University of Missouri Bulletin Law Series

Volume 15 *June 1917* Article 3

1917

Some Problems in Hearsay and Relevancy in Missouri

E. W. Hinton

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There is no rule better known than that hearsay evidence is generally not admissible. It is equally true, tho not so widely known, that there are a large number of specific exceptions to this general rule of exclusion. Hearsay has been so long under the ban that the profession not uncommonly thinks of it as not being evidence at all, rather than as a kind of evidence generally excluded for reasons of policy connected with the jury trial.

This notion is responsible for a good deal of confusion in dealing with the exceptions under which hearsay is received. Instead of frankly dealing with the problem on the basis of a recognized exception to the hearsay rule, there is a constant tendency to conclude that because certain evidence having all the earmarks of hearsay is actually received, it can not be hearsay, and to distinguish it from hearsay by such phrases as "verbal acts" and *"res gestae."*

Under this confused process courts frequently seem to think that it is sufficient to determine that given matter is hearsay without considering the exceptions, thus unduly limiting the legitimate use of hearsay. In other fields the "verbal act" phrase has been invoked to admit hearsay that can not be classified under any known exception.

It must be remembered that the term *"res gestae"* is used in many different senses, and that to settle that spoken or written words are a part of the *res gestae* does not in the least determine whether we are dealing with hearsay or not. For example, A calls B a liar who promptly knocks him down. These words are relevant and admissible as explaining the cause of the assault. To call them a part of the *res gestae* means no more than that, for there is obviously no question of hearsay involved. We are not trying to prove that B is a liar, but merely what provoked him to make the assault. If in the progress of the fight A should

cry out, "He is choking me," this would also be admitted, and probably with the explanation that it was a part of the *res gestae*. Here the court is admitting hearsay because we are trying to prove that B did choke A by A's unsworn, un-crossexamined assertion to that effect. This hearsay assertion is receivable because there is an exception to the hearsay rule covering that sort of an assertion when made under the conditions supposed. The same confusion is involved in the "verbal act" phrase. The speaking of any words is of course an act, involving mental and physical action—a verbal act. Since all speaking is a verbal act it is not very helpful to use such a term to explain two very different situations, viz., the admission of words where no question of hearsay is involved, and the admission of words amounting to an assertion under some exception to the hearsay rule.

For example, if it were important to prove that A was unfriendly to B, no one would doubt that proof that A professed friendship for B, and at the same time circulated damaging reports about him which he knew to be false, would be good evidence for the purpose. Here no problem of hearsay is involved. We are not taking A's assertions as true, but are arguing from the falsity and inconsistency to the probable motives or feelings which prompted them. If, however, A used words which amounted to an assertion of his hate for B, we are immediately confronted with the hearsay rule, and hence must find an appropriate exception. Nothing but confusion is gained to call this a verbal act, for that will not help to differentiate this particular piece of hearsay from the general mass of inadmissible hearsay.

Another source of confusion is the frequent failure to separate certain problems of relevancy from the hearsay rule and its exceptions. To illustrate: a party may seek to prove fact X as tending to establish fact Y, and may offer to prove X by hearsay claimed to come under a well settled exception. Here are two distinct questions: is X sufficiently relevant to Y to be proved at all, and if so, is the offered hearsay a permissible means of proving X? Yet it is not uncommon to find these two questions discussed to the confusion of both, as if the question were simply whether hearsay was admissible to prove Y.

With this brief introduction it is now proposed to consider the somewhat confused and inconsistent treatment of three very similar problems in hearsay and relevancy by the Supreme Court of Missouri: first, on the issue of self-defense, the proof of threats by the deceased as tending to show that he was the aggressor; second, the proof of threats of suicide by the deceased as tending to disprove the charge of murder; third, the proof of threats by a third person as tending to show that such person committed the crime rather than the defendant.

The argument involved in each situation is the same, namely: A threatened to assault B, and therefore he probably intended to do so. A fight took place between A and B, and therefore it is probable that A was carrying out his intention. S threatened to kill himself, and therefore he probably intended to do so. S died from wounds which he might have inflicted himself, and therefore it is probable that he carried out his intention. T threatened to burn J's house, and therefore he probably intended to do so; the house was burned when T might have done it, and therefore it is probable that he carried out his intention.

