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Admissibility in California of Declarations of Physical or Mental Condition

(CONCLUDED)

XI

The cases heretofore discussed involving the admissibility of declarations of mental condition to prove intent at a particular time, for example, whether there was an intent upon *A's* part to divest himself of title to Blackacre when he handed a deed to *B*, or to *C* for *B*, are different from those presently to be considered. Intent is a fact of major importance in the gift cases and declarations of intent before and after the physical acts are admissible to prove the intent at the time of the acts when it is essential to know what the intent was. Intent before or after a physical act is relevant to determine the intent at the time the physical act was done. Assuming the idea that mental condition or intent is almost necessarily to be found from words uttered, is a sound one, and that reasonable necessity justifies a departure from the rule forbidding the use of Hearsay, also that intent is a continuing thing, the decisions are sound which hold that declarations as to present intent are admissible to prove past or future intent. The decisions in California, and elsewhere, however, do not stop with those cases where intent is an operative fact, and Hearsay is admitted to prove intent only, but go farther and permit the introduction of declarations of intent to prove the happening of a future act. The famous *Hillmon* case,⁷¹ which was in various courts for more than twenty years, is the leading case wherein it was held declarations of intent to do an act are admissible to prove that the act thereafter was done. The following brief statement of the case may be useful in the discussion that follows. That was an action on a policy of insurance upon the life of one Hillmon in which his wife, the plaintiff, was named the beneficiary. Plaintiff claimed her husband had died during the continuance of the policy on March 17, 1879, at Crooked Creek, and gave notice to the insurance company. The company denied the death of Hillmon and further alleged a conspiracy upon the part of Hillmon and one *B* to defraud the company; that they had falsely represented that a dead body they had procured was Hillmon's, that the body was not Hillmon's, but that of another, and that Hillmon was alive and in hiding. There was evidence tending to show that the body was Hillmon's and evidence that it was the body of one Walters. To sustain the claim that the body was Walters, defendant company offered in evidence let-

⁷¹ *Mutual Life Insurance Co. v. Hillmon* (1892) 145 U. S. 285, 12 Sup. Ct. 909.

ters written by Walters about the 4th or 5th of March, 1879, from Wichita, Kansas, to his sister, and to his fiance, stating, in substance, that he was shortly going with Hillmon, a sheep trader, to "Colorado or parts unknown to me." There was evidence that Walters had left home, and his betrothed, in Iowa in March, 1878, was afterwards in Kansas until March, 1879, that during this time he had regularly written letters to his family and his betrothed; that he wrote letters to his sister and betrothed postmarked at Wichita early in March, 1879, and that he had not been heard from since that time. There also was evidence that Hillmon and one B left Wichita about March 5, 1879, traveled together through Kansas in search of a site for a cattle ranch and that on the night of March 18, 1879, while they were in camp at Crooked Creek, Hillmon was accidentally killed and his body buried there. The Supreme Court of the United States held error was committed by the trial court in refusing to admit Walters' letters. In an opinion, by Mr. Justice Gray, it was held the letters were admissible to prove that Walters went away from Wichita with Hillmon. This case has become a leading one and is often cited for rulings that declarations of intent, plan or design are admissible to prove that the intent, plan or design was actually carried out;⁷² in other words, that declarations of intent are admissible to prove the happening of a future act.⁷³

That the principle announced in the *Hillmon* case is far-reaching and different from the rule that declarations of intent are admissible to show intent at the time the declaration is made cannot successfully be disputed.⁷⁴ A declaration by A that he did this or that is inadmissible, because it is Hearsay, when it is offered to prove the fact that A did what he said he did.⁷⁵ A declaration, however, by A that he intended to do this, or that, is regarded as admissible Hearsay to prove that A later actually did the thing he said he intended to do.⁷⁶

⁷² WIGMORE, EVIDENCE (2d ed. 1923) §1725, note 1.

⁷³ Chafee, *The Progress of the Law, 1919-1922—Evidence* (1922) 35 HARV. L. REV. 444.

⁷⁴ (1924) 37 HARV. L. REV. 513, 519, a review of WIGMORE ON EVIDENCE (2d ed. 1923) by Zechariah Chafee, Jr. See also Maguire, *The Hillmon Case—Thirty-three Years After* (1925) 38 HARV. L. REV. 711, incorporating an extract from the notes on evidence by Ezra Riply Thayer, who was secretary to Mr. Justice Gray at the time he wrote the opinion in the *Hillmon* case. The precedent chiefly relied upon by Mr. Justice Gray in the *Hillmon* case was *Insurance Co. v. Moseley* (1869) 75 U. S. (8 Wall.) 397, wherein the declarations held admissible were declarations of existing pain, and spontaneous declarations as to the cause of a fatal accident.

⁷⁵ *Fischer v. Bergeson* (1874) 49 Cal. 294. *Rulofson v. Billings* (1903) 140 Cal. 452, 74 Pac. 35.

⁷⁶ The *Hillmon* case goes much further and holds that the declarations are admissible to prove that the declarant, and another, in the future, did an act.

Professor Wigmore accepted the *Hillmon* case as sound and approved the principle therein announced.⁷⁷ He states that it is proper to show a plan or design in order to show whether an act was or was not done, and that when it is sought to prove a plan or design by declarations the question arises whether the declarations are Hearsay, which is a question separate and apart from the question of relevancy.⁷⁸ He concludes that the declarations are admissible Hearsay under the rule admitting declarations to show condition of mind, and that the only limitation to the use of such declaration is that the declarations must be of a present existing state of mind and made under circumstances that are not open to suspicion.⁷⁹ This explanation is perhaps too simple. When Hearsay is held admissible there should exist a special reason making that particular type of Hearsay admissible. It should be either necessary or reasonably trustworthy evidence or both. The reason why a declaration of *A* that he intends to go from Wichita to Colorado is more trustworthy than a declaration by *A* that he went from Wichita to Colorado is not altogether clear, and the question whether *A* actually went, as for example, the question in the *Hillmon* case, is not a question that creates a fair necessity for the admission of Hearsay evidence. Further the Hearsay is not especially trustworthy. Hearsay evidence is, of course, often relevant. Its vice does not lie in the fact that it is irrelevant but in the fact that it is offered as proof of the truth of what was said, when the declarant was not under oath, and where there is no opportunity to cross-examine him. Telling criticism has been made of the extension of admissible Hearsay sanctioned by the *Hillmon* case in an interesting article by Eustace Seligman. Mr. Seligman is of the opinion that this type of Hearsay evidence should not be admitted,⁸⁰ and sees no real

The declarations were received to prove that Walters left Wichita for Colorado and left with Hillmon. It seems that the rule of the *Hillmon* case might very well be limited. The probabilities that Walters did what he said he intended to do were much greater than the probabilities that Hillmon joined Walters in doing what Walters said he and Hillmon intended to do. This phase of the testimony in the *Hillmon* case, if noticed, was not stressed by the learned Justice. See *State v. Farnam* (1916) 82 Ore. 211, 161 Pac. 417, Ann. Cas. 1918A 318, commented upon in Note (1917) 26 YALE L. J. 798 for a case wherein it was held the declarations should be received for the purpose of proving what the declarant intended to do but that they are not admissible to prove what the other person intended to do.

⁷⁷ WIGMORE, EVIDENCE (1st ed. 1904) §1725; WIGMORE, EVIDENCE (2d ed. 1923) §1725.

⁷⁸ WIGMORE, EVIDENCE (2d ed. 1923) §102.

⁷⁹ WIGMORE, EVIDENCE (2d ed. 1923) §1725.

