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## Admissibility in California of Declarations of Physical or Mental Condition

### I

THE ADMISSIBILITY in evidence of declarations tending to show the physical or mental condition of the declarant, or his intention, plan or design, often has, and in the future often will, perplex the courts and particularly the trial judges. Without careful analysis the solution of the problem presented is not easy. The questions of relevancy — “an affair of logic and experience, and not at all of law”<sup>1</sup> — is not often difficult. The difficulty arises because of a general distrust of Hearsay evidence, a distrust firmly fixed in English and American law. That certain Hearsay evidence should not be received and made the basis for determining or extinguishing legal relations is as certainly a part of our law of procedure as is the requirement of written pleadings or a jury in most actions at law. In truth most Hearsay is excluded because it is thought it is not the kind of evidence a jury may safely hear and act upon.<sup>2</sup>

To permit the introduction of Hearsay would be to invite fact finding upon the narration of persons who had not perceived the happening related, but had gotten their information from other persons who, when they related what occurred, were not under oath. Also there would be no opportunity afforded to sift by cross examination the narration of those who saw or heard. Experience with the jury after a time, however, proved that there was a real need for some Hearsay. A practical solution of the problem was found by the courts in admitting some Hearsay when a necessity existed and when it had a high degree of trustworthiness.<sup>3</sup> Admissible Hearsay is often characterized as an exception to the Hearsay rule.<sup>4</sup> The number of so-called exceptions and

<sup>1</sup> THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 269.

<sup>2</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1361, 1364.

<sup>3</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1420.

<sup>4</sup> It is thought it is not strictly logical to frame a definition or a rule and at the same time, or later, announce other rules or definitions and call them exceptions to the rule. To say that all Hearsay evidence is inadmissible is too broad; to say that Hearsay evidence is inadmissible is too narrow. A logician has said: “The definition should be exactly equivalent to the class of objects defined; that

their scope indicate that the courts admit much Hearsay. The determination of what Hearsay is safely admissible and what is not, when there is a fair necessity for its admission and when not, requires the exercise of sound judgment. Sometimes, it is believed, there has been a failure to recognize what is and what is not Hearsay. To properly classify admissible Hearsay requires painstaking statements. No doubt much of the confusion and conflict in the decisions and treatises is directly traceable to a failure to state in clear and simple language why one type of Hearsay is admissible and why another is not. The uncontrollable phrase *res gestae*, often employed in the statement made as to why this or that evidence should or should not have been admitted, has done incalculable harm. Professor Wigmore did not go too far when he said, "It should never be mentioned,"<sup>5</sup> if he meant, as no doubt he did, never mentioned to explain the admissibility or inadmissibility of evidence. A learned scholar explaining the history of the phrase has said that the phrase was employed by trial judges in the latter part of the eighteenth century when the law relating to Hearsay was unsettled. Professor Thayer states:

"They could not, in the stress of business, stop to analyze minutely; this valuable phrase did for them what the 'limbo' of the theologians did for them, what a 'catch-all' does for a busy housekeeper or an untidy one,—somethings belonged there, others things might, for purposes of present convenience, be put there. We have seen that the singular form of phrase soon began to give place to the plural; this made it considerably more convenient; whatever multiplied its ambiguity, multiplied its capacity; it was a larger 'catch-all.' To be sure, this was a dangerous way of finding relief, and judges, text-writers, and students have found themselves sadly embarrassed by the growing and intolerable vagueness of the expression."<sup>6</sup>

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is, it must be neither too broad nor too narrow. In other words, the definition must take account of the whole class and nothing but the class." (CREIGHTON, *INTRODUCTORY LOGIC* (4th ed. 1927) 72.) It is thought greater discrimination might have resulted had attempts been made to define admissible and inadmissible Hearsay. Somehow something often seems to be overlooked by defining in terms of a general rule and exceptions. If this method is not employed but definitions are affirmative the result seemingly is greater accuracy of thought and expression.

Had Hearsay been classified as admissible and inadmissible Hearsay it is believed there would have been fewer mistakes as to what is and what is not Hearsay. A classification thus made probably would have resulted in wiser judgments as to what Hearsay should have been admitted and what should have been rejected. Certainly it is true that considerable difference of opinion exists as to what is and what is not Hearsay. Often in the discussion by the courts of whether words spoken are admissible, no opinion is expressed as to whether they are or are not Hearsay.

<sup>5</sup> WIGMORE, *EVIDENCE* (2nd ed. 1923) §1767.

<sup>6</sup> THAYER, *LEGAL ESSAYS* (1927) 244. See page 207, *Beddingfield's Case—Declarations As A Part Of The Res Gestae*, for an exhaustive treatment of the history of the phrase and sharp criticism of its use.

The phrase is often found in the opinions of California judges. In fact it has been employed by some judges or all English and American courts, and in most instances, if not all, without any profit. Use of this obscure and ambiguous phrase will not solve the problems to be considered here; hence it will not be employed. No confidence whatsoever is to be placed in its efficacy.

The phrase *res gestae*, as has been stated, should probably never be used. It rarely, if ever, sheds light upon the solution of problems of this type. As has been well stated by Professor Wigmore:

"The phrase '*res gestae*' so far as it has a legitimate use, implies that when we are disputing about a particular occurrence, evidence relating to any part of the occurrence is admissible. This is a mere truism; it is the converse of the fundamental proposition that evidence can be offered only of facts in issue or relevant to the issue (ante, §2). Thus nothing is added in the way either of limitation or of enlightenment. We are told merely that evidence may be offered on a certain point because that point is part of the matter we are disputing about."<sup>7</sup>

Speaking of the origin of the phrase, he states:

"Thus the phrase 'part of the *res gestae*' came to be the shibboleth for admitting anything in the shape of words which could not be brought under one of the standard exceptions to the Hearsay rule."

And as has been correctly stated by Professor E. M. Morgan in an article, *Suggested Classification Of Utterances Admissible As Res Gestae*:

"The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as '*res gestae*.' . . . Certain it is that since its introduction at the close of the eighteenth century, on account of its exasperating indefiniteness it has done nothing but bewilder and perplex. It has been employed in almost every conceivable connection to warrant the admission or exclusion of evidence. When applied to designate non-verbal facts admissible because relevant to the matter in issue it does little harm, though surely nothing is to be gained by expressing in a dead and foreign tongue an idea for which there are accurate and adequate English words. When used to describe utterances, it works unmitigated mischief."<sup>8</sup>

## II

It seems advisable before considering particular situations within the scope of this article to point out the dividing line between testimony that is and is not Hearsay. Perhaps no better method can be employed to bring out this essential distinction than to quote from two dis-

<sup>7</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1757.

<sup>8</sup> (1922) 31 YALE L. J. 229.

tinguished authorities on the law of evidence. Professor Wigmore truly says:

"The theory of the Hearsay rule (ante, §1361) is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the Hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received, according as it has any relevancy in the case; but if it is not received, this is in no way due to the Hearsay rule."<sup>9</sup>

The following words from the pen of Professor E. M. Morgan illuminate the subject:

"When a witness in court offers evidence regarding a matter within his own knowledge, he is under oath and subject to cross-examination. If he reports the utterance to another, he is, as to the fact and content thereof, in exactly the same situation as if he were reporting any non-verbal event of which he has knowledge. His oath and the cross-examination, however, are guaranties only that he is himself speaking the truth, and not at all that the person whose utterance he is reporting was speaking the truth. When the fact and content of such person's utterance, regardless of its truth, are relevant and material, there is no reason for excluding the testimony of the witness concerning them. But when the utterance is offered for its truth, then the witness is testifying only to its fact and content, and the utterer is testifying to the matter asserted in the utterance. As the utterer is not under oath and is not subject to cross-examination, his testimony is ordinarily deemed too untrustworthy to be received. If it is to be admitted, it must be because there are some good reasons for not requiring the appearance of the utterer and some circumstances of the utterance which performs the functions of the oath and the cross-examination. In other words, it must be under some exception to the rule against Hearsay."<sup>10</sup>

### III

As has been clearly stated by Professor Wigmore,<sup>11</sup> the earliest and clearest recognition of the rule making admissible many declarations as to mental or physical condition is found in the decisions dealing particularly with the admissibility of utterances of pain or suffering, offered for the purpose of proving the physical condition of the declarant. In the leading case of *Aveson v. Kinnard*,<sup>12</sup> decided by Lord Ellenborough in 1805, the Court of Kings Bench held admissible the declarations of the plaintiff's wife that she was ill, for the purpose of

<sup>9</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1766.

<sup>10</sup> Morgan, *A Suggested Classification Of Utterances Admissible As Res Gestae* (1922) 31 YALE L. J. 229, 230.