Is such an argument permissible in a court of law? It cannot be claimed that the known intention of X to bring a given result to pass, whether innocent or harmful, would be a sufficient basis *per se* for a conclusion that he carried out his intention. Experience shows no such uniform connection between intention and conduct. But in connection with other facts, such as opportunity and ability to produce the result, intention becomes an important factor in determining the author.

As applied to a defendant, it was never doubted that intention was a relevant and important fact, in determining whether he did a given act. And if a defendant's intention is relevant as bearing on his probable conduct, the intention of a third person under similar conditions must be equally relevant as bearing on his probable conduct, unless we are to have one system of logic for a defendant, and a totally different one for third persons. In order to argue that either a defendant or a third person was probably carrying out his intention, such intention must, of course, have existed at the time of the act sought to be established. Normally

this is impossible to prove directly; from the nature of a situation we can only argue that a known prior intention continued to the time in question. Within what limits this is permissible can not be defined, because no two cases are precisely alike. An intention to commit a simple assault and battery because of some slight provocation might not continue an hour; an intention to kill another because of a real or fancied grievance might well continue for months. As against defendants the original rule appeared to be that the intention must be shown to have existed close enough in point of time to warrant a reasonable inference of continuance under all the circumstances. Certainly no stricter rule should be applied to the case of a third party. And in fact there is a good deal to be said in favor of applying a more liberal time rule in the latter case. In a criminal case a very high degree of certainty is necessary to convict, and therefore prior intention may well be excluded unless close enough in point of time under the circumstances to raise a strong probability of continuance.

A defendant is entitled to an acquittal if there is a reasonable doubt of guilt, and hence proof tending to show the commission of the act by a third person might well be sufficient to raise a reasonable doubt, tho it would not have been sufficient to convict such third person if he had been on trial. This view does not appear to have been discussed in any of the cases, and in some of them, because of a confused treatment of the *res gestae* notion, a stricter rule seems to have been applied to the intention of a third person, *e. g. Foster* v. *Shepard.*[1]

Assuming that the prior intention may be shown, there is no difficulty about the means of proof in the case of a defendant; because it is universally recognized that whatever he may have said, whether circumstantially evidencing his intention, or directly asserting it, is receivable as an admission. In the case of a third person, declarations of intention are of course hearsay, i. e. unsworn, un-crossexamined assertions of a fact (intention) used to prove the existence of the fact asserted, and must therefore come in under some exception to the hearsay rule, if they are to be admitted. The *res gestae* phrase has been most frequently

1. (1913) 258 Ill. 164.

invoked to the utter confusion of the subject, because it suggests declarations connected with, and accompanying an act, so as to be a part of the thing done.[2]

In fact there is a much broader exception which ought to be well understood at this time, and that is that whenever a state of mind is a relevant fact, contemporaneous assertions of such state of mind are receivable to prove it. In *Doe* v. *Palmer*,[3] the rule as applied to the intention of a testator was thus stated by Lord Chief Justice Campbell: "In all cases where there is any imputation of fraud in the making of the will, the declarations of the testator are admitted respecting his dislike or affection for his relations, or those who appear in the will to be the objects of his bounty, and respecting his intentions either to benefit them or to pass them by in the disposition of his property."

And in *Sugden* v. *St. Leonards*,[4] also a will case involving the intention of the testator as a relevant fact, Lord Justice Mellish thus stated the rule and the reason: "Whenever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which we can find out what his intentions were."