⁸⁰ Seligman, *An Exception to The Hearsay Rule* (1912) 26 HARV. L. REV. 146. Mr. Seligman distinguishes the cases holding that declarations of state of mind before an act are admissible to show state of mind thereafter. He states that "at first sight" it is apparently no step at all from the rule of those cases to the conclusion that declarations of state of mind at one time are admissible to prove that a

difference between declarations of intent when offered to prove a future act, and declarations of memory or belief that an act has happened, to prove a past act. If declarations of belief or memory should be received to prove a past act, there would be not much left of the Hearsay rule, and generally the courts hold that such declarations are inadmissible Hearsay.⁸¹

The strongest arguments for the admissibility of declarations of intent to prove the happening of a future act are that its admission leads to more good than evil, and that often there exists a practical necessity for resorting to this type of evidence.⁸² When declarations of intention are admitted to prove a future act there is obviously a risk that the declarant was not telling the truth, and also that he did not carry out his intention. The admission of declarations of memory that a past act was done introduces the risk that the declarant's memory was faulty in addition to the risk that he was not telling the truth.⁸³ It

physical act was done later. He states that there are two reasons why this is a big step, a step that should not be taken, first, because the courts are practically forced to use Hearsay when mental state is an essential issue in the case, something that must be determined, second, because the fact to be proved is "an external act," and intention is only one way to prove it, and a weak way. He states that the above reasons are negative but that the affirmative reasoning is stronger; that if this evidence is admissible then logically all Hearsay would be admissible. He sees no sound reason for distinguishing between declarations of intent to prove a future act, and declarations of memory or present belief as to a past act, to prove a past act. He argues that the cases are substantially alike and that support is difficult to find for the proposition that present intent to do an act is more trustworthy, in determining whether an act was done, than present belief or memory that an act was done in the past.

The second edition of Professor Wigmore's excellent work on Evidence which appeared after Mr. Seligman's article does not cite it.

⁸¹ WIGMORE, EVIDENCE (2d ed. 1923) §1722, and cases cited. As Professor Chafee has cleverly said "The trouble is, that this gets much hearsay in by the back door." Chafee, *The Progress of the Law, 1919-1922—Evidence* (1922) 35 HARV. L. REV. 445. The rule of the Hillmon case lets in much Hearsay by the front door. Possibly the trouble is we often find ourselves in a predicament in cases where Hearsay is needed and generalizations are made that are too broad. The traditional "exceptions" to the Hearsay rule may be too narrow.

See also Thayer, *Observations on The Law of Evidence* (1915) 13 MICH. L. REV. 365. For the English cases see PHIPSON, THE LAW OF EVIDENCE (6th ed. 1921) 64.

⁸² See Maguire, *The Hillmon Case—Thirty-three Years After* (1925) 38 HARV. L. REV. 709. This article is not only a critical study of the Hillmon case but it also discusses other interesting decisions of the same type.

⁸³ See Professor Maguire's analysis on this point, Maguire, *The Hillmon Case—Thirty-three Years After* (1925) 38 HARV. L. REV. 709, 721.

But see Hutchins and Sleisinger, *Some Observations On The Law of Evidence—State Of Mind To Prove An Act* (1929) 38 YALE L. J. 283, wherein the question is approached from the standpoint of modern knowledge of psychology. The conclusion, seemingly, is that declarations of memory to prove a past act may in general be more reliable than declarations of intention or state of mind to prove a future act.

should not be forgotten that there is no opportunity for cross-examination of the declarant to test whether he is telling the truth or whether his memory is accurate. From these observations, that briefly have been made, the suggestion is risked that there are weighty reasons why declarations of intent should not be received to show that a future act⁸⁴ was done by another; and that declarations generally should not be admitted to prove that the declarant did the thing he said he would do unless there are corroborating circumstances, and then only where the declarant is dead or unavailable, and hence cannot be put upon the witness stand. With these limitations the admissibility of declarations of present state of mind to prove a future act would rest upon a fairly firm basis. Thus limited, declarations of intent to prove a future act should be admissible; without these limitations they should be excluded. The limitation that the declarant be not available as a witness was not made in the *Hillmon* case, and is not generally made a requisite for the admissibility of declarations to prove present physical condition, or present state of mind or intent, or present intent to prove a future act.⁸⁵ In some cases where declarations of state of mind to prove a future act were held admissible the declarant was not available, in others he was. Though the declarant was not available in the *Hillmon* case⁸⁶ the admissibility of the Hearsay was not put upon this ground. Perhaps the fact that Walters was not available had some influence with the court in causing it to reach the conclusion reached. Though there were circumstances in the *Hillmon* case that corroborated the declarations of Walters, the admissibility of the declarations was not put upon that ground. Perhaps, also, the result was a little easier to reach because of the corroborating circumstances. No one knows as to these things. Actual cases of great importance to the litigants concerned and others, no doubt are the cases that most frequently produce changes of the so-called settled rules of substantive and procedural law. Our generalizations are always, or nearly always, either too broad or too narrow. Mr. Justice Holmes has very aptly said, speaking upon the dangers of over-generalization: "A generalization is empty so far as it is general. Its value depends on the number of particulars which it calls up to the speaker and the hearer. Hence the futility of arguments

⁸⁴ Seemingly Professor Maguire approves of this limitation. Maguire, *The Hillmon Case—Thirty-three Years After* (1925) 38 HARV. L. REV. 715, 717.

⁸⁵ *People v. Barker* (1904) 144 Cal. 705, 78 Pac. 266; *McNamara's Estate* (1919) 181 Cal. 82, 183 Pac. 552, 7 A. L. R. 313; WIGMORE, EVIDENCE (2d ed. 1923) §1725, and cases cited.

⁸⁶ It is stated by Hutchins and Sleisinger, *Some Observations On The Law of Evidence—State of Mind to Prove an Act* (1929) 38 YALE L. J. 288, that in all the cases cited by Mr. Justice Gray in the opinion in the *Hillmon* case the declarant was dead. Walters was either dead or his whereabouts unknown.

on economic questions by one whose memory is not stored with economic facts."⁸⁷ While we can to some extent work out rules of law in advance of actual problems, and do so to much good purpose, seemingly, confrontation with actual situations is needed to correct our generalizations, to narrow or broaden them as the case may be. The *Hillmon* case, and what it has been interpreted to hold, may have gone too far. Looking back upon it, and the cases in other jurisdictions that have followed it, the conclusion is suggested that it should be limited, and that properly limited, as just stated, a new rule of admissible Hearsay safely may be made that will prove highly useful.⁸⁸

XII

That the rule of the *Hillmon* case, namely, that declarations of intent are admissible to prove a future act, has been generally followed in the United States is not to be doubted.⁸⁹ The *Hillmon* case has had a notable influence upon the judiciary of this state, and there are a good many California decisions in which the rule has been announced,

⁸⁷ *Law in Science and Science in Law*, an address delivered by Mr. Justice Holmes before the New York State Bar Association in 1899 (1899) 12 HARV. L. REV. 443, 461.

⁸⁸ A statute in Massachusetts (MASS. GEN. LAWS (1921) c. 233, §65) while not covering this precise type of declaration contains the idea that the death or unavailability of a witness furnishes a basis for admissible Hearsay. It reads as follows:

"A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."

For interesting comments upon this statute and the admission of the declarations of deceased and insane persons see THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM (1927) 39. This book is a report of a learned committee sponsored by the Commonwealth Fund.

⁸⁹ WIGMORE, EVIDENCE (2d ed. 1923) §1725. Chafee, *The Progress of the Law, 1919-1921 — Evidence* (1922) 35 HARV. L. REV. 302, 444.

The case, however, did not win the approval of the Illinois Supreme Court. See Nordgren v. People (1904) 211 Ill. 425, 71 N. E. 1042, commented upon by Professor Wigmore in Note (1913) 8 ILL. L. REV. 203.