<sup>11</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1718.

<sup>12</sup> (1805) 6 East 188, 102 Eng. Reprint 1258.

showing that at the time she made the statements she was in fact in bad health. The declarations were made shortly after a certain Tuesday, the day she went to the office of a surgeon to be examined, to obtain a certificate of health, which was to be presented to the defendant as a part of an application for a policy of insurance upon her life, that was later issued to the plaintiff, her husband. In holding the declaration admissible, Lord Ellenborough pointed out that such utterances "must be resorted to from the very nature of the thing" and that in this case the statements were made before "she could contrive any answer for her own advantage and that of her husband." That the evidence was Hearsay is obvious. It was given at the trial by one Susannah Lees who, it was said, was an acquaintance of Mrs. Aveson who "called accidentally" upon her and found her in bed at 11:00 o'clock in the forenoon. The statements of Mrs. Aveson were declarations of a person not under oath at the time they were made. There was no opportunity for cross-examination of the declarant and the evidence was offered and received to prove that the statements were true; namely, that Mrs. Aveson was in ill health on the particular day she said she was ill; in fact they were statements of a person who at that time was incompetent to testify against her husband in his action against the defendant upon a contract of insurance upon his wife's life.

Some American courts, notably New York, have not followed the rule as laid down in *Aveson v. Kinnard*. The New York courts have qualified the rule holding that utterances of pain or suffering to be inadmissible must be involuntary exclamations, screams, groans, or similar inarticulate utterances, where they are not made to a physician during consultation.<sup>13</sup> The weight of American authority, however, follows the rule laid down by Lord Ellenborough in *Aveson v. Kinnard*, that articulate expressions of pain and suffering are admissible to show physical condition at the time the utterances are made though they are not made to a physician called to treat a patient.<sup>14</sup> The New York rule is based upon the fallacious theory that the reason for the common law rule was that such testimony was admitted because of necessity arising from the incompetency of parties to testify, and that the necessity no longer existed after parties to the suit were permitted to testify.<sup>15</sup> As has been said by Wigmore, "The truth seems to be that

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<sup>13</sup> *Roche v. Brooklyn City and Newtown Railroad Co.* (1887) 105 N. Y. 294, 11 N. E. 630, 59 Am. Rep. 506. See WIGMORE, EVIDENCE (2nd ed. 1923) §1719, for cases from other jurisdictions following the New York rule.

<sup>14</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1719, note 9.

<sup>15</sup> *Roche v. Brooklyn City and Newtown Railroad Co.* (1887) 105 N. Y. 294, 11 N. E. 630, 59 Am. Rep. 506; WIGMORE, EVIDENCE (2nd ed. 1923) §1719.

the New York limitation is inconsistent alike with precedent, with principle, with good sense and with itself."<sup>16</sup> There seems no sound basis for the distinction which makes groans or screams admissible no matter who hears them and makes articulate expressions of pain admissible only when they are made to a physician who is called to treat a patient. There is a practical necessity for resorting to contemporary expressions of pain when bodily condition is material, though parties may testify at the trial, and expressions thereof constitute reliable proof that suffering existed.

The California decisions, particularly some of the Supreme Court decisions, leave the question in some doubt though seemingly they follow the orthodox rule as laid down in *Aveson v. Kinnard*. In *Lange v. Schoettler*,<sup>17</sup> decided by the Supreme Court in 1896, an action for wrongful death of plaintiff's son, the court held statements made by the deceased "in regard to his sufferings were properly admitted." The reason assigned for the admission of the testimony was that the utterances "indicated his bodily condition and were part of the symptoms by which his case was to be judged and by which it was ascertained to what extent he was injured. His declarations are taken, because although they may be feigned, still it is the best we can do. Whether feigned or not must be left to the jury." Justice Temple, who wrote the opinion, cited no authority for the rule announced. Counsel for appellant who urged that the declarations were not contemporaneous with the injury and were not admissible, cited *Roche v. Brooklyn City and Newtown Railroad Co.*<sup>18</sup> Counsel for respondent cited *Baltimore and Ohio Railroad Co. v. Rambo*<sup>19</sup> and *Travellers' Insurance Company v. Mosely*.<sup>20</sup> The cases cited by respondent followed the orthodox or

<sup>16</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1719, page 687.

<sup>17</sup> (1896) 115 Cal. 388, 393, 47 Pac. 139, 140. See also *Munro v. Pacific Coast Dredging and Reclamation Co.* (1890) 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248.

<sup>18</sup> (1887) 105 N. Y. 294, 11 N. E. 630, 59 Am. St. Rep. 506.

<sup>19</sup> (C. C. A. 6th, 1893) 59 Fed. 75.

<sup>20</sup> (1869) 75 U. S. (8 Wall.) 397. In *Baltimore & Ohio Railroad Co. v. Rambo*, *supra* note 19, a decision of the United States Circuit Court of Appeals, Sixth Circuit, the opinion by Taft, Circuit Judge, held that testimony of non-professional witnesses as to the physical condition of plaintiff was admissible where they testified to articulate expressions of pain and suffering. He cited to sustain the ruling, *Travellers' Insurance Co. v. Mosley*, and quoted the following from Justice Swayne, who wrote the opinion in the latter case: "Upon the same ground, the declarations of the party himself are received to prove his condition, ills, pains, and symptoms, whether arising from sickness or an injury by accident or violence. If made to a medical attendant, they are of more weight than if made to another person. But to whomsoever made, they are competent evidence. Upon these points, the leading writers upon the law of evidence, both in this country and in England, are in accord." (59 Fed. at 77.)

English rule and do not make the qualification of the rule to be found in the New York decisions.<sup>21</sup> Seemingly then the court in *Lange v. Schoettler* declined to follow the New York decisions.

In 1899 the question again arose in the *Estate of James*,<sup>22</sup> wherein there was an issue whether Dr. Charles James died single or married. Laura Milen claimed to be his widow. To disprove her claim of a marriage by contract with the deceased, declarations of Dr. James, made shortly before his death, were admitted to the effect that "he had dropsy, catarrh, and symptoms of Bright's disease, and that he was impotent." The court held the testimony inadmissible, saying that it was Hearsay and that it was not a part of the *res gestae*. Discussing particularly the declaration as to Dr. James' physical condition, Justice Garoutte, writing the opinion, said:

"These declarations of James as to his various bodily afflictions were in no sense those of a patient to his physician. Neither were they those involuntary and spasmodic exclamations of an injured man as to his physical pains made at the time of the injury. These declarations of the deceased were not involuntary exclamations. They were made deliberately and calmly, and necessarily covered the health of the deceased for a past period of time."

To sustain the conclusion reached he cited *Roosa v. Boston Loan Company*,<sup>23</sup> quoting from the opinion a portion thereof, wherein it was stated that bodily condition may be proved by exclamations or expressions indicating pain but that such statements should be confined to those complaints, exclamations and expressions as "naturally accompany and furnish evidence of a present existing pain or malady." Seemingly then the holding of the court is based upon the proposition that the declarations of Dr. James related not to pain or suffering existing at the time the declarations were made, but to past maladies.

Following *Estate of James*, the Supreme Court in 1900 decided *Green v. Pacific Lumber Company*,<sup>24</sup> very often cited in this state. In a personal injury suit it was held a nurse, who attended the plaintiff, might testify to complaints of pain and suffering uttered during the first week after her injury. Justice Garoutte, again writing the opinion, said the testimony was not Hearsay, and used language in the opinion, as he did in the *Estate of James*, that has caused learned readers to conclude that he intended to announce the New York rule that articulate statements of pain and suffering are not admissible unless made to a physician treating a patient.<sup>25</sup> Justice Garoutte said:

<sup>21</sup> See *supra* n. 20.

<sup>22</sup> (1899) 124 Cal. 653, 659, 57 Pac. 578, 581.

<sup>23</sup> (1882) 132 Mass. 439.

<sup>24</sup> (1900) 130 Cal. 435, 62 Pac. 747.

<sup>25</sup> See Note (1914) 2 CALIF. L. REV. 243; Kidd and Ball, *Law and Mental Diseases* (1920) 9 CALIF. L. REV. 108.

