty on the part of the declarant, but it is sufficient that the entry is made for the benefit of some one other than the declarant, and not simply for the declarant's

[1] Vol. 2, Chap. LI.

[2] 2 Ld. Raym. 873.

[3] Sims v. American Ice Co., 109 Md. 68, 71 Atl. 322; State Bank of Pike v. Brown, 165 N. Y. 216, 59 N. E. 1; Leland v. Cameron, 31 N. Y. 115.

[4] Taylor v. R. Co., 80 Ia. 431, 46 N. W. 64; Bridgewater v. Roxbury, 54 Conn. 213, 6 Atl. 415.

[5] 19 Harv. L. Rev. 301; Poole v. Dieas, 1 Bing. 649.

[6] Smith v. Blakey, L. R., 2 Q. B. 332.

[7] 57 Kan. 440, 46 Pac. 777.

own convenience or amusement. So a record kept by a dentist showing work done for a patient should be admissible after his death, whereas a list kept by a boarding house keeper showing names of all persons who had dined with her, would not go in under this exception.[8] It is hardly necessary to say that the duty of an employee to his employer to keep the employer's books or to keep a record of work done for the employer is sufficient. England clings to the exception in its original form, but it will be seen upon reading the American cases that the courts speak of declarations or entries in the course of business instead of duty. This is the first alleged extension of the general doctrine. By reading the cases on the subject, it will be seen that most of them are really cases of declarations in the course of duty, but there are some American decisions which stand for the alleged extension.[9] Those who argue against the extension say that its recognition means that records kept by a party in his own business and simply for his own convenience are admissible, and that in such case the requisite of trustworthiness is not satisfied, inasmuch as entries by a person in his own business are not so trustworthy as they would be if made by a third person, who owes a duty by virtue of his employment to make them. It cannot be denied that the language of the courts favors the extension, and in the light of the decisions we can hardly hope for a return to the old doctrine.

The second alleged extension of the doctrine, makes it include entries by persons who are living and available. One of the leading cases suggesting this extension is the case of *Shove* v. *Wiley*.[10] There an action was brought against an indorser on a note. An entry in a record book, made by a clerk in a bank where the note was left for collection, to the effect that notice was given to the maker, was admitted after the clerk testified that he always kept an accurate record of such notices. The court said that authentication by the clerk was sufficient to let in the entry. It is submitted that this case, and the others like it, may be explained by the doctrine of refreshing recollection, and that this alleged extension is indefensible. The Massachusetts court seems to recognize the doctrine of refreshing recollection, but restricts the use of memoranda to regular entries made in the course of business. This brings us to a discussion of refreshing recollection.

While it is true that a witness must have some recollecion of the

[8] Cf. Kennedy v. Doyle, 10 Allen 161.

[9] Augusta v. Windsor, 19 Me. 317; Lassone v. Ry., 66 N. H. 345; cf. Queen v. Worth, 4 Q. B. 132.

[10] 18 Pick. 558.

facts to which he is to testify, in order to make any qualified testimonial statement, it is equally true that a witness may have a clearer recollection of some things than of others, depending upon the time of occurrence and various other circumstances.[11] To assist the witness in the recollection of past occurrences, the doctrine of refreshing recollection has long been recognized. There are two methods of refreshing the recollection of a witness:

(1) Though the witness may not have an independent recollection of the facts, yet by consulting a memorandum his recollection may be so refreshed that he can now testify to the facts from an independent present recollection; or,

(2) He may not be able even after consulting the memorandum to testify to the facts, yet he may be able to swear that he made this memorandum of the facts at the time they occurred, or while they were fresh in his mind, and that he knew at the time that the memorandum was correct. In other words, the witness swears to the facts contained in the memorandum after seeing it, because he now knows that he once knew the contents of the memorandum to be true.

Where the first method is used, the witness, in the absence of the statute, may make use of any memorandum without regard to who made it or when it was made. A memorandum so used does not go to the jury, but must be shown to the other side if desired by them, and they on cross examination may show it to the jury.[12]

For refreshing recollection in the second manner, the memorandum must be made contemporaneously with the occurrence of the facts recorded, and the witness must have personal knowledge of its accuracy. A memorandum of this sort must also be shown to the other side, but it may be read to the jury on direct examination. It may be argued that such a procedure is not a case of refreshing the recollection of the witness, but that it is really the memorandum that is testifying. At first blush this argument seems tenable, but upon examination of the cases, no foundation will be found for it. In the early English case of *King* v. *St. Martins*,[13] the memorandum used was not admissible in evidence because of the lack of a stamp, and yet it went to the jury under this second method. In the later American case of *Burbank* v. *Dennis*,[14] a deposition had been taken

[11] See People v. Soap, 127 Cal. 408, 59 Pac. 771.

[12] For cases illustrating these principles, see: Acklens Executor v. Hickman, 63 Ala. 494; Wilber v. Buckingham (Iowa 1911), 132 N. W. 960.

[13] 2 A. & E., 210.

[14] 101 Cal. 90, 35 Pac. 444.

and the witness had failed to sign it as required, yet the stenographer who took down the testimony was allowed to refresh his memory from his notes and testify to the statements of the witness contained in the deposition. These cases go to show that it is the witness who is testifying and not the memorandum. In New York the rule prevails that before the memorandum may be shown or read to the jury, the witness must be asked if he has a present recollection. Under this rule, it becomes quite important to ask this question *first*, where a deposition is being taken.[15] This doctrine prevails in a few other courts, but a majority of the jurisdictions hold the other way. It is submitted that all those cases where entries made by living available persons go to the jury, leaving out of consideration the exception of account books, are cases illustrating this second method of refreshing recollection. The entry doesn't testify at all, but simply goes in as embodying the testimony of the witness.