See Greenacre v. Filby (1916) 276 Ill. 294, 114 N. E. 536, L. R. A. 1918A 234, also commented upon by Professor Wigmore in Note (1917) 11 ILL. L. REV. 573. This is an interesting case. The action was for wrongful death alleged to have been caused by defendant selling liquor to G which intoxicated him and caused him to be killed by a train. Defendant's defense was that G committed suicide. The trial court admitted G's declaration made about 9 o'clock the evening he was killed—he was killed about 11:52 P.M.—while standing in front of a jewelry store winding his watch, and comparing it with a clock there, "I am going home, kiss my wife and the baby good-night and go to bed." G went home but left the house about 10 o'clock and was not again seen alive. The trial court excluded several declarations by G made shortly before his death that indicated he intended to commit suicide. The judgment below for plaintiff was affirmed. The court seemingly thought the vital factor in determining whether such declarations were admissible was whether they accompanied some physical act, a factor of no importance in declarations of this type.

and applied, that declarations of plan, intent or design are admissible to prove a future act. There are, for instance, many decisions holding that uncommunicated threats of the deceased, in a criminal prosecution for homicide, are admissible to show that the deceased was the aggressor.⁹⁰ Seemingly they are only held admissible when there is some evidence of self-defense.⁹¹ Some of the cases place the admissibility of the declarations upon the ground that they were part of the *res gestae*.⁹² The phrase is utterly meaningless when used as a basis for determining whether a declaration of intent should be admitted to prove a future act.⁹³ When uncommunicated threats of deceased are admitted, to

⁹⁰ *People v. Arnold* (1860) 15 Cal. 476; *People v. Scroggins* (1869) 37 Cal. 676; *People v. Alivtre* (1880) 55 Cal. 263; *People v. Travis* (1880) 56 Cal. 251; *People v. Thomson* (1891) 92 Cal. 506, 28 Pac. 589; *People v. Lamar* (1906) 148 Cal. 564, 83 Pac. 993; *People v. McGann* (1924) 194 Cal. 688, 230 Pac. 169; *People v. Spraic* (1927) 87 Cal. App. 724, 262 Pac. 795.

⁹¹ *People v. Scroggins* (1869) 37 Cal. 676; *People v. Gonzales* (1917) 33 Cal. App. 340, 164 Pac. 1131; *People v. Spraic* (1927) 87 Cal. App. 724, 262 Pac. 795.

⁹² *People v. Arnold* (1860) 15 Cal. 476. This was a prosecution for homicide where the defense was self-defense. There was some evidence that deceased was the aggressor. The trial court excluded testimony of a witness offered by defendant who was asked what deceased said when he borrowed a pistol shortly before the killing. The ruling at the trial was made because there was no evidence that the threat was communicated. The Supreme Court reversed the conviction holding the ruling was error. The opinion by Baldwin, J., in the main excellent, is marred somewhat by the statement that "This declaration, being made at the time of procuring the weapon, was a part of the *res gestae* and illustrative of the transaction." The following from Mr. Justice Baldwin's opinion furnishes much more light on the question:

"This leads us to the inquiry, whether the fact that A procures a weapon for a particular purpose conduces at all to show, in a question of conflicting proofs as to the manner in which he used it, what the manner was. We apprehend that if a man goes into a house, borrows a gun, goes out with it, saying that he means to use it on another, and a rencontre happens between him and that other, and the witnesses who see the difficulty differ, or the circumstances are equivocal as to which one of the two commences the affray, that some light might be thrown upon this question conducing to or towards its solution, by the proof of these facts as to A's procuring it and his motives in doing so. The jury might possibly, with some reason, conclude that as the weapon was procured for this purpose of assault on another, that purpose was fulfilled; that the assault, in other words, was made in pursuance of the intended purpose when the weapon was procured, and especially if other facts in corroboration of the conclusion existed." (15 Cal. at 482.)

⁹³ For instance in *People v. Arnold*, *supra* note 92, what additional value is to be found in the statement because made when deceased borrowed the revolver? He might have made the statement when cleaning it, when buying ammunition for it, when looking for it in his house, etc., or he might have threatened to kill the defendant when putting on his coat, when about to leave his home, when getting in his car at his house to go where defendant lived, when reading a newspaper while sitting on the porch, or while wiping his brow with his handkerchief, or while sitting on his porch in quiet mood gazing into space. We are not concerned with what he was doing when he threatened to kill. What one was doing is of no importance. Did he threaten is the important question.

support other testimony that deceased was the aggressor, it is improper for the trial judge to so limit the jury in their use that they may only be considered for the purpose of determining hostility or non-hostility of the declarant at the time the declaration was made.⁹⁴

The question has arisen in California, and elsewhere, whether the state may introduce a declaration of the deceased that he did not intend to assault or kill the defendant. The ruling in California seems to be that the state may not prove in the first instance that the deceased said he did not intend to have an encounter with defendant; that such a declaration may be introduced only to rebut defendant's evidence of threats.⁹⁵ In a prosecution for homicide where the defense is self-defense, and there is some evidence that deceased was not the aggressor, no sound reason is seen why the state should not be permitted to introduce a declaration of the deceased that he did not intend to assault or kill the defendant. The ruling in California holding the declaration inadmissible seems to be due to the use of a *res gestae* rule. Because it was thought threats of the deceased when doing something explained an act, for example, the borrowing of a weapon, it was concluded that a declaration of the deceased, when he took a weapon from his house, that he did not intend to attack defendant didn't explain anything and so was not a part of the *res gestae*.⁹⁶ The distinction seems wholly

⁹⁴ *People v. Thomson* (1891) 92 Cal. 506, 28 Pac. 589.

See Hutchins and Sleisinger, *Some Observations on the Law of Evidence—State of Mind to Prove an Act* (1929) 38 YALE L. J. 298, suggesting from the standpoint of psychology threats do not mean much, that their probative force is slight, but perhaps not so weak as to require exclusion.

⁹⁵ *People v. Carlton* (1880) 57 Cal. 83, 40 Am. Rep. 112; *People v. Powell* (1891) 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75.

⁹⁶ In *People v. Carlton*, *supra* note 95, defendant was prosecuted for killing X. The defense was self-defense. On the morning of the killing, there appeared in a newspaper, published by defendant, an article abusive of the deceased. The article was shown to deceased while eating breakfast. The statement proved was, that when shown the article, the deceased said he would settle the matter of the article in the courts, and not by force, that shortly thereafter he prepared to leave his house, that he had a pistol in his pocket, and that when he was about to leave he said he thought he would leave it there, that his wife protested that she did not desire to have the loaded pistol left in the house. The court holding this testimony inadmissible, Mr. Justice Ross writing the opinion, cited and quoted from *People v. Arnold* (1860) 15 Cal. 476, saying that deceased's threats were there held admissible because made at the time the weapon was borrowed, that Mr. Justice Baldwin stated that it was part of the *res gestae*, which Mr. Justice Ross said meant "illustrative of the transaction; that is to say, illustrative of the act of procuring the pistol . . . and being a part of that transaction, it was, with the act it tended to illustrate, admissible, for the purpose of showing, as far as might be, who was in fact the first assailant." The court then said that the declaration in the Arnold case would not have been admitted as part of the *res gestae* had it not been proved that deceased borrowed the pistol because there would have been no act calling for explanation. But in the very next sentence it was said the threats would have been admissible as "inde-

without basis, and is another illustration of the great harm of using a phrase to solve a problem instead of making an analysis of the problem.

XIII

In criminal and civil cases it is sometimes important to know whether the deceased committed suicide. The question is often a very significant one in homicide cases and suits upon insurance policies. In many jurisdictions⁹⁷ including California⁹⁸ declarations of the deceased of intent to commit suicide are admissible. These declarations come within the rule admitting Hearsay declarations of intent or plan to prove a future act. The basis for the admission of the declarations is perhaps not entirely clear in some of the California decisions. The phrase *res gestae* has here again had a mischievous effect, making an interpretation of some of the decisions somewhat difficult, because the idea is injected into them that the declarations of an intent to commit suicide to be admissible must have accompanied some physical act. In *Jenkin v. Pacific Mutual Life Insurance Company of California*,⁹⁹

pendent circumstance." Finally, thinking no doubt that somehow the *res gestae* rule solves many difficult evidence problems, the court concluded:

"This testimony was not a part of the *res gestae*, and was not admissible under the authorities to which reference has been made, nor upon any theory or principle of the law with which we are acquainted. From it injury might readily have resulted to the defendant, for it might have been and probably was argued therefrom that deceased intended to resort to the courts rather than to force for redress, and therefore did not commence the rencounter in which he lost his life." (57 Cal. at 85, 40 Am. Rep. at 114.)