"Involuntary declarations and exclamations of a person's present pain and suffering are admissible as tending in some degree to show his physical condition." Previously he had said the witness was asked, "You may state any complaints of pain and suffering which you heard." Perhaps it is fair to infer that the non-professional witness testified to articulate statements of present pain and suffering. It seems reasonable to conclude that in the *Estate of James* the statements were not declarations of existing pain and suffering, that is, pain and suffering experienced at the time the statements were made. If they were not statements of this type, the utterances no doubt were lacking in that element of trustworthiness that seems reasonable to be required for the admission of Hearsay evidence; and, as has been stated, it is probable that in *Green v. Pacific Lumber Company* the testimony that was held properly admissible did not consist of groans, shrieks, or similar involuntary inarticulate expressions of pain and suffering, but articulate statements of the declarant that he was then suffering. These cases on the precise facts involved should not be understood as adopting the New York rule to the effect that declarations to non-professional witnesses of pain and suffering are only admissible where they are involuntary inarticulate exclamations.

In 1919 the Supreme Court in *Bloomberg v. Laventhal*,<sup>26</sup> an assault case, seemingly announced and applied the orthodox rule holding that declarations of present pain are admissible. Justice Melvin, writing the opinion, said:

"Appellant's counsel assert that prejudicial error was committed by the court in allowing witness Hirsch to relate statements which he said had been made to him by plaintiff to the effect that the latter had pains in the head and that he could not sleep. It appears from the record that these were complaints regarding, and were the usual concomitants of, existing discomforts, and not narratives of past miseries. Such statements may be properly admitted in evidence."

Perhaps it may fairly be said that this decision makes clear the rule in California on this question.

In this connection mention should be made of *People v. Wright*,<sup>27</sup> decided by the Supreme Court in 1914. The case is not precisely in point, but it has a bearing upon the problem involved. The defendant was convicted of murder in the second degree by causing the death of a woman while performing an illegal operation. Over objections of defendant, declarations of deceased were admitted that she was pregnant, to prove that at the time of the statements she was in fact pregnant. A witness testified that the deceased said she was pregnant

<sup>26</sup> (1919) 179 Cal. 616, 619, 178 Pac. 496, 497.

<sup>27</sup> (1914) 167 Cal. 1, 138 Pac. 349.

and stated her purpose in visiting the doctor. Justice Henshaw, writing the opinion, said the testimony though not admissible "as direct proof of the commission of the abortion" was admissible "as evidence establishing the condition of the woman and the avowed purpose of her visit." He said the testimony was Hearsay. Expressing no opinion as to whether the declarations were admissible as to "the avowed purpose of her visit" to the doctor, as this is a different question from the one under consideration, the court's broad ruling seemingly sanctions the admissibility of declarations of physical condition to prove physical condition, at the time the statements are made, although the statements are not of the involuntary exclamation type, in fact not even statements of existing pain.<sup>28</sup>

The decisions of the District Court of Appeal somewhat more definitely hold that articulate declarations of pain or suffering are admissible to prove existing bodily condition though the declarations are not made to a physician.<sup>29</sup>

Though some doubt may exist because of the language employed in the decisions of the Supreme Court to express the rule, it is to be hoped that the orthodox or English rule will be applied, and that this well settled type of admissible Hearsay will be given full recognition. It is, of course, true that pain and suffering and bodily condition may

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<sup>28</sup> There is an interesting comment on the case in Note (1914) 2 CALIF. L. REV. 243. See also *Thrasher v. Board of Medical Examiners of State of California* (1919) 44 Cal. App. 26, 185 Pac. 1006. An order of the Board of Medical Examiners revoking a physician's license was set aside by the Superior Court. Upon appeal the order was affirmed. It was held statements by a woman that she was pregnant when she first visited the physician were Hearsay and not admissible. No mention was made of *People v. Wright, supra*. In accord with *People v. Wright, supra*, is *People v. Northcott* (1920) 45 Cal. App. 706, 189 Pac. 704.

<sup>29</sup> *Evarts v. Santa Barbara Consolidated Railway Co.* (1906) 3 Cal. App. 712, 86 Pac. 830; *Dow v. The City of Oroville* (1913) 22 Cal. App. 215, 134 Pac. 197; *Williams v. A. R. G. Bus Co.* (1920) 47 Cal. App. 568, 190 Pac. 1036. In *Evarts v. Santa Barbara Consolidated Railway Co., supra*, it was said: "There was no error in admitting testimony of witnesses as to complaints made by deceased of suffering and pain. None of the testimony referred to a statement of past condition. *Lange v. Schoettler*, 115 Cal. 390 [47 Pac. 139]; *Green v. Pacific Lumber Co.*, 130 Cal. 440 [62 Pac. 747]." In *Dow v. The City of Oroville, supra*, it was said a witness *H* was permitted to testify over objection that plaintiff some three weeks after the accident "declared to the witness that he was then still suffering physical pain." In holding the testimony admissible it was stated that such declarations were proper and that it is only where complaints or declarations refer to past condition that testimony of the complaints is inadmissible. In *Williams v. A. R. G. Bus Co., supra*, it was said that error was assigned because of the admission of the "testimony by the wife and mother of the plaintiff as to statements made by him with reference to the pain and suffering which he was undergoing during the period in which he was recovering." It was held, "This testimony was properly admitted under a well-recognized rule of evidence." The court cited *Lange v. Schoettler, supra*, and *Green v. Pacific Lumber Co., supra*.

be proved by a testimony that is not Hearsay. Direct proof, however, is more difficult to obtain, if it is to be given by a witness who has observed the condition of the person in question, and, it is not so satisfactory as declarations when it is given by the person upon the witness stand in support of his claim. For the most part people do not complain of pain or suffering unless it exists. So due to the "fair necessity" of the situation, and the trustworthiness of such testimony, it would seem that it is quite safe to admit statements or declarations of pain or suffering to prove the physical condition of the declarant at the time such statements are made.

The California courts, following the great weight of authority elsewhere, strictly adhere to the rule that statements as to past pain or suffering are not admissible; that they are Hearsay, and do not fall within any recognized class of admissible Hearsay.<sup>30</sup> In *Ensign v. Southern Pacific Company*,<sup>31</sup> an action for wrongful death, it was said statements made by the deceased some hours after the accident that his back "was wrenched" were not admissible, that they did not constitute "any part of the *res gestae* and, therefore, did not fall within the exception to the Hearsay rule."<sup>32</sup> *People v. Bray*<sup>33</sup> is also authority for the proposition that statements as to past pain or bodily condition are not admissible. In that case defendant was convicted of manslaughter. His defense was that the deceased died of influenza. It was held statements of deceased, made after the alleged attack, that some time before she was suffering from influenza were not admissible. A distinction was made between complaints of present pain and suffering and a narration of past suffering. The court states that declarations of present pain and suffering are admissible "upon the principle of *res gestae*."

#### IV

Due to the great number of cases it is not practicable to give the same detailed consideration to them as was given to the cases involving declarations of pain and suffering to prove existing bodily condition. The cases involving a great variety of topics will be grouped somewhat arbitrarily, perhaps.

There exists a generally recognized rule of wide application that declarations are admissible to show the present state of mind or intention of the declarant, when state of mind or intention is relevant.<sup>34</sup>

<sup>30</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1722.

<sup>31</sup> (1924) 193 Cal. 311, 223 Pac. 953.

<sup>32</sup> The court cited *Estate of James* (1899) 124 Cal. 653, 57 Pac. 578.

<sup>33</sup> (1919) 42 Cal. App. 465, 183 Pac. 712. See Note (1920) 5 CORN. L. Q. 333, for a comment on this case and a discussion of declarations of past pain and suffering.

<sup>34</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1729.

Sometimes the declarations are received to prove the truth of the facts asserted and sometimes they are admitted to prove merely that the declarant made the declaration. If admitted for the former purpose they are Hearsay and to be received must fall within some recognized class of admissible Hearsay. If they are admitted for the latter purpose they do not come within the general prohibition of the Hearsay rule, hence to be admissible need not fall within any special class of admissible Hearsay.<sup>85</sup>

The rule that declarations of mental condition are admissible to show present state of mind, that is, the declarant's state of mind at the time the declarations are made, is peculiarly applicable to actions for alienation of affections. The question has arisen in California, and though the decisions have not been entirely harmonious, a rather well settled rule has been recognized and applied. For example, in an action by the husband for the alienation of his wife's affections, it has been held, in California, that declarations of the wife, made after she became acquainted with the defendant, were admissible to show that at the time she made the declarations she had no affection for her husband and had affection for the defendant.<sup>86</sup> Her declarations were admissible

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<sup>85</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1745.