In the United States the exception was most clearly recognized by the Supreme Court of the United States in *Mutual Life Insurance Company* v. *Hillmon*.[5] The issue was as to the identity of a dead body; a man had been killed in an accident; the plaintiff claimed that the dead man was the insured, Hillmon; the defendant claimed that the dead man was one Walter, a stranger; in connection with other evidence tending to identify Walter as the dead man, the defendant, in order to show the probability of Walter's being present at the time, offered letters written by him several weeks before expressing his intention of going to that part of the country with Hillmon. The letters were rejected by the trial judge on the hearsay objection. In holding that the

2. For an extreme application of this notion, see *Greenacre* v. *Filby* (Ill. 1916) 114 N. E. 536.
3. (1851) 16 Q. B. 747.
4. (1876) 1 Prob. Div. 154.
5. (1892) 145 U. S. 285.

letters should have been admitted, Mr. Justice Gray said: "But upon another ground suggested they (the letters) should have been admitted. A man's state of mind or feelings can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written. The nature of the fact is the same, and evidence of its proper tokens is equally competent to prove it, whether expressd by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with the act must be shown, in order to warrant the admission of declarations of intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party. The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be. Afer his death there can hardly be any other way of proving it."

On this basis, the three situations considered, declarations of intention by the deceased to attack the defendant, declarations of intention by the deceased to commit suicide and declarations of intention by a third person to commit the crime in question, should be governed by exactly the same rule. In each case the declarations of intention are receivable under an exception to the hearsay rule to prove the intention then asserted. But if the intention at the time of the declaration is too remote or otherwise not relevant, then such declarations are excluded, not because of the hearsay rule, but because the thing they tend to prove, *i. e.* intention at that time, is not to be proved at all.

Turning to the decisions in Missouri, it appears that the question of uncommunicated threats came up in the early case of *McMillen* v. *State*.[6] An offer was made to show a recent threat by the deceased to shoot the defendant. In approving the rejection of this evidence, Judge Napton said: "As Jackson Logsdon" (the deceased) "was not a party to the prosecution, what he said is no more than the hearsay of any other man, and was therefore upon

6. (1850) 13 Mo. 30.

general principles inadmissible. Had his declarations been *in articulo mortis* or a part of the *res gestae,* they would have come within the exception to the general rule.....The bill of exceptions does not show when the declarations were made. Recently is a word of indefinite character." The *res gestae* time limit applicable to declarations of things made under the stress of an exciting event, etc. is here misapplied to declarations of intention.

The same notion can be traced in the next case of *State* v. *Jackson.*[7] There the threat was properly excluded because, according to the defendant's own version of the difficulty, the deceased was not attempting to carry out his threats, and there was no question of self-defense, but the Supreme Court announced the strange doctrine that threats were not admissible if sufficient time had elapsed for the blood to cool. As no such limitation has ever been suggested in case of threats by the defendant, the court was evidently influenced by this notion of *res gestae*—declarations accompanying an act. In *State* v. *Hays,*[8] the offer was to prove communicated threats, but the opinion fails to distinguish the situation, and again puts undue stress on the time element, nearness to this difficulty.

The question came up again in *State* v. *Sloan,*[9] where the offer was to show repeated threats down to the day of the difficulty. The Supreme Court held that they should have been admitted, saying: "The threats were continuous and frequent; they were all blended and inseparable; and the last threat, when the deceased had his revolver with him, showing an ability to carry out and accomplish his purpose, went to form a part of the *res gestae,* and must be considered as of the same transaction. They were therefore all admissible.....to show whether the defendant acted in necessary self-defense." Here the court thought that the connection was sufficient to bring them within the elastic *res gestae* doctrine.

7. (1853) 17 Mo. 544.
8. (1856) 23 Mo. 287.
9. (1871) 47 Mo. 604.

When the question came up again in *State* v. *Elkins,*[10] the time element was put on the proper basis. Judge Wagner there said: "When threats by the person killed should be admitted in evidence or rejected is a question involved in a great deal of doubt and uncertainty. If they have been made a long time antecedent to the commission of the act, they may be not only valueless, but entirely inadmissible. The relations of the parties may have since entirely changed, and in the intervening time the person making them may have wholly abandoned any previously conceived intention of harming the person against whom they were uttered.....Their relevancy, admission or rejection depends materially upon the circumstances surrounding each particular case." Here appears to be a tacit recognition that there is an exception to the hearsay rule, distinct from any doctrine of *res gestae,* under which threats are admissible to prove intention at the time of making such threats, and clearly that the relevancy of such prior intention as tending to show that the deceased was the aggressor depends upon the time and circumstances from which it may fairly be inferred that such intention continued.