In the Arnold case the *res gestae* was borrowing the weapon. Was there not in this case something that the words could have been attached to thereby making them admissible? The act of deceased in leaving his house, if act there must be, is just as important as the act of borrowing a pistol in the Arnold case. In these cases the mere acts of borrowing the pistol and leaving the house did not require explanation as they were in no sense operative facts. What one said when receiving a pistol might be important if there were a question whether he bought or borrowed it.

See WIGMORE, EVIDENCE (2d ed. 1923) §111 (7) wherein he expressed the view that the state should be permitted in these cases to show deceased was in a peaceable state of mind, that he did not intend to employ violence against the defendant.

In *People v. Powell* (1891) 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75, a homicide case, declarations of the deceased made on the morning of the shooting that he would not arm himself, when it was suggested he should do so, were held inadmissible.

⁹⁷ See WIGMORE, EVIDENCE (2d ed. 1923) §1726, and cases cited. In some jurisdictions, notably Illinois, these declarations are not admissible. See *Seibert v. People* (1892) 143 Ill. 571, 32 N. E. 431. See also *Thomson's Case* [1912] 3 K. B. 19.

⁹⁸ *Rogers v. Manhattan Life Insurance Co. of New York* (1903) 138 Cal. 285, 71 Pac. 348; *Benjamin v. District Grand Lodge No. 4, Independent Order B'nai B'rith* (1915) 171 Cal. 260, 152 Pac. 731; *People v. Tugwell* (1915) 28 Cal. App. 348, 152 Pac. 740; *People v. Selby* (1926) 198 Cal. 426, 245 Pac. 426.

⁹⁹ (1900) 131 Cal. 121, 63 Pac. 180. This was an action on an accident policy by the assignee of the beneficiary. The insured died from the effects of a

an action on an accident insurance policy, the declarations were held inadmissible where they did not accompany an act. They were made, said the court, "an indefinite number of days before he was shot." In a later case, *Rogers v. Manhattan Life Insurance Company*,¹⁰⁰ an action on a life insurance policy, where it was essential that plaintiff show the death of the beneficiary before June 14, 1897, the expiration date of the policy, it was held a declaration by the insured was admissible, which was contained in a letter written on June 10, 1897, to the captain of a ship, on which the insured was a passenger, saying the insured intended to jump overboard and end his life. The deceased was not seen after 9:30 P.M., June 9, 1897. *Jenkin v. Pacific Mutual Life Insurance Company of California*¹⁰¹ was not mentioned. Seemingly the opinion in this case places the admission of the letter upon the ground that it was part of the *res gestae*, which in this case, according to the court, were all the movements of the insured from the time he left home until, and including, the last time he was seen on the boat. In another and still later case, *Benjamin v. District Grand Lodge No. 4, Independent Order of B'nai B'rith*,¹⁰² an action on a life insurance policy, the declarations of the insured that he intended suicide were held admis-

gun shot wound. No one witnessed his death. The opinion states that some testimony was introduced that "an indefinite number of days before he was shot" deceased said he contemplated suicide. As to these declarations, the court held:

"As against the beneficiary and her assignee these declarations, not accompanying nor explanatory of any act, were not competent evidence, and the court erred in refusing to strike them out on motion of plaintiff." (131 Cal. at 123, 63 Pac. at 181.)

¹⁰⁰ (1903) 138 Cal. 285, 71 Pac. 348. The opinion by Haynes, C., discusses *res gestae*, stating that the contention was that the letter of the insured was not a part of the *res gestae*, that the principal fact in issue was the death of *R* and the letter could not be a part of the *res gestae*. The opinion then recites in some detail *R*'s movements from the time he left home on June 9 until he was last seen by officers on the steamer, and from these premises concludes:

"These facts preceding the letter in question were properly received in evidence as part of the *res gestae*, or 'transaction' or 'things done,' (Bouvier's Law Dictionary), in connection with the disappearance, which the plaintiff claims were coincident with the death of Rogers. The last act of Rogers of which there is direct proof was the writing of said letter and his disappearance from the 'Santa Rosa,' and these acts were part of the *res gestae*." (138 Cal. at 290, 71 Pac. at 350.)

Seemingly, the *res gestae* rule, whatever it was conceived to be, had somehow to be met. The court cites *Mutual Life Insurance Co. v. Hillmon* (1892) 145 U. S. 285, 12 Sup. Ct. 909.

¹⁰¹ (1900) 131 Cal. 121, 63 Pac. 180.

¹⁰² (1915) 171 Cal. 260, 152 Pac. 731.

Jenkin v. Pacific Mutual Life Insurance Co. of California (1900) 131 Cal. 121, 63 Pac. 180, was discussed by the court in a manner that leads the reader to conclude the *Jenkin* case was distinguished on the ground that the declarations held inadmissible there were made "an indefinite number of days" before the death of the declarant,

sible. The declarations were contained in a letter written by the insured to his brother-in-law, the day after the insured disappeared from his home. At the same time, the brother-in-law received in the mail the insured's commutation ticket and account book. *Jenkin v. Pacific Mutual Life Insurance Company of California*¹⁰³ was distinguished, seemingly on the ground that the declarations held inadmissible in that case were too remote. Nothing was said about *res gestae*, the court placing its opinion upon the sound basis that the insured's letter was admissible to prove "the probability of his having committed suicide according to the declarations in his letter."

XIV

In a criminal prosecution for homicide where an autopsy revealed poison in the body of the deceased it was held that the trial court committed error in excluding the testimony of a witness who would have testified that deceased had declared she contemplated taking her own life.¹⁰⁴ The admissibility of the testimony was put upon the ground that the declarations did not refer to past events, but to the future, and that they showed her state of mind at the time she spoke, which in connection with the other circumstances in the case, showed she might have taken her own life. This opinion also says nothing of *res gestae*. The conclusion seems warranted that the California courts, in future cases, will not make the admissibility of threats to commit suicide turn upon any kind of *res gestae* rule.

It also has been held in a prosecution for homicide, when the defense introduces evidence tending to show suicide by the deceased, that the state may introduce declarations of the deceased showing a state of mind that would make suicide less probable.¹⁰⁵

and hence too remote. Mr. Justice Melvin said, referring to the ruling in the *Jenkin* case, and holding the declarations admissible in the case under consideration:

"This court held that as against the beneficiary and her assignee, these declarations not accompanying nor explanatory of any act were not competent evidence. But in this case the acts and conduct of deceased within a reasonable period of his disappearance were admissible as showing his state of mind at the date of the alleged suicide." (171 Cal. at 267, 152 Pac. at 734.)

¹⁰³ (1900) 131 Cal. 121, 63 Pac. 180.

¹⁰⁴ *People v. Tugwell* (1915) 28 Cal. App. 348, 152 Pac. 740. The opinion by Conrey, P. J., relies chiefly upon *People v. Wilson* (1910) 14 Cal. App. 515, 112 Pac. 579, and *Commonwealth v. Trefethen* (1892) 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235. Nothing is said about *res gestae* in the opinion. For interesting observations upon *Benjamin v. District Grand Lodge No. 4, Independent Order B'nai B'rith* (1915) 171 Cal. 260, 152 Pac. 731, and *People v. Tugwell*, *supra*, see *Note* (1916) 4 CALIF. L. REV. 145.