<sup>86</sup> *Adkins v. Brett* (1920) 184 Cal. 252, 193 Pac. 251. The opinion by Justice Olney contains an excellent statement of the rule. The testimony admitted by the trial court was a declaration by the wife that she had gone automobile riding with defendant, dined with him, etc., and intended to continue doing so, and that plaintiff was distasteful to her. It was held this testimony was admissible to prove her state of mind, but not the truth of her assertions that she had gone riding with defendant, etc. In view of the fact that the testimony was admissible for one purpose, and not for another, the judgment below was reversed because the trial judge failed to instruct the jury sufficiently that the declarations were admissible for the sole purpose of showing her state of mind. The opinion states that when other evidence is available as to state of mind the trial judge might in his discretion refuse to admit the evidence when it seems highly probable the jury would not consider it for the sole purpose of determining state of mind.

Without employing the loose phrase *res gestae* the learned justice stated the rule as follows:

"The evidence was, in fact, Hearsay, both as to the past matters stated in the conversations and as to the wife's statements of her then feelings toward the plaintiff and the defendant. But the rule is thoroughly well settled that when the intention, feelings, or other mental state of a certain person at a particular time, including his bodily feelings, is material to the issues under trial, evidence of such person's declarations at the time indicative of his then mental state, even though Hearsay, is competent as within an exception to the Hearsay rule. In the present case the state of his wife's feelings at the time of these conversations, both toward her husband and toward the defendant, was material, and the conversations were indicative of her feelings, and this being so, evidence of them was admissible to show her then state of feelings." (184 Cal. at 355, 193 Pac. at 252.)

The court disapproved of rulings to the contrary in *Humphrey v. Pope* (1905) 1 Cal. App. 374, 82 Pac. 223, and *Barlow v. Barnes* (1916) 172 Cal. 98, 155 Pac. 457. It approved the rule stated in *Cripe v. Cripe* (1915) 170 Cal. 91, 148 Pac.

Hearsay. They were admitted to prove the truth of the facts asserted. The rule admitting this type of Hearsay is based upon the "fair necessity" of the situation. As has been well stated by Justice Holmes when he was a member of the Supreme Judicial Court of Massachusetts: ". . . such declarations, made with no apparent motive for misstatement, may be better evidence of the maker's state of mind at the time than the subsequent testimony of the same persons."<sup>37</sup> For the reasons just stated, declarations of one spouse are admitted for the purpose of showing the declarant had affection for the other spouse.<sup>38</sup>

## V

The condition of mind of a testator, or a grantor, is of great importance in cases when there is a claim that undue influence was successfully practiced, thus preventing the exercise by the maker of a free will. The California courts following the sound rule found expressed in many decisions from other jurisdictions<sup>39</sup> hold that declarations of the state of mind of the testator, or grantor, are admissible in evidence to show the mental condition of the declarant at the time the declarations are made.<sup>40</sup> The distinction is carefully made in these cases between the use of the declarations for the purpose of proving that undue influence was in fact exercised, and for the purpose of proving the

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520, wherein it was held error to exclude defendant's testimony that before he, the father of plaintiff's husband, had advised a separation that his son had told him that plaintiff drank to excess and was abusive. It was held the testimony was admissible to prove that the son had no affection for his wife before the defendant sought to bring about a separation. The testimony was also held admissible to prove the motive of the father in bringing about the separation. For the latter purpose, the testimony was not Hearsay as it was admissible for the purpose of determining the good faith of the father regardless of whether the declarations of the son were true or false. Mental state must of course be relevant. *Bridge v. Ruggles* (1927) 202 Cal. 326, 260 Pac. 553.

<sup>37</sup> *Elmer v. Fessenden* (1889) 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724.

<sup>38</sup> *Jameson v. Tulley* (1918) 178 Cal. 380, 173 Pac. 577. Here letters from the wife to the plaintiff, her husband, were admitted to prove that a state of affection existed between the husband and wife before the alleged wrongful acts of defendant. Letters of the wife to the husband written after the alleged wrong of defendant were held to have been improperly admitted, when the real purpose in offering them was to show a confession by the wife of improper relations with defendant. The latter letters were inadmissible Hearsay; the first letters admissible Hearsay. See also *Bourne v. Bourne* (1919) 43 Cal. App. 516, 185 Pac. 489.

<sup>39</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1738, citing cases from many jurisdictions.

<sup>40</sup> *Estate of McDevitt* (1892) 95 Cal. 17, 30 Pac. 101; *Estate of Calkins* (1896) 112 Cal. 296, 44 Pac. 577; *Estate of Arnold* (1905) 147 Cal. 583, 82 Pac. 252; *Estate of Snowball* (1910) 157 Cal. 301, 107 Pac. 598; *Estate of Ricks* (1911) 160 Cal. 450, 117 Pac. 532; *Lamb v. Wilkie* (1912) 19 Cal. App. 286, 125 Pac. 757; *Estate of Gleason* (1913) 164 Cal. 756, 130 Pac. 872; *Estate of Jones* (1913) 166 Cal. 108, 135 Pac. 288; *Estate of Carson* (1920) 184 Cal. 437; 194 Pac. 5, 17 A. L. R. 239; *Estate of Anderson* (1921) 185 Cal. 700, 198 Pac. 407.

state of mind or mental condition of the declarant at the time the declaration was made. For the latter purpose the statements are admissible Hearsay, for the former they are not admissible. When offered to prove the truth of the assertion that undue influence was exercised they are Hearsay of an ordinary kind and hence inadmissible. No necessity exists for resorting to Hearsay and such Hearsay is not specially reliable. They do not fall within any class of admissible Hearsay. When offered, however, for the purpose of showing mental condition a sound reason exists for a special class of admissible Hearsay. The most reliable and often the only evidence of the mental state of a person is to be found from his declarations.

So then the rule is that declarations of mental state are admissible Hearsay to prove the mental state of the declarant at the time the declaration is made. This distinction was nicely drawn by Justice Harrison in *Estate of Calkins*,<sup>41</sup> wherein he said:

"To the extent that these declarations at or prior to the making of the will, afforded any evidence bearing upon the state of the testatrix's mind at the time of the execution of the will—her mental capacity, the condition of her mind toward the object of her bounty, as well as toward the persons by whom she was surrounded, and the correspondence of her acts with the feelings and purposes entertained by her at the time she executed the will—they were properly admitted, and were entitled to consideration by the jury; but, to the extent that they purported to be declarations of the acts of others, or of her own acts, they were but matters of hearsay merely, whose truth rested in the veracity of the utterer, and upon which there was no opportunity of cross-examination or of explanation by the party who had uttered them, and were not entitled to any weight by the jury, and cannot be considered for the purpose of sustaining their verdict."

The mental condition of the testator, or grantor, in these cases, before, during, and after the will or deed is executed, is regarded as a relevant fact, hence it is proper to admit declarations made before, during, and after the execution of the instrument in question. "The stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distance up or down the current," said a learned writer in a valuable article dealing with various questions of evidence.<sup>42</sup> Accordingly it has been held that the declarations, to be admissible, need not have been made at the very time the deed or will was executed, but that they are admissible though

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<sup>41</sup> *Estate of Calkins* (1896) 112 Cal. 296, 300, 44 Pac. 577, 578.

<sup>42</sup> Chaffee, *The Progress of the Law, 1919-1922—Evidence* (1922) 35 HARV. L. REV. 428, 444.

made before<sup>43</sup> or after<sup>44</sup> the time of making of the deed or will. Obviously, declarations made at the time of making the instrument are admissible to show the mental condition at the very time the instrument was executed. The admissibility of the declaration when made at the time of the act is often based upon the meaningless phrase *res gestae*.<sup>45</sup> Like declarations made before, or after, the execution of the instrument they should be received for the sole purpose of showing the then state of mind of the declarant and not to prove the truth of the matter asserted.<sup>46</sup>

<sup>43</sup> Estate of McDevitt (1892) 95 Cal. 17, 30 Pac. 101; Estate of Arnold (1905) 147 Cal. 583, 82 Pac. 252; Estate of Snowball (1910) 157 Cal. 301, 107 Pac. 598.

<sup>44</sup> Estate of McDevitt (1892) 95 Cal. 17, 30 Pac. 101; Estate of Ricks (1911) 160 Cal. 450, 117 Pac. 532; Piercy v. Piercy (1912) 18 Cal. App. 751, 124 Pac. 561.

<sup>45</sup> Estate of McDevitt (1892) 95 Cal. 17, 30 Pac. 101; Estate of Arnold (1905) 147 Cal. 583, 82 Pac. 252; Estate of Ricks (1911) 160 Cal. 450, 117 Pac. 532; Estate of Gleason (1913) 164 Cal. 756, 130 Pac. 872.