The later cases add nothing to the Elkins case which may be taken as settling the rule. But in the case of *State* v. *Wright,*[11] approved in *State* v. *Porter,*[12] it was ruled that in case of threats *by the defendant,* remoteness does not affect the competency, but goes only to the weight of the evidence. This would seem to go too far against a defendant, and in any event the rule ought not to be more liberal than in case of threats by the deceased. This last proposition appears to be conceded by the opinion in *State* v. *Wilson.*[13]

The question of the admissibility of threats of suicide appears to have arisen for the first time in *State* v. *Punshon.*[14] The defendant was tried for the murder of his wife by shooting. The claim of the defence was that she killed herself, and the defendant so testified. The parties had quarrelled and were alone in a car-

10. (1876) 63 Mo. 159.
11. (1897) 141 Mo. 333, 42 S. W. 934.
12. (1908) 213 Mo. 43, 111 S. W. 529.
13. (1913) 250 Mo. 323, 157 S. W. 313.
14. (1894) 124 Mo. 448, 27 S. W. 1111.

riage at the time. The circumstances were strongly against the defendant, and yet if the jury had believed that Mrs. Punshon really intended suicide, they might in view of that fact have credited Punshon's story, or at least have had serious doubts of his guilt. The defendant offered evidence of repeated threats of suicide because of their marital difficulties. This offer was excluded, and the defendant convicted. On appeal, Judge Burgess approved the ruling, saying: "The statements of the wife were not part of the *res gestae* as exclamations of pain, nor were they in respect to her health, and were properly excluded; and so were her statements that she intended to kill herself, for the same reason. She was not a party to the prosecution and the state was not bound by anything she may have said."[15] It is interesting to see the exploded McMillen case invoked to sustain the ruling, without noticing the long line of cases overruling it through the last forty years. The Punshon case was reversed on other grounds, and on the second appeal the decision on this point was adhered to without comment.[16].

In *State* v. *Fitzgerald*,[17] the defendant testified that the deceased shot herself, and the trial court *admitted* threats of suicide. Hence on the defendant's appeal this question was not before the court, but the same judge took occasion to review a number of cases, and concluded: "Such statements are only admissible in a criminal case when part of the *res gestae*, or when they are admissible as dying declarations. This we think not only supported by the decided weight of authority, but by reason as well."[18] Curiously enough the court entirely overlooked the cases of threats by the deceased, which ought to have settled the rule for this situation.

In *State* v. *Bauerle*,[19] the Punshon and Fitzgerald cases were followed without discussion, tho again the overruled McMillen case was cited. Finally in *State* v. *Ilgenfritz*,[20] the question was again examined by Commissioner Williams and the correct con-

15. Citing, *McMillen* v. *State* (1850)13 Mo. 30.
16. *State* v. *Punshon* (1896) 133 Mo. 44, 34 S. W. 25.
17. (1895) 130 Mo. 407, 32 S. W. 1113.
18. Citing, *State* v. *Punshon* (1894) 124 Mo. 448, 27 S. W. 1111.
19. (1898) 145 Mo. 1, 46 S. W. 609.
20. (1914) 263 Mo. 615, 173 S. W. 1041.

clusion reached that threats of suicide should have been admitted, thus reaching the same result that had been worked out at least fifty years earlier in the first class of cases. It is unfortunate, however, that the learned Commissioner should have undertaken to distinguish such threats from hearsay by calling them "verbal acts." If the term "verbal acts" must be retained, it ought to be limited to cases which do not involve a hearsay use of words, where the words do not amount to an assertion of the fact to be established, but furnish only circumstantial evidence of it. For example, on the issue of sanity the assertion by the alleged lunatic that he was the Emperor Napoleon would be merely circumstantial evidence of a disordered mind. Certain profane expletives might in like manner evidence annoyance or temper. And so certain false assertions might circumstantially evidence a particular intention. Such things might be called verbal acts to distinguish them from hearsay. But confusion is bound to result from a failure to recognize that declarations of intention or of any other mental state, are hearsay, but nevertheless admissible as an exception because of necessity.