¹⁰⁵ *People v. Selby* (1926) 198 Cal. 426, 245 Pac. 426. Defendant contended that one T, with whom he was living as his wife, either committed suicide or was accidentally shot while he was attempting to disarm her to prevent her from killing herself. Deceased, a married woman, was estranged from her husband. A short time before her death she had sued her husband for divorce. Her attorney

There are other California decisions, which are not so easily grouped as the cases just discussed, that is, the decisions relating to the admissibility of threats of deceased to kill another, and threats of one to kill himself, wherein it has been held that declarations of intent to do a thing are admissible to prove that it was done. These cases are within the rule of the *Hillmon* case, *supra*, broadly interpreted. Some of the declarations held admissible probably would be excluded if the rule should be limited, as suggested, so as to make declarations admissible only when there are corroborating circumstances, and only when the declarant is dead or unavailable, and then for the sole purpose of showing that the declarant did the thing he intended or planned to do.

For instance it has been held in a proceeding to determine whether a child was entitled to inherit from the deceased, as an illegitimate child who had been legitimated by his father, where the child's mother was the legal wife of another at the time the child was begotten, and the question of access of the husband to his wife was of the utmost importance, that the declarations of the husband that he intended to leave the locality, where he and his wife were then living, were admissible to prove that the husband actually left and went to a distant

was permitted to testify that on the day before, and the day of her death, at a meeting between her and her husband, she had greeted her husband with a kiss and expressed friendliness for him. Evidently the defense contended that deceased killed herself because she had no hope of resuming her former relationship with her husband. The court cited *People v. Tugwell*, *supra* note 104, and *People v. Wilson*, *supra* note 104, saying they supported the admissibility of her declarations though the declarations in those cases tended to show suicide. Then the court announced the following basis for its conclusion which is not very clear:

"The testimony in the instant case was not admissible to show motive because it involved hearsay, but the hearsay quality, as we have indicated, would not be objectionable when admitted as tending to refute the theory of suicide. And the rule is that if testimony is admitted on a wrong theory, but is admissible under another theory, its admission under the wrong theory will not constitute error." (198 Cal. at 430, 245 Pac. at 428.)

Compare the ruling in this case with the ruling in *People v. Carlton* (1880) 57 Cal. 83, 40 Am. Rep. 112. Note that the state may not show that deceased declared he did not intend to attack defendant, who concededly killed deceased, but asserted he did the act in his own necessary self-defense.

See Hutchins and Sleisinger, *Some Observations on the Law of Evidence—State of Mind to Prove an Act* (1929) 38 YALE L. J. 297, wherein it is suggested that threats of suicide do not always indicate that the declarant intends to carry out the threat and that perhaps they should not be admitted indiscriminately. It is said:

"It is important, therefore, that the tribunal be able to differentiate cases where the probable correlation between words and other overt acts is high from those where it is low, or possibly negative. In the doubtful ones it is necessary to insist on more corroborative evidence and frequently evidence of a special sort, amounting to an abbreviated case history of the declarant."

part of the state.¹⁰⁶ The declaration of intent to prove a future act was thus admitted to show impossibility of access where access was the crucial question in the case.

In an action to quiet title to land claimed by the wife as separate property under a deed from her husband, and under color of title by adverse possession, it was held that a declaration of the husband that he intended to desert the wife was admissible to prove that he deserted her.¹⁰⁷ In determining whether defendant was guilty of statutory rape, his declarations to a livery stable keeper that he wanted a conveyance to go to a place named to have sexual intercourse with a "little girl" has been held admissible to prove the purpose of the defendant, and to corroborate other evidence, which tended to show that he accomplished his purpose.¹⁰⁸ As a part of the state's case that a doctor caused the death of a woman, by performing an illegal operation, the declarations of the woman that she was pregnant and intended to go to the doctor's office for an operation, have been held admissible to prove that she went.¹⁰⁹ In other criminal cases, this rule of evidence has been applied to establish the innocence of the accused. In a murder case, to establish an alibi, a declaration of defendant that he intended to go

¹⁰⁶ Estate of McNamara (1919) 181 Cal. 2, 183 Pac. 552, 7 A. L. R. 313.

The opinion in the case, which is particularly interesting on the question of non-access to dispute paternity, written by Mr. Justice Olney, sustained the admissibility of the declaration of B, the husband, that he intended to leave the place where he and his wife had lived and to go to a distant city, to prove that he went far away and hence did not have access to his wife. He relied upon Mutual Life Insurance Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909. There was ample evidence from other sources to show non-access. The opinion does not state whether B, the husband, was dead or unavailable as a witness.

See also People v. Barker (1904) 144 Cal. 705, 78 Pac. 266. The question there was whether former testimony of a witness should be admitted. It was held his letters written from Seattle were admissible to show, as stated therein, that he did not intend to return to California. The case is not, perhaps, very important as the evidence was only used to determine a preliminary question of fact upon which depended the admissibility of evidence.

¹⁰⁷ Union Oil Co. v. Stewart (1910) 153 Cal. 149, 110 Pac. 313, Ann. Cas. 1912A 567.

¹⁰⁸ People v. Harlan (1901) 133 Cal. 16, 65 Pac. 9. This declaration was also an admission of a party hence admissible on that ground.

¹⁰⁹ People v. Thomas (1921) 51 Cal. App. 731, 197 Pac. 677.

The opinion of Kerrigan, J., points out that the declaration was not evidence as to the doctor's conduct. Of course, considered along with the other evidence it tended to show guilt. The elastic *res gestae* rule was stretched this time to include the declaration as a "part of the *res gestae* of a particular phase of the whole transaction."

In People v. Wright (1914) 167 Cal. 1, 138 Pac. 349, previously discussed and mentioned *supra* note 28, similar declarations of the woman were held admissible not as "direct proof of the commission of the abortion" said Mr. Justice Henshaw, but as evidence "establishing the condition of the woman and the avowed purpose of the visit." See also People v. Northcott (1920) 45 Cal. App. 706, 189 Pac. 704.

to a certain lumber yard was held admissible to show the accused could not have been the guilty man.¹¹⁰ And in a criminal prosecution for maliciously using explosives to destroy a building inhabited by human beings, the declaration of the accused, made at the time he got dynamite from a mine, to the effect that he wanted to remove a rock from his land, was held admissible, but not declarations of the same sort made before getting the explosive.¹¹¹

XV

One phase of the use of declarations in will contests has already been considered, namely, declarations of the testator as to his state of mind to determine whether he was unduly influenced. It has been pointed out that declarations of the testator are admissible to show mental condition as an aid to determine whether the document in question represents his desires or the desires of another. Reasoning from statements by a testator that he had great affection for *A*, a near relative, to the conclusion that the testator was not permitted to carry out his will with respect to his property, is quite logical, where *A* was left nothing in the will. The California decisions, however, make it quite plain that the declarations are admissible for the limited purpose of showing mental condition and that they are not admissible to show acts of undue influence which the declarant said were practiced upon him by others. In the latter aspect the declarations are inadmissible Hearsay. Will contests often present problems other than the question of undue influence. The inquiry often is (a) whether the testator was of sound mind, (b) whether he made a will, or (c) whether having made a will he revoked it. Declarations of the deceased often are offered, as stated by Professor Wigmore, to show that deceased did or

¹¹⁰ *People v. Fong Sing* (1918) 38 Cal. App. 253, 175 Pac. 911. The opinion by Hart, J., quotes from GREENLEAF ON EVIDENCE wherein such declarations are called "verbal acts." Previously he stated:

"The doctrine of *res gestae* is so well understood that it is hardly necessary to remark that under that rule evidence is admissible of extrajudicial declarations tending to explain or show the character or motive or purpose or intent of a transaction, itself a fact in dispute, which would under other or ordinary circumstances be excluded as hearsay or self-serving."

He then stated that these declarations are admissible "not altogether under the rule of *res gestae*" but because they are "indicative of the frame of mind of the declarant as to some act growing out of the principal transaction, . . ." (38 Cal. App. at 258, 175 Pac. at 913.)