<sup>46</sup> In Estate of Gleason (1913) 164 Cal. 756, 130 Pac. 872, there is contained a good deal about *res gestae*, some of which is good and some confusing. A will was contested on grounds of undue influence and lack of capacity. The jury found in favor of the will in which the testator left ten dollars to his sister and the balance of his estate, about forty thousand dollars, to his wife. The notary public who drew the will, and also took the testator's acknowledgment thereto, testified that after the instrument was executed the testator within ten or fifteen minutes thereafter returned to the office and seemed to be in a state of nervous collapse and remarked, "Oh, hell, that paper, . . . That will." The notary testified that he then told the testator that an acknowledgment of the will was unnecessary and the witness replied, "I know, but I had to do it. I had to do it right or hell would pop at home; I could not stay there." The notary then asked the testator whom he married and the testator replied that he didn't know. "I got drunk, and they said I was married; that is all I know about it."

The trial court admitted the evidence and instructed the jury that the conversation was admitted upon the question of the soundness or unsoundness of the mind of the testator and was not to be considered as establishing undue influence by the defendant, the testator's wife. The Supreme Court affirmed the judgment below, saying, after considerable discussion of the above testimony and an instruction that was given, that the error, if any, was harmless as the evidence fell far short of showing undue influence. The following commendable observation was made as to the phrase *res gestae*: "Definitions of *res gestae* are as numerous as prescriptions for the cure of rheumatism and generally about as useful." Seemingly the writer of the opinion held the view that the testimony was not a part of the *res gestae*, so called, and that had it been, it would have been admissible for that reason. The conclusion was reached that the declarations were expressions of an opinion about a past occurrence "And was no more a part of the *res gestae* because it was uttered a few minutes after the execution of his will than it would have been if spoken a month later."

Not intending to suggest that the result of the decision was erroneous, it seems that the testimony was admissible for the purpose of showing the decedent's attitude of mind towards his wife. Presumably the court was of the opinion that if the testimony should be held to be a part of the *res gestae* then the declarations would have gone to the jury as proof that the wife forced the testator to make the will leaving practically all of his property to her. It is, of course, true that certain declarations are admissible to prove the truth of the matter declared when they are made under the stress of excitement. The phrase *res gestae* is often

The declaration to be admissible must relate to the mental condition of the declarant. Declarations therefore which relate solely to acts of undue influence are not admissible<sup>47</sup> for any purpose.

## VI

It is probably true that most legal relations arise out of a combination of acts done and words spoken. Some arise out of acts alone, while others arise out of words alone.<sup>48</sup> Bearing in mind that the Hearsay rule excludes declarations only when they are offered for the purpose of proving the truth of the facts asserted by the declarant, it is obvious that the rule against the admission of Hearsay has no application where the sole concern is with whether the words were spoken and not with whether they were true or false.<sup>49</sup>

There is a rule of evidence of wide application, separate and apart

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employed to describe this class of admissible Hearsay evidence. Certain declarations are also admitted when made in connection with the doing of an equivocal act. These are sometimes called "*res gestae*" and sometimes "verbal acts." The declarations of the testator did not fall within either class and hence were only admissible to show the state of mind of the testator. This article makes no attempt to deal with spontaneous declarations which form a true class of admissible Hearsay, and only incidentally with statements made in connection with acts that do not relate to mental or physical condition, which are not Hearsay. These situations are highly interesting and may be classified and described without employing the meaningless phrase *res gestae* and its first cousin, if not twin brother, "verbal act." They include so many situations and so many problems that special and separate treatment is required.

<sup>47</sup> Estate of Anderson (1921) 185 Cal. 700, 198 Pac. 407. In this case the learned writer of the opinion, Justice Olney, critically discusses three declarations that were admitted. The first one, made three months after the will, was that the testatrix had changed her mind as to the disposition of her property and regretted the will she had made. He concluded that the only evidentiary effect of the declaration was that it might be said to show that she acted under pressure in the first instance. He concluded that this declaration had little or no value as to the state of her mind and should not have been admitted, as it would have influenced the jury improperly, and have been taken by them as proof that she had been unduly influenced. He concluded when the declaration is of the type that its prejudicial effect is greater than its proper purpose, it should be excluded. The second declaration was contained in a letter by the testatrix to her aunt to the effect that the will had been made at the aunt's request. He very properly concluded that its only effect was to prove undue influence of the aunt and that it was wholly inadmissible for that purpose, that it was Hearsay and not within a special class of admissible Hearsay. The third declaration was that the testatrix requested her husband to accompany her to Reno to protect her from her aunt and uncle because she feared they would be cruel towards her. He properly concluded that this declaration was admissible to prove her state of mind toward her aunt.

See also Estate of Jones (1913) 166 Cal. 108, 135 Pac. 288.

<sup>48</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1772. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae* (1922) 31 YALE L. J. 230, 231.

<sup>49</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1766; Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae* (1922) 31 YALE L. J. 230-231.

from the Hearsay rule, that makes admissible declarations made at the time equivocal, or meaningless, physical acts are done, to show the significance of the act, when the act is one of the main acts in issue. The necessity for such a rule of evidence is obvious when we bear in mind that many legal relations arise out of a combination of acts done and words spoken at the same time. This broad rule of evidence is the basis for the admission of these declarations, "*Irrespective of the truth of any assertion they may contain; and they neither profit nor suffer by virtue thereof.*"<sup>50</sup>

The following are examples of the general statement that words alone may create legal relations, and of the proposition that evidence by witness *A* as to what *B* said is not always Hearsay evidence. In an action for slander, for instance, when *P* puts *X* upon the witness stand to prove that he heard *D* utter certain defamatory words of and concerning *P*, the Hearsay rule is not involved. At this time the court is concerned only with whether the words were spoken. Also in an action by *P* against *D* for breach of an oral contract when *X* is put upon the stand by *P* to prove what words *X* heard uttered by *D*, the Hearsay rule is of no moment. There are many other similar situations.<sup>51</sup>

The rule excluding Hearsay may not be involved in the situations when words have accompanied physical acts which are equivocal or meaningless standing alone. The following is an illustration of the latter statement. The general rule is that when a debtor owes his creditor two debts the debtor may designate which debt he is paying when the amount paid is not sufficient to pay both debts. The declarations of the debtor made at the time of paying the money are admissible to show which debt was designated. Proof of his declarations at the

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<sup>50</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1772. The learned author states the proposition as follows:

"Thus the words are used in no sense testimonially, *i.e.* as assertions to evidence the truth of a fact asserted in them. On the one hand, therefore, the Hearsay rule interposes no objection to the use of such utterances, because they are not offered as assertions (ante, §1766). On the other hand, so far as they may contain assertions, these are not to be used or argued about testimonially, nor believed by the jury; for this would be to use them in violation of the Hearsay rule. In short, the utterances enter *irrespective of the truth of any assertion they may contain; and they neither profit nor suffer by virtue thereof.* For example, when an act of adverse possession is to be proved as the foundation of title, and the adverseness consists in a claim of ownership, the occupier's statement, 'This land is mine; for I have a deed from Doe,' is admissible as giving his occupation the significance of an adverse claim, but not as evidence that he has as asserted, a deed from Doe."

<sup>51</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1770. THAYER, LEGAL ESSAYS (1927), *Bedingfield's Case*, page 267. *Clark v. Rusb* (1861) 19 Cal. 393, holding admissible declarations of the parties where the question was whether an oral contract had been made.

time of handing over the money does not violate the rule prohibiting Hearsay, as the declaration is not offered for the purpose of proving the truth of any fact contained in the declaration.<sup>52</sup> It may be, because of the applicable rule of substantive law, that we are not concerned with whether the words uttered were false or true. On the other hand, because of applicable rules of substantive law the court may be concerned with the question whether the words uttered were true or false, when they are uttered at the time of the doing of an equivocal or meaningless physical act and the Hearsay rule may be involved. The thought sought to be emphasized is that the Hearsay rule may or may not apply to situations when utterances are made in connection with physical conduct, that standing alone is equivocal or meaningless. It is also to be remembered in this connection, as has been previously pointed out, that declarations of mental condition or actual intent are generally admissible though they are Hearsay. It may therefore be only academic in some cases to determine whether or not the Hearsay rule is involved, whether the declarations are admitted because they fall within a special class of admissible Hearsay, *viz.* declarations that show mental condition or true intention; or, whether the Hearsay rule

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<sup>52</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1777. *McFarland v. Lewis* (1840) 3 Ill. 344.

That the actual intent of the debtor may be immaterial is seen by the following example.