The question of threats by a third person to commit the act with which the defendant is charged does not appear to have come before the Supreme Court until the case of *State* v. *Crawford*.[21] At the trial of the defendant on a charge of arson, evidence of threats by a third person against the property of the prosecuting witness was offered and excluded. From the brief report it is impossible to tell what sort of threats were proposed to be proved, or when they were made, or whether there was any other evidence to connect such person with the offense. The Supreme Court approved the ruling below on the ground that such threats were *res inter alios*, and had no bearing on the guilt of the accused. It is therefore impossible to say what this case stands for.

The same question arose again in *State* v. *Taylor*.[22] The defendant was charged with burglary in breaking and entering a country store early in the morning; his claim was that he found

21. (1889) 99 Mo. 74, 12 S. W. 354.
22. (1896) 136 Mo. 66, 37 S. W. 907.

the door open and went in expecting to find some one in charge. Evidence of threats by a third person was excluded. Judge Sherwood approved the ruling, saying: "The offer of defendant to prove that Jim Baker, the blacksmith, had made a key which would fit and unlock the store in question, and that he intended to burglarize it, was properly rejected. Mere threats by third persons to commit the crime charged against the accused, or the confessions of such persons in open court that they committed the crime, is wholly inadmissible in defense of the party on trial, because such matters are purely hearsay." The court added that if some overt act on the part of Baker had been proved, or if he had been shown to have been in the immediate vicinity at the time, a different ruling might have been proper. The reason given by the court that the threats were hearsay, while true in fact, furnished no objection in law, because of the exception for declarations of intention. They are not to be classed, as the court did, with subsequent confessions which are narratives of past transactions, and for which there is no hearsay exception. If the threats were properly excluded, it was not because they were hearsay, but because there were not sufficient other facts to warrant any inference that Baker had broken into the store.

On the latter proposition it would seem that enough had been shown to admit the threats, because it surely can not be necessary to make such a showing as would convict the third person—a less degree of certainty than that might properly raise a reasonable doubt of the defendant's guilt. The question arose a third time in *State* v. *Barrington*.[23] The defendant was convicted of murder on strong circumstantial evidence. His own account of the affair was that he accompanied the deceased out into the country at night to meet some strangers on business; that a dispute arose and these strangers shot the deceased. Defendant offered to prove that deceased was engaged in a swindling business in which he made a number of enemies who had threatened him with violence. This evidence was excluded. The Supreme Court affirmed the ruling, without any particular discussion, on the authority of the Crawford case and the Taylor case, quoting the fore-

23. (1906) 198 Mo. 23, 95 S. W. 235.

going excerpts from the two opinions. The court also cited a case from West Virginia,[24] and one from Wisconsin,[25] in each of which it was broadly announced that threats by third persons were not admissible because they had no bearing on the guilt or innocence of the accused.

The Barrington case therefore leaves the question in confusion. The same reason that excepts threats of the deceased from the hearsay rule on the question of self-defense or suicide, is equally applicable to threats by a third person. Such a state of facts as would make the prior intention of the defendant to commit the act a relevant fact, must equally make the intention of a third person relevant.

The Barrington case may possibly be supported on the ground that there was no evidence to connect the threats offered to be proved with the strangers who were claimed to have done the shooting, tho it is certainly arguable that the fact that some unknown person had a grudge against the deceased and the intention of injuring him would tend to corroborate the defendant's testimony as to the attack of strangers.

The author is not aware of any later case in this state dealing with this question. Hence the problem of threats by third persons remains to be settled, when the question arises, on the reason and analogies furnished by other cases of declarations of intention.

University of Chicago Law School E. W. HINTON[26]

24. *Crookham* v. *State* (1871) 5 W. Va. 510.
25. *Buel* v. *State* (1899) 104 Wis. 132.
26. Formerly Professor of Law, and Dean of the School of Law, University of Missouri.