¹¹¹ *People v. Burke* (1912) 18 Cal. App. 72, 122 Pac. 435.

The court cited *Mutual Life Insurance Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, and *Rogers v. Manhattan Life Insurance Co. of New York* (1903) 138 Cal. 285, 71 Pac. 348. Speaking of the declarations excluded Burnett, J., said they were self-serving declarations not admissible because they did not accompany an act—"these conversations were no part of the *res gestae* and were clearly hearsay." The declarations excluded were no doubt cumulative evidence so it is not suggested that reversible error was committed in excluding them.

did not intend to make a particular kind of will; that he had or had not made a particular kind of will; that he had or had not made a will; that a particular will had or had not been revoked.¹¹² In determining the admissibility of declarations of the testator as to the above matters, the courts for the most part rely upon the rules of evidence previously considered. In some of the situations mentioned the decisions in favor of admissibility of declarations go farther and find support in even broader rules admitting Hearsay evidence. Some writers upon this subject have concluded, seemingly wisely, that the will cases fall within a special class, that is to say, that there exists a peculiar rule of admissible Hearsay which governs them.¹¹³ Two highly interesting and well-known cases have had marked influence in shaping the law for many American courts, namely, *Sugden v. St. Leonards*,¹¹⁴ an English case, decided in 1876, and *Throckmorton v. Holt*,¹¹⁵ decided in 1901 by the Supreme Court of the United States. These cases are sufficiently important to warrant their statement. The facts in the cases are many so only brief statements will be attempted.

Sugden v. St. Leonards, *supra*,¹¹⁶ involved the will of the great English lawyer Edward Sugden, Lord St. Leonards. He had written a long and intricate will. It was kept in a tin box in a room in his residence where it remained until about five months before his death. After his death when search was made, the will could not be found. Plaintiffs in the case propounded as executors the contents of a lost will, and eight codicils. It was asserted the will was executed in 1870. The testator died in 1875 at the age of ninety-three. The will was probated as a lost will. Defendants appealed to the Court of Appeal where the appeal was dismissed. His daughter and confidant, Charlotte Sugden, was the principal witness relied upon to establish the intricate will of the great English lawyer, who was known to be a most "methodical man of business." Under the English law, Miss Sugden, for whom her father had a great affection, would have received nothing of his estate unless provided for by a will. There was much evidence that cannot be noticed in this article tending to prove the contents of the will. Our chief interest lies in certain declarations of the testator that were held admissible by four of the five judges of the Court of Appeal. It was held that declarations of the deceased, both before and

¹¹² WIGMORE, EVIDENCE (2d ed. 1923) §1734.

¹¹³ Maguire, *The Hillmon Case—Thirty-three Years After* (1925) 38 HARV. L. REV. 715, note 22. Chafee, *The Progress of the Law, 1919-1922—Evidence* (1922) 35 HARV. L. REV. 447. See also WIGMORE, EVIDENCE (2d ed. 1923) §1736.

¹¹⁴ (1876) L. R. 1 P. D. 154.

¹¹⁵ (1901) 180 U. S. 552, 21 Sup. Ct. 474.

¹¹⁶ (1876) L. R. 1 P. D. 154.

after the execution of the will, were admissible to prove the contents. The most interesting opinion on the evidence question involved is by Jessel, M. R. He at once calls attention to the Hearsay rule but concludes that declarations of the deceased in a proceeding to establish a lost will should be held to be admissible Hearsay because (a) there is great difficulty of obtaining evidence in these cases, (b) the declarant is disinterested, (c) the declarations are made before a dispute or litigation has arisen and (d) which he says is the strongest reason, because the declarant has peculiar knowledge. Other reasons were given by the other judges who thought the testimony admissible. Mellish, L. J. particularly objected to the admissibility of declarations of the testator made after the execution of the will to prove contents, saying that they were not statements of anything that was "passing in his mind at the time," that they were but statements of facts which are excluded by the Hearsay rule, not within any class of admissible Hearsay, and expressed doubt as to "whether it is a desirable thing to establish a new exception." He was of the opinion that declarations of the deceased before, and at the time of execution of the will, are admissible to prove state of mind and should be admitted to corroborate other evidence as to contents. He, however, was of the opinion that the will in question was established without the aid of the declarations of the testator made after the execution of the will, and so concurred in the result.

*Throckmorton v. Holt*¹¹⁷ is equally interesting and more dramatic. This was a proceeding to probate a document as the will of Joseph Holt, once Judge Advocate General of the United States Army, who died at the age of eighty-seven in Washington, D.C. Probate of the alleged will was rejected on the ground that it was a forgery. The case finally reached the Supreme Court of the United States where an interesting and exhaustive opinion was written by Mr. Justice Peckham as to the admissibility of declarations of General Holt. After General Holt's death on August 1, 1894, no will was found though a thorough search was made. On August 26, 1895, a sealed envelope was received through the mail by the register of wills of the District of Columbia containing a paper which purported to be General Holt's will. The document bore the names of Ellen B. E. Sherman, U. S. Grant and W. T. Sherman, as witnesses. There was nothing in the envelope but the document which purported to be the will of General Holt. It was dated February 7, 1873, and bore signs of mutilation by burning and tearing. On February 7, 1873, Ellen B. E. Sherman was the wife of W. T. Sherman, who was then the commanding gen-

¹¹⁷ (1901) 180 U. S. 552, 21 Sup. Ct. 474.

eral of the United States Army, and U. S. Grant was then President. When the will was received all the persons just mentioned were dead. The case is long and contains many interesting details which must be omitted. There was much evidence as to the genuineness of the signatures of General and Mrs. Sherman, President Grant, and General Holt. No witness testified that he ever saw the document before it was received by the register of wills. As stated, the paper was not probated as the jury found it was a forgery. It was first concluded by the Supreme Court of the United States that error had been committed by the trial court in its rulings upon evidence relating to the genuineness of the signatures to the documents.

Turning next to the question of the admissibility of declarations of the deceased, offered by the contestants to show the disposition of the property in the document was improbable, and that it was, therefore, a forgery, the Court concluded that declarations of General Holt, both before and after the date of the document, were Hearsay and inadmissible. The leading English and American cases were considered in a lengthy opinion. Special notice was taken of the distinction sometimes made between declarations before and after execution of a will, but it was concluded where the issue is forgery no date of execution can be fixed, that the date on the paper does not fix anything as it may be a forgery. But it was concluded there is no sound distinction between declarations made before and after the execution of a genuine will. It was said whether made before or after, they are Hearsay and not within "any of the recognized exceptions." The distinction was carefully drawn by Mr. Justice Peckham between declarations to show mental condition, state of affection, etc., and declarations offered to prove the truth of the facts asserted by the declarant. He concludes that declarations of state of mind are of no importance when there is no question presented of the testamentary capacity of the deceased. He regarded declarations of the deceased about a will as peculiarly weak and unreliable, saying: "It is every day experience that declarations of that nature are to the last degree unreliable as a basis for an inference as to probable testamentary disposition of property. Those who thought by reason of such declarations that they would certainly be remembered in the will of the testator are so frequently disappointed, and that too in cases where there is not the remotest suspicion of forgery, that it would seem exceedingly unsafe to permit a jury to draw an inference based upon such evidence, relative to the genuine character of the instrument propounded as a will."¹¹⁸ He had no faith in the trustworthiness of evidence by witnesses as to statements made by

¹¹⁸ 180 U. S. at 578, 21 Sup. Ct. at 484.

persons about what they intended to do or had done as to the disposition of their property after death, and he thought to dispose of property on the basis of unsworn declarations would be quite contrary to the letter and spirit of statutes of wills.