*B* owes *A* two debts, one of \$500.00 for a white horse bought by *B*, and another of \$200.00 for a black horse. *A* sues *B* for \$300.00 the balance due on the purchase price of the white horse. *B* pleads the statute of limitations. *A* shows part payment by *B* of \$200.00 which if made on that debt will take the case out of the operation of the statute. *B* produces a witness *X* who testifies that he saw *B* hand \$200.00 to *A* and heard *B* say to *A* at the time, "this is for the black horse." *A* would not be permitted to prove that though *B* did say that he was paying on the black horse he meant the white horse. *X*'s testimony as to what *B* said is not Hearsay but testimony of the words used by *B* constituting his election which stands irrespective of *B*'s actual state of mind when he uttered the words.

Professor E. M. Morgan in the article heretofore frequently cited, *A Suggested Classification of Utterances Admissible as Res Gestae* (1922) 31 YALE L. J. 229, 233, gives the following example where the Hearsay rule is not involved:

"The utterance may be circumstantial evidence of a state of mind which, in turn, is circumstantial evidence of the intent, as where a resident of *X*, while removing therefrom to *Y*, utters imprecations upon *X* and all its inhabitants, either reverently or blasphemously calling down upon them the condemnation of the Almighty. If domicile is in issue, the intent at the time of removal is an operative fact; the hostility of the declarant is circumstantial evidence of his intent to abandon *X* as his residence, and his utterance is circumstantial evidence of his hostility. Where the utterance is merely circumstantial evidence of the state of mind, it is not offered for the truth of the matter asserted and does not violate the rule against Hearsay." See *People v. Valcalda* (1922) 188 Cal. 366, 205 Pac. 452, holding admissible declarations of the accused to meet the defense of insanity.

is not involved at all, and the declarations are admitted because the particular legal relation arises out of it, or is extinguished by, the doing of acts and the uttering of words the truth or falsity of which is of no significance. The words may come in as admissible Hearsay and they may also be admissible because they are relevant operative facts.<sup>53</sup> It is believed, however, that it is essential that these distinctions be kept in mind. Much loose language and many improper decisions have resulted from incorrect analysis, and the use of the meaningless phrase *res gestae*.

Declarations in connection with equivocal or meaningless physical acts are admitted because the combination of the words and the acts create or extinguish legal relations. In those cases the declarations must accompany equivocal or meaningless conduct. The declarations to be admissible under this rule must have been made at the time the acts are done. This is a requirement of relevancy only. When, however, the declaration is offered to prove mental condition, actual state of mind, no requirement exists that the declaration shall have been made at the time a physical act was done. Actual state of mind before or after the

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<sup>53</sup> The following extract from WIGMORE, EVIDENCE (2nd ed. 1923) §1729 is no doubt much clearer:

"A statement of *intent*, so far as made by an accused person, is considered elsewhere (post, §1732). A statement of intent, made by other persons, does not so frequently come into question, for the reason that the intent itself is less often a material and relevant fact to be proved. Moreover, whenever it is relevant and therefore provable, it is commonly so only when attending an act otherwise ambiguous and equivocal. For example, when money is handed over, the precise nature of the act, whether a loan or a payment, will depend much upon the intent; when land is occupied, the precise effect of the occupation, whether adverse or not, will depend much upon the intent. In such cases, declarations accompanying the act will be admissible as coloring and completing its significance, under the Verbal Act doctrine (post, §1772), whether they do or do not include an assertion of intent; and as this larger doctrine suffices to admit declarations of intent accompanying the act, the applicability of the present Exception (though clear enough) is a merely academic question."

Doubt has been expressed as to whether the phrase "verbal acts" should be employed in discussing the admissibility of evidence. The use of the phrase, if properly restricted, may not be objectionable, yet, as such phrases somehow seem destined for much misuse, a learned writer has stated that the phrase is almost as obnoxious as *res gestae*. Professor Morgan in the article *A Suggested Classification of Utterances Admissible as Res Gestae* (1922) 31 YALE L. J. 227, 235, makes the following criticism of it:

"It is said that in these cases, the utterance is admissible as a verbal act or a verbal part of an act. It must be obvious that every utterance is a verbal act, so that the term, properly defined, signifies nothing more than an act consisting of words. Since, however, acts are often popularly contrasted with words, its use might, with much plausibility, have been confined to utterances entirely without the scope of the rule against hearsay, because not offered to prove the matter asserted in them. So limited, it would have been convenient, if not helpful. In such event, it could never have been applied to a direct declaration of a state of mind offered to prove that state of mind."

act may be relevant. This is Hearsay of a special kind. The reason for admitting this type of Hearsay is, as previously pointed out, that there is a "fair necessity" for such testimony. So when a declaration of mental condition is offered, proof is not required that it was made while doing a physical act. Opinions of courts of last resort in the United States contain many statements that declarations of mental condition to be admissible must accompany physical conduct and distinctions are made between what is and what is not physical conduct that are wholly unsubstantial.

It is perhaps somewhat doubtful whether upon purely logical grounds it is entirely wise to include in this article a discussion of those cases where the evidence in question is not Hearsay. Some of the situations, however, where the declarations are not Hearsay, and are admissible because relevant, are included, because of the state of the decisions and because of the close relationship of actual and expressed intention.<sup>54</sup> Very often no distinction is taken in the decisions between actual state of mind or expressed state of mind or intention.

Litigation involving the question whether title has passed to land, money, chattels, bonds, or choses in action, furnish opportunity for serious questions as to the admissibility of declarations of the donor or grantor, and as to the purpose for which such declarations may be admitted. The problem in these cases is often somewhat different from the problem in the cases previously considered. The actual mental condition of the alleged donor or grantor is sometimes material, sometimes immaterial.

## VII

There are many California decisions of interest involving the admissibility of declarations made in connection with the delivery of deeds, money, stocks, bonds, chattels, and choses in action, and, considered as a group, there is a liberal tendency to admit declarations of the alleged donor or grantor on one ground or another.

To pass title to land, the deed thereto must have been delivered by the grantor to the grantee with intent to pass title to the land described.<sup>55</sup> While there are certain rebuttable presumptions applied by the courts that furnish aid in the solution of these questions much evi-

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<sup>54</sup> As was stated in *supra*, n. 46 there is no attempt to discuss generally the admissibility of utterances employed in connection with equivocal physical conduct or declarations of a spontaneous sort offered as proof of the truth of the facts declared. These interesting and important cases deserve separate consideration.

<sup>55</sup> *Hotalling v. Hotalling* (1924) 193 Cal. 368, 224 Pac. 455; *Kimbro v. Kimbro* (1926) 199 Cal. 344, 249 Pac. 180 and comment thereon in Note (1926) 15 CALIF. L. REV. 156. See The Northern California Conference Association of the Seventh Day Adventists v. Smith (1930) 79 Cal. Dec. 153, 285 Pac. 314, and comment thereon in Note (1930) 18 CALIF. L. REV. 709.

dence is taken as to whether the grantor handed the deed to the grantee, or to another for him, actually intending at that time to pass the title to the grantee to the land described in the deed. In many cases where it is claimed land was given by one person to another, it has been held that what the grantor said at the time he gave the deed to the grantee, or to another for him, is admissible evidence.<sup>56</sup> Where the grantee claims a gift of the land from the grantor, actual intent to pass title is essential<sup>57</sup> and in one respect what the alleged grantor said when he handed over the writing is admissible Hearsay. In another aspect what the alleged grantor said is not Hearsay at all. Though actual intention to pass title is essential, words must be employed,

<sup>56</sup> *Lewis v. Burns* (1895) 106 Cal. 381, 39 Pac. 778; *Ruiz v. Dow* (1896) 113 Cal. 490, 45 Pac. 867; *Union Oil Co. v. Stewart* (1910) 158 Cal. 149, 110 Pac. 313, Ann. Cas. 1912A, 567; *Rice v. Carey* (1915) 170 Cal. 748, 151 Pac. 135; *Smith v. Smith* (1916) 173 Cal. 725, 161 Pac. 495; *De Cou v. Howell* (1923) 190 Cal. 741, 214 Pac. 444; *Rodriguez v. Rodriguez* (1924) 69 Cal. App. 399, 231 Pac. 375; *Jones v. Coulter* (1925) 75 Cal. App. 540, 243 Pac. 487; *The Northern California Conference Association of the Seventh Day Adventists v. Smith* (1930) 79 Cal. Dec. 153, 285 Pac. 314.