One of the most interesting questions connected with the exception of declarations in the course of duty arises when the entry is made by one party of something reported by another. The general principle that a person whose statement is received in evidence must speak from personal observation or knowledge has been invoked to exclude entries made under the circumstances just mentioned. If the objections were valid, there would be a gap in the law which would be quite disastrous in view of the modern way in which business is done, for example in the large department stores of our cities. If A reports a sale, either orally or by written memorandum, to B, who records it, and A and B are both called as witnesses, and A testifies that he made a correct report, and B that he made an accurate record, it would seem that there could be no objection to letting in the entry under the second method of refreshing recollection.[16] If B is dead there is no difficulty, since his entry goes in under the general exception of declaration in the course of duty, after A has testified that he made an accurate report. The difficulty comes when A is dead. If his report is in writing, the general exception may cover the case, but if his report to B was oral, it is rather hard to fill the gap, except in England where oral statements in the course of duty are admissible. To allow the entry to go in in other jurisdictions we must say that the fact that B recorded the

[15] For statement of the rule, see: Russell v. R. Co., 17 N. Y. 134; Bank v. Madden, 114 N. Y. 280, 21 N. E. 408.

[16] Mayor v. Ry. Co., 102 N. Y. 572.

statement immediately is sufficient. If A and B were both dead, the difficulty would be no greater, inasmuch as B's entry goes in under the general exception if the sufficiency of A's report is once conceded. Mr. WIGMORE is in favor of admitting such entries where either A or B or both are dead or unavailable. In § 1530 of his treatise, he says:

> "The conclusion is, then, that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so."

His view is supported by considerable authority which is collected in the note of the text.[17] More recent cases seem also to support Mr. WIGMORE's view. In *U. S.* v. *Veneble Const. Co.*,[18] an engineer in charge of government work was called as a witness and records kept in his office giving certain measurements of masonry, etc., which records were transcribed from notes or reports of various subordinates, were used by him to refresh his memory and went to the jury, though the subordinates were not called. In the more recent case of *Pacific Telephone and Telegraph Co.* v. *Huetter*,[19] an action was brought for injury to plaintiff's lines by blasting done by defendant. In order to show the extent of such injury, plaintiff proposed to show the amount of work done in repairing the lines. The plantiff had kept a separate account of the laborers employed in such work. Each man reported his time to the city superintendent's clerk, who entered it on a separate piece of paper from that on which the regular reports were kept, which paper was forwarded to the district superintendent's office, and copied in a separate record. The district superintendent's clerk testified that he had correctly transcribed the reports into the record and the clerk in the city superintendent's office that he correctly recorded the slips given him by the laborers. The record in the district superintendent's office was admitted though the laborers were not called. The

[17] See: Donovan v. B. & M. R. Co., 158 Mass. 450, 33 N. E. 583; West Va. Architects and Builders v. Stewart, 36 L. R. A. (N. S.) 899, Note.

[18] 124 Fed. 267.

[19] (Wash. 1912), 123 Pac. 607.

original slips of the laborers had been destroyed. In giving the decision of the court, FULLERTON, J. says:

> "The original entries were made in the regular course of business from oral reports made by numerous different persons of transactions lying within their knowledge, and the practical inconvenience of producing such persons to testify would outweigh the probable utility of doing so. It is not probable that had these persons been called they could have testified to much more than the record now shows. They could scarcely have remembered after the lapse of time that intervened between the work and the trial the number of times they worked at such repairs or the number of hours they put in at each time they so worked. At most, all they could have said would have been that they performed work in repairing the lines and made truthful reports thereof to the company's officers. But, as we have shown, the record now shows by unquestionable evidence that they did perform such work, and that they made truthful reports thereof will be presumed until at least some evidence is introduced to impeach the presumption, of which there is nothing in this record."

These are sufficient to show that the law is tending toward Mr. WIGMORE'S conclusion. It represents an extension of the doctrine of declarations in the course of duty, and also of the doctrine of refreshing recollection, yet as a matter of expediency, in view of present business methods, the extension is justified, and moreover, the evidence in such cases is just as trustworthy as it would be in case a number of subordinates were called to testify to the accuracy of reports made by them, their recollection of which would, at best, be quite hazy. The inconvenience of bringing in a long string of employees, even if they were available, should have considerable practical weight in determining the matter.

To summarize, it is submitted:

(1) That entries in the course of duty by a person now deceased or unavailable are admissible, assuming relevancy.

(2) That the alleged American extension of the doctrine to declarations in the regular course of business, though somewhat doubtful on principle, is supported by several decisions and many dicta, and seems to be gaining ground.

(3) That the alleged extension to entries by living available persons is not a genuine extension of the general exception, but that

the cases suggesting such extension may be explained under the doctrine of refreshing recollection.

(4) That notwithstanding the requirement that a witness must speak from personal knowledge, yet where a record is regularly kept by a person whose duty is to keep it, though the entries therein may result from the reports of subordinates made orally or in writing, the tendency of modern decisions is that such record should be admissible under the general exception in case the entrant is unavailable, or under the doctrine of refreshing recollection in case he is called as a witness, though the subordinates, because of great inconvenience, are not called.

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