The jury that sat in the trial court in this case had answered special interrogatories. In response to the question whether the paper alleged to be the will of General Holt had been revoked, they replied "no, because it was not executed." Commenting then upon whether the declarations of General Holt were admissible on the issue of revocation, Mr. Justice Peckham said they were not, that the burnt and mutilated paper coming through the mails from an unknown source did not raise a presumption that it was revoked by the testator. There was no proof, he said, that General Holt mutilated or burnt the paper, hence declarations to show that he did or did not intend to revoke were not admissible.

These notable cases raise many interesting questions, and suggest others, as to the admissibility of declarations of the deceased in will contests. Some of them, but not all, have come before the courts of California. Speaking generally, rather a liberal attitude for the admission of declarations is found in the decisions of the California courts. The reasoning of the Court of Appeal of England as found in *Sugden v. St. Leonards*, *supra*, evidently was more persuasive than that of the Supreme Court of the United States in *Throckmorton v. Holt*, *supra*.

Perhaps the most interesting, and at the same time the most liberal California decision, is *Estate of Morrison*,¹¹⁹ decided by the Supreme Court in 1926. It is not wholly unlike *Sugden v. St. Leonards*. The proceeding was one to probate the holographic will of Leon Morrison. The brief document reads as follows:

"Oakland, Cal.

Janry 12, 1921.

At my death I give all my property to my dear friend, Marion Scott.

L. Morrison"

Probate of the document was contested on the ground that Morrison did not execute it, that he was of unsound mind at the time of its execution, and that the pretended will was procured by undue influence. The last two grounds seemingly were abandoned by the contestants. The document was admitted to probate by the trial court. Miss Scott testified that the first time she saw the document was several months after Morrison's death when she received it in the mail in an envelope addressed to her. She testified that the instrument was in Morrison's

¹¹⁹ (1926) 198 Cal. 1, 242 Pac. 939. For an interesting note see (1929) 62 A. L. R. 698.

handwriting. To further support the document as Morrison's will the trial court admitted declarations of Morrison made in May and June, 1921, after the date of the instrument, while he lay ill in a hospital.

The evidence of Morrison's declaration was furnished by *McK* and *H*, male nurses, and three other persons, patients there at the time. *McK* and *H* testified Morrison showed them the document in question, asked *McK* if he wanted to take a look at it and said, "This is my last will and testament."

Seemingly, the opponents of the will did not object to the testimony until the examination of *H* had been completed. Not until considerable testimony tending to impeach the proponent's witnesses had been introduced was a specific objection made that Morrison's declaration was inadmissible.

The nurses, *McK* and *H*, testified that Morrison made the statement in the toilet of the hospital to which he had been assisted by them; that Morrison took the document from his pocket, showed it to them, and after they looked at it Morrison folded it and put it back in his purse. Testimony was given by *CC*, *S* and *MC*, fellow patients of Morrison, that he had said to them that he had made a will leaving his entire estate to Miss Scott. Prompt and specific objections seem to have been made to the introduction of this testimony, but it was admitted.

There was a great amount of testimony from experts that the writing was not Morrison's. The Supreme Court in an opinion by Mr. Justice Richards affirmed the judgment of the trial court admitting the will to probate as Morrison's will holding no error had been committed in admitting the testimony of the witnesses mentioned. The opinion contains a discussion of the various authorities on this interesting question. The rule of *Throckmorton v. Holt*, *supra*,¹²⁰ was criticized as against the weight of authority.¹²¹ Chief reliance seems to have been put upon *Hoppe v. Byers*,¹²² a Maryland case, a strong decision for the admissibility of declarations of the deceased when the issue is forgery. The Maryland court, as stated in a portion of the opinion quoted by Mr. Justice Richards, placed the admissibility of the testimony upon the ground that evidence as to handwriting is at best most unsatisfactory, that often there are arrayed against each other experts of equal honesty and means of knowledge, and that every collateral fact which is not immaterial should be heard to aid in the solution of the problem. It was said a more serious question was presented as to the admissibility of

¹²⁰ (1901) 180 U. S. 552, 21 Sup. Ct. 474.

¹²¹ Professor Wigmore's criticism that *Throckmorton v. Holt* was "a lonesome decision" was endorsed.

¹²² (1883) 60 Md. 381.

the testimony of Morrison's fellow patients than that presented by the testimony of the male nurses. Presumably it was thought the *res gestae* rule, so often criticized in this article, furnished additional support for the admissibility of their testimony that Morrison said, "This is my last will and testament." These witnesses testified that Morrison spoke these words when he showed them the document. The words were said to be "part of the *res gestae*, or in other words, of the immediate transaction to which said witnesses were testifying, viz., their identification of the offered instrument as an existing document at the time of its presentation to them for inspection by the testator."¹²³ Finally, the court seems to have rested its decision upon the ground that "under the circumstances of this particular case" the declarations were admissible "as tending to show the existence of such document prior to the death of the decedent."¹²⁴ There seems no escape from the proposition that declarations of the deceased like those held admissible, that deceased had made a will and left all his property to S, are Hearsay. They are statements of a past fact admitted to prove the truth of the assertion and do not come within the scope of the rules permitting Hearsay to prove state of mind or declarations of a plan or intent to prove the happening of a future act.¹²⁵

In *Estate of Morrison, supra*, the court cited and distinguished *Estate of Gregory*,¹²⁶ saying, in substance, that it was an authority against the admissibility of declarations to show undue influence, and that the court "undertook in a sentence to give application of the same doctrine to cases wherein the issue of forgery was involved." Whether this observation is wholly accurate is somewhat doubtful. Certainly *Estate of Gregory*, if it does hold that declarations of the testator upon the issue of forgery are not admissible — and there is much to be said

¹²³ Mr. Justice Richards discussed at some length the California will cases holding declarations of the deceased are not admissible to show acts of undue influence. In considering them he states as to several of them, the declarations were "not part of the *res gestae*."

¹²⁴ Morrison's statement to the nurses did serve to identify the paper. The statement he then made, seemingly, does nothing more than that. They did not testify that he told them how he had disposed of the property at his death. On an issue of forgery these witnesses of course could testify that they previously saw the questioned document in Morrison's possession.

¹²⁵ WIGMORE, EVIDENCE (2d ed. 1923) §1736. Though this is true, of course, it does not follow that it is not wise to make another class of admissible Hearsay, namely declarations of a deceased person to show that he died leaving a will and what the will contained.

See WIGMORE, EVIDENCE (2d ed. 1923) §1736 for an elaboration of three current theories as to the admissibility of similar testimony.

¹²⁶ (1901) 133 Cal. 131, 65 Pac. 315.

for the proposition that it does so hold—is impliedly overruled by *Estate of Morrison*.¹²⁷

¹²⁷In *Estate of Gregory* (1901) 133 Cal. 131, 65 Pac. 315, probate of an alleged will of Catherine E. Gregory was rejected. The Supreme Court reversed the order rejecting probate. Deceased died August 17, 1898. In the will offered, Charlotte B. Gregory, an adopted daughter, was the legatee and Martha Munson was named the guardian. The document bore the date December 10, 1895. The contestants claimed that a document dated March 22, 1892, was the true will. In this document one Ash and Charlotte were legatees and Ash was appointed guardian of Charlotte. The contestants asserted (a) forgery, (b) that the document was not signed in the presence of any witnesses or acknowledged to have been signed by the testatrix, and (c) undue influence of Martha Munson and another. In response to certain interrogations, the jury found that the will was not signed by deceased in the presence of the attesting witnesses, or at all, nor was it declared by her to be her will. They found no undue influence by Martha Munson or others. The trial court admitted for contestants, over objections of proponents, declarations of deceased to the effect that the only will she had made was the Ash will. Ash testified that deceased told him of attempts of one R to persuade her to make Martha Munson guardian of Charlotte and that on the night before the day of her death deceased told him she was going to die, that she wanted him (Ash) to carry out her will, to see that Charlotte was cared for, that everything was in his hands.