*Lewis v. Burns*, *supra*, is somewhat different from the other cases cited. That was an action to quiet title. Plaintiff claimed the land in question was the community property of himself and wife, who was dead at the time of the suit. Defendants who derived title from the wife claimed the property was the separate property of the wife. The property was conveyed to the wife during the marriage by grantors, whose names do not appear. One De. B paid for the lots. Houses were built upon the lots by De. B, for whom plaintiff and his wife worked. Plaintiff claimed that De. B acted as the agent of his wife and himself in buying the lots and building the houses, was reimbursed by them, and that the title was taken in the name of the wife. Defendant claimed the lots and houses were gifts from De. B to the wife. It was held error upon the part of the trial court to exclude the testimony of several witnesses offered by plaintiff, of declarations of De. B, then dead, made about the time the lots were bought, and the houses built, as to the character in which he made the purchases of the lots and the terms upon which he was building the houses. The court said what De. B said was a part of the *res gestae* and was admissible. What he said about the lots and the houses seemingly was admissible to show his state of mind or actual intent. The title to the lots was in Mrs. L. There is no question that the lots were either hers or hers and her husband's. It was highly important to know whether De. B was buying the lots and building the houses under an agreement for compensation for the money laid out on them or in order to make a gift. What he said was to show his mental condition and seemingly admissible Hearsay. It was relevant because the transactions were equivocal.

<sup>57</sup> For interesting discussions of the substantive law of California relating to delivery of deeds see the following. Note *Deeds: Conditional Delivery* (1914) 2 CALIF. L. REV. 146; Note *Escrows: Prior Contract Necessary to Constitute Escrow* (1917) 5 CALIF. L. REV. 420; Note *Deeds: Sufficiency of Delivery When Delivered to Take Effect Upon Death* (1917) 5 CALIF. L. REV. 338; Note *Delivery of Deeds: Conditional Delivery to the Grantee* (1920) 9 CALIF. L. REV. 64; McMURRAY, *A Review of Recent California Decisions in the Law of Property* (1921) 9 CALIF. L. REV. 459; Note *Deeds: Conditional Delivery to the Grantees* (1927) 15 CALIF. L. REV. 156; Note *Real Property: Deed of Gift Conditioned on Death of Grantor: Intent of Grantor* (1930) 18 CALIF. L. REV. 709.

though no particular words of art are required, that mean a gift is being made, that title is being passed. So then it seems what the alleged grantor said when handing over the deed is important for two reasons; first, to ascertain his actual state of mind, and for this purpose, the words are admissible Hearsay, and, second, to ascertain what the words were he used, and for this purpose the declarations are not Hearsay, but admissible relevant evidence to show the meaning of an equivocal act. The declarations then, it is suggested, are important in two aspects, one to show actual intention, and two, to show the words used. Some of the explanations given for the admissibility of the declarations go no farther than to state that they were part of the *res gestae*.

The more interesting question, perhaps, in this type of case is whether declarations made before or after the delivery of the deed are admissible. Some California cases have held that declarations made after the alleged delivery of the deed are inadmissible.<sup>58</sup> They were overruled as being unsound, on this question of evidence, in the leading case of *Williams v. Kidd*,<sup>59</sup> in which, after a very full discussion of

<sup>58</sup> *Bury v. Young* (1893) 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186. In this case the declarations made after the delivery of deeds were held inadmissible as an attempt upon the part of the grantor to create evidence in his favor.

*Ord v. Ord* (1893) 99 Cal. 523, 34 Pac. 83. In this case it was claimed a deed had not been delivered with intent to pass title. It was held declarations by the grantor after executing and handing over a deed were inadmissible; (1) that they were Hearsay; and (2) that the grantor could not disparage his deed by declarations or acts done subsequent to its execution. The judgment below was reversed because of the admission of declarations of the grantor that he had delivered a deed provisionally and had unsuccessfully demanded its return to him. The court distinguished *Dean v. Parker* (1891) 88 Cal. 283, 26 Pac. 91, saying the declarations admitted in that case, which were made after the execution of the deed, sustained the delivery of the deed.

See also *Aguirre v. Alexander* (1881) 58 Cal. 21.

<sup>59</sup> (1915) 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E 703. This was an action to set aside a deed which purported to be a conveyance of certain property by W. H. Williams to Laura Belle Kidd. Plaintiffs were the residuary legatees under the will of Williams; defendant was his grand-niece. The deed was dated in 1901. Williams died in 1909. The deed was recorded in July, 1910. Judgment below was for plaintiffs. It was affirmed on appeal. There was considerable circumstantial evidence tending to show the deeds were, and were not, made by the grantor with intent to divest himself of the title to the property in question. It was held the trial court properly admitted declarations of Williams, made at the time the deed was made, and also declarations he made before and after the deed was made. Williams owned some forty pieces of property. At one time he had a plan to make deeds to all his property so as to dispose of it at his death in this way rather than by a will. He made only four deeds. His declarations made to his agent, who was assisting Williams in carrying out his plan, showing that he contemplated the passing of all his property at his death in this way, were admitted. These declarations showed an intent on his part not to part with the title to his property during his lifetime. The trial court also admitted evidence showing that after the execution of the deed, Williams expended a substantial amount of

the question, the rule was announced that declarations of an alleged grantor made before, at the time of, and after the execution of a deed are admissible, to show whether a delivery was made sufficient to pass title, and that such declarations are not objectionable because they show no delivery and no passage of the title. Admissibility of these declarations was put upon the ground that they show the intention of the alleged grantor. Declarations made before and after the physical act of executing the deed are admissible to show the state of mind of the alleged grantor; they are admissible Hearsay received because of the rule which permits evidence of what was said to show actual state of mind at the time it was said. What was said before or after execution should be strictly limited, as it is in the undue influence cases previously considered, to prove state of mind. Where a question has arisen as whether one intended to deliver a deed to another to pass title to Black Acre it is desirable and important to know what was the state of mind of the alleged grantor before<sup>60</sup> and after the time it is claimed a gift was actually made, on the theory that there is continuity of state of mind.

### VIII

Similar questions of evidence arise in the cases where the dispute is as to whether there has been a gift of money in the bank, bonds, or

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money on the property in question and negotiated for a sale of it as if he owned it. The court, speaking through Lorigan, J., said: "All these matters had some tendency to show that there was no intention on the part of Williams to deliver it except as a part of a testamentary scheme which he had abandoned."

The court in overruling *Bury v. Young* (1893) 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186, and *Ord v. Ord* (1893) 99 Cal. 523, 34 Pac. 83, on the question whether declarations after the alleged delivery are admissible, said that if title has passed declarations of the grantor disparaging it are not admissible but that such a rule has no application to those cases where the very question at issue is whether title has passed. The court made it plain that this evidence is admitted to show the intent of the alleged grantor. *Sprague v. Walton* (1904) 145 Cal. 228, 78 Pac. 645, a gift of money case, was cited, and a portion of the opinion quoted, to the effect that declarations made before, contemporaneously, or after an alleged gift, are admissible as "There is no better proof of intention than declared intention, and it is often the only means of proof." The opinion does not state whether the court regarded the declarations as Hearsay or not.

And see *Rice v. Carey* (1915) 170 Cal. 748, 151 Pac. 135, following *Williams v. Kidd*, *supra*, holding declarations made after delivery admissible. Also see the Northern California Conference of Seventh Day Adventists v. Smith (1930) 79 Cal. Dec. 153, 285 Pac. 314, and *Morgan v. Matthieson* (1930) 103 Cal. App. 510, 285 Pac. 325.

<sup>60</sup> *Kyle v. Craig* (1899) 125 Cal. 107, 57 Pac. 791. Here the court held declarations of the alleged grantor made shortly before the execution admissible as bearing upon his intent. It was claimed a deed was not delivered with intent to pass title to the grantee. The instrument was executed January 7, 1895. The declarations that were admitted were made January 4, 1895. Seemingly it was considered necessary by the court to speak of *res gestae* to fortify its conclusion that the testimony was admissible.

stock. In several California decisions declarations of the alleged donor made at the time,<sup>61</sup> before,<sup>62</sup> and after have been admitted to show

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<sup>61</sup> Ruiz v. Dow (1896) 113 Cal. 490, 45 Pac. 867; Kyle v. Craig (1899) 125 Cal. 107, 57 Pac. 791; Sprague v. Walton (1904) 145 Cal. 228, 78 Pac. 645.

The question involved in Sprague v. Walton, *supra*, was whether about thirty-eight hundred dollars belonged to the estate of M. S. or his wife N. S. The money was represented by savings bank deposits and at one time was community property of M. S. and N. S. Defendant, the executrix of the estate of N. S., the wife, claimed that there had been a gift of the money from M. S. to N. S. The trial court found there was no gift. It was held upon appeal that error had been committed in excluding declarations of M. S. made at the time he signed and delivered certain orders upon the bank. It was said, "There is no better proof of intention than declared intention, and it is often the only means of proof." No decisions were cited, but the court cited CAL. CODE CIV. PROC. §1870, sub. 2. This section provides that evidence may be given of "The act, declaration, or omission of a party, as evidence against such party." As the action was by the executor of the estate of M. S. against the executrix of the estate of N. S., the evidence properly may have been admitted as an admission, yet it was also admissible, as the court stated, as a declaration to show actual mental condition, and also to show what words were used.