The court said there was no evidence of lack of capacity that the evidence was all "addressed to the issues of forgery and undue influence." The conclusion was then reached that declarations were inadmissible and prejudicial. It was said that contestants relied, among other decisions, upon *Hoppe v. Byers* (1883) 60 Md. 381, subsequently strongly relied upon in *Estate of Morrison, supra*. The conclusion was reached that the declarations were inadmissible. Chipman, C., writing the opinion, used the following language:

"The declarations admitted in this case do not go into the question of mental capacity at all; they go directly to the issue of forgery, and undue influence, and fraud, and to the independent substantive fact that deceased did not execute the will in question, by showing that she said in her lifetime that she made no will except that of March 22, 1892. In short, contestant was permitted to prove declarations of the deceased which went to the principal issues in the contest, and did not go, nor were they intended to go, to mental capacity or the state of her mind in any perceptible degree." (133 Cal. at 137, 65 Pac. at 317.)

Later in the opinion, Chipman, C., did say, after quoting from *In re Calkins* (1896) 112 Cal. 296, 44 Pac. 577, wherein declarations to show undue influence were said to be inadmissible Hearsay and not entitled to any weight, that "These remarks apply equally to the issue of forgery."

In re Kauffman (1897) 117 Cal. 288, 49 Pac. 192, where the sole issue was fraud and undue influence, the court, following *In re Calkins, supra*, held that the declarations of deceased that she did not make a will, did not know what was in it, were inadmissible.

See also *Estate of Thompson* (1921) 185 Cal. 763, 148 Pac. 795, wherein it was held under CAL. CODE CIV. PROC. §1339, which provides that no will shall be probated as lost or destroyed unless its provisions are established by at least two creditable witnesses, that two independent witnesses are required to prove that an alleged destroyed will contained a clause revoking former wills, and that the testimony of one witness and the declarations of the testator did not satisfy the requirements of the section.

Prior to the *Estate of Morrison* (1926) 198 Cal. 1, 242 Pac. 939, the Supreme Court also had decided *Estate of Sweetman* (1921) 185 Cal. 27, 195 Pac. 918. There the Supreme Court affirmed a judgment admitting to probate the will of

Estate of Morrison was followed by the Supreme Court in a decision rendered in 1927, in which it was held error upon the part of the trial court to exclude declarations of the testator, made after the date of a document, presumably alleged to be a forged will, that the document was a genuine will.¹²⁸ The judgment of the trial court non-suiting the proponent was also reversed because certain minor legatees, under the alleged will, were not served with written grounds of the opposition to its probate.

No doubt the will cases raise questions that are not present in other cases where declarations of intent or plan are offered to prove the happening of a future act. There is of course a practical necessity for

Delia M. Sweetman. It was probated as a lost will. It was last seen in her possession two and one-half months before her death. It was conceded by the proponents and opponents of the document offered for probate that deceased had made another will at an earlier time. This will was referred to as the Berlin will. The second will was referred to as the Johnson will. The Berlin will was found at her death. Each side, without objection of the other, introduced many declarations of deceased. One side introduced declarations to the effect that the Johnson will, which no one, including deceased, had seen for some time, would be found at her death, while the other side introduced deceased's declarations that it had been purposely destroyed. These declarations were made from time to time within a few days of her death. As each party relied upon the declarations the case is not very important. The majority of the court were of the opinion that they were sufficient to support the finding below, which in the absence of evidence must have been otherwise because of the presumption that the will had been revoked, as it was not found at her death in her possession.

Mr. Justice Richards says of Sweetman's Estate that the admissibility of the declarations "was conceded" and the only question was whether the evidence prevented the operation of the rebuttable presumption of revocation.

Mr. Justice Olney, with whom Angellotti, C. J., and Lawlor, J., concurred, dissented in *Estate of Sweetman, supra*. They were of the opinion that the disposition of the case turned upon CAL. CODE CIV. PROC. §1339 providing no will shall be probated as lost or destroyed unless the same "is proved to have been in existence at the time of the death of the testator" or was destroyed fraudulently or by public calamity. The trial court found the will was not fraudulently destroyed. There was no question of destruction by a public calamity. They were of the opinion that the declarations did not show the will was in existence at the time of death, that it had disappeared some time before her death and, that at most, her declarations would only support an inference that she believed the will to be in existence, and not an inference that the will actually was in existence. Mr. Justice Olney said: "They were not declarations that she had the will, or knew its whereabouts, or knew that it was still in existence, but were merely expressions of a belief that it would be found if searched for." (185 Cal. at 34, 195 Pac. at 921.)

¹²⁸ *Estate of Thompson* (1927) 200 Cal. 410, 253 Pac. 647. In this case the Supreme Court adopted an opinion, written by Langdon, P. J., then presiding justice of a District Court of Appeal, wherein Mr. Justice Langdon said that *Estate of Morrison* (1926) 198 Cal. 1, 242 Pac. 939, sets at rest any doubt upon this question, and that the supreme court in the *Morrison* case, after a most careful consideration of the authorities, had adopted the rule laid down in *Hoppe v. Byers* (1883) 60 Md. 381.

It seems reasonable to conclude that the dicta in *Estate of James* (1899) 124 Cal. 653, 57 Pac. 578, and the holding in *In re Kauffman* (1897) 117 Cal. 288, 49 Pac. 192, as to the declarations of the testator are no longer the law.

resorting to Hearsay as the declarant is dead. Where there is a genuine document and the question is as to its execution the declarations may safely be received where there is corroborating evidence. Where the question is whether a concededly genuine document has been revoked the declarations, seemingly are as to past events and the same objection exists here as exists to declarations as to past events in cases that have nothing to do with wills, previously discussed. When the question is as to whether a paper is a forgery, whether it ever existed, declarations of the alleged testator are peculiarly weak, if there is substance in the proposition that declarations to prove a future act are more reliable than declarations to prove that an event happened in the past.

California courts have elected to stand with the jurisdictions taking a very liberal view as to the admissibility of Hearsay declarations of a testator or an alleged testator. Perhaps time alone will tell whether the administration of justice is advanced by the liberal view as to Hearsay in will cases sanctioned by the English Court of Appeal in *Sugden v. St. Leonards*,¹²⁹ or the conservative view adopted by the Supreme Court of the United States in *Throckmorton v. Holt*.¹³⁰ The suggestion, however, is made that declarations of the alleged testator should not be received unless there are corroborating circumstances. In view of the inherent weakness of Hearsay, which will not be repeated, it seems not requiring too much to insist upon evidence of corroborating circumstances, before the existence or non-existence of a fact, the highly important matter of a will or no will, shall be found by a jury, or a judge whose duty it is to find the facts.¹³¹

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¹²⁹ (1876) L. R. 1 P. D. 154. See also *Woodward v. Goulstone* (1886) L. R. 1 A. C. 469; *Barkwell v. Barkwell* [1928] P. 91 and comment thereon in Note (1928) 77 U. OF PA. L. REV. 300.

¹³⁰ (1901) 180 U. S. 552, 21 Sup. Ct. 474.

¹³¹ Should experience prove that the present rule in California is too liberal and the rule of *Throckmorton v. Holt* too strict, it might be well to consider the possibility of legislation of a similar nature to that now existing (CAL. CODE CIV. PROC. §1339; see *supra* note 127) affecting the proof of lost or destroyed wills.

CAL. CODE CIV. PROC. §1339 might be amended, or a new section might be enacted, providing that declarations of the alleged testator shall only be admitted where they support or are corroborated by the testimony of at least one of three disinterested handwriting experts, who shall be appointed by the court. Power might be given the court to appoint three experts where there is evidence that the document in question is a forgery, and it purports to be an olographic will, or a non-olographic witnessed will, where all the witnesses thereto are dead or not available; and evidence of declarations of the alleged testator only admitted if they are corroborated by the report and the testimony of at least one of the experts. The chief objections to such plan are that it attaches great importance to the testimony of disinterested experts, and the procedure might prove too costly where the amount involved is small.