See also Schooler v. Williamson (1923) 192 Cal. 472, 221 Pac. 145, wherein it was held that there was no delivery, and hence no gift, of ten one thousand dollar bonds, but that there was an oral trust of the bonds for plaintiff's benefit, and that declarations of the alleged creator of the trust were admissible. The bonds originally belonged to J. H. They were in his safe deposit box at the time of his death. On an envelope containing the bonds was written plaintiff's name and address and a description of the bonds. Plaintiff alleged that J. H. told plaintiff on July 19, 1920, that he would arrange matters so she would get some bonds, and that on July 20, 1920, he told her that he had done so. One C, a witness, testified that he went to the trust company with J. H. on July 19; that J. H. wrote the endorsement, just described, on the envelope containing the bonds, after showing him the bonds, and, that after writing on the envelope he placed them in the box and said, "I am glad I done that"; and pointing to the box said, "There is five thousand dollars more for her there." He testified he told J. H. that plaintiff might not get the bonds and J. H. replied, "You see that she gets them, they are hers and for her and you see that she gets them." C also testified that he and J. H. went to the box again on July 31, that J. H. picked up the envelope and said, "These are Nellie's, I am glad I done that." An attorney who had written a will for J. H., in which plaintiff was bequeathed \$5000 in bonds, testified that J. H. showed him the bonds and envelope on July 26, 1920, and when J. H. was asked if the bonds were a part of his estate just the same as some other bonds, J. H. replied that they were. On several other occasions the attorney had advised J. H., when shown the bonds and the endorsement on the envelope, that plaintiff would not get the bonds at his (J. H.'s) death. The attorney testified that in a will he drew for J. H. ten thousand dollars in bonds were left to plaintiff, that the conversation of July 26, 1920, concerning the bonds and the envelope arose in connection with the execution of a new will in which the legacy to plaintiff was reduced to five thousand dollars of bonds. Speaking of these declarations, Wilbur, C. J., said:

"If this last-mentioned statement of July 31st is a part of the parol declaration of trust relied upon by appellant it is clear that the intermediate declaration of July 26th is a part of the *res gestae* and therefore admissible (Jones on Evidence, sec. 347; sec. 1850, Code Civ. Proc.), and that the introduction of the declaration of July 31st made the decedent's declarations of July 26th also admissible."

whether or not a gift was made. The declarations are admissible for the same reasons they are admissible in the cases where it is claimed there has been a gift of the title to land. When the declarations are made before or after the alleged gift they are admissible Hearsay to show mental condition. When the declarations are made at the very time of handing over the bonds, stock, savings deposit book, or chattel, the declarations have a double aspect. In one aspect they are admissible Hearsay to show actual intent or mental condition, while in another aspect they are admissible to show whether words of gift were employed. Here too the words used in connection with the physical conduct are important. They are operative facts.

### IX

When there is a dispute between an alleged vendee of personal property and a judgment creditor of the alleged vendor the declarations of the alleged vendor made at the time of the alleged sale are admissible for the same reasons stated in discussing the gift cases.<sup>63</sup>

In those cases where domicile must be determined, the declarations of the person whose domicile is in question as to where he considered himself to be domiciled are admissible to show his actual intent.<sup>64</sup>

Declarations of one in possession of land that the land is his are admissible.<sup>65</sup> The declarations in one aspect are admissible Hearsay

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This statement was followed by the statement that the decision was not placed "wholly on that ground." It was then stated that if J. H. believed the effect of writing plaintiff's name on the envelope containing the bonds resulted in making the bonds her property a trust came into existence.

<sup>62</sup> Ruiz v. Dow (1896) 113 Cal. 490, 45 Pac. 867.

<sup>63</sup> Eppinger v. Scott (1896) 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220. Justice Harrison, writing the opinion, stated the declarations were "a part of the transaction, and were admissible for the purpose of throwing light upon its character." The phrase *res gestae* was not employed by the learned justice. He cited no authority.

<sup>64</sup> Estate of Brady (1918) 177 Cal. 537, 171 Pac. 303. The case contains no discussion, only a brief statement that declarations made at the time of registering and afterwards were admissible.

See WIGMORE, EVIDENCE (2nd ed. 1923) §1727 and §1784. He states that many courts hold that declarations as to domicile are "verbal acts" and so limit admissibility to the situations where the declarations are made in connection with physical acts. He expresses the opinion that the declarations should be admitted under the rule of admissible Hearsay which makes admissible declarations to prove mental condition of the declarant at the time they were made.

See Barnard v. United States (C. C. A. 9th, 1908) 162 Fed. 618.

<sup>65</sup> Draper v. Douglas (1863) 23 Cal. 347; Cannon v. Stockmen (1869) 36 Cal. 535, 95 Am. Dec. 205; Phelps v. McGloan (1871) 42 Cal. 298; Stockton Savings Bank v. Staples (1893) 98 Cal. 189, 32 Pac. 936.

See WIGMORE, EVIDENCE (2nd ed. 1923) § 1778, wherein the rule is expressed that these declarations are not admissible Hearsay "but verbal parts of his act of occupation."

In Phelps v. McGloan, *supra*, the declaration was to the effect that *P* did

showing intent to claim the ownership, and as the notoriety of his adverse possession is important, his declarations in another aspect are admissible as operative facts, namely, to show the claim was openly made. In this aspect the declarations are not Hearsay in any sense.

Sometimes no question of title by adverse possession is involved, only the question whether the occupier is the owner. While it is true one in possession of property is presumed to be the owner, declarations made in connection with physical acts are received to show whether he was claiming to be the owner, that is, possessing the land as owner.<sup>66</sup>

### X

There are many California decisions holding in homicide cases that the State may introduce evidence of prior threats of the accused.<sup>67</sup> They are admissible to show intent at the time of the homicide, but they also are admissions of the party on trial, hence their admissibility does not solely rest upon the rule which sanctions Hearsay to prove mental condition.<sup>68</sup> Evidence of threats of the accused seemingly tend

not claim the land. Such declarations are also admissible. Often such declarations are admissible as admissions of a party with which subject this article has no concern.

<sup>66</sup> *Tait v. Hall* (1886) 71 Cal. 149, 12 Pac. 391. This was an action to restrain a road overseer from opening a road. There was a claim that one *T* by words, or conduct, had dedicated the strip in question for public use as a road. It was held declarations of *T*, through whom plaintiff claimed, made when surveying the land, that he was not going to have a road on the west side of the land he was surveying, were admissible. Seemingly, the declarations were admissible to show that at the particular time the survey was made *T* was possessing the land as an owner. This fact was relevant to meet the claim that he had informally dedicated the land to the public use as a highway. The declaration should not have been admitted to prove the truth of the facts asserted but merely to prove that he was exercising acts of ownership. Whether he was or was not doing acts of ownership was relevant upon the question of dedication.

<sup>67</sup> *People v. Craig* (1896) 111 Cal. 460, 44 Pac. 186; *People v. Gross* (1899) 123 Cal. 389, 55 Pac. 1054; *People v. Suesser* (1904) 142 Cal. 354, 75 Pac. 1093; *People v. Wilt* (1916) 173 Cal. 477, 160 Pac. 561; *People v. Brown* (1921) 53 Cal. 664, 200 Pac. 727. These are only a few of California cases on this question.

The opinion of Harrison, J., in *People v. Craig*, *supra*, is especially clear. He avoids the phrase *res gestae* saying:

"To establish this intent it was competent for the prosecution to offer any evidence that would enable the jury to ascertain the state of his mind at the time of the killing, and this would be best evidenced by his acts and declarations at or about that time." (111 Cal. at 465, 44 Pac. 187.)

In *People v. Wilt*, *supra*, the threat was against *J*, not *S*. for whose death defendant was being tried, but the proof showed defendant killed *S* while attempting to shoot *J* and *S*.

<sup>68</sup> WIGMORE, EVIDENCE (2nd ed. 1923) §1732.

No sound reason is seen why declarations of the accused that he did not intend to attack the deceased should not be received to show state of mind.

The objection to the admissibility of such declarations that they are self serving is not a sound one. Professor Wigmore has correctly said: "But this objection applies equally to many classes of statements under the present Excep-

to prove more than the mental condition of the accused at the time of killing. They also fall within the rule which makes admissible declarations of a plan or design to prove the happening of a future act,<sup>69</sup> a question hereafter considered generally, and particularly as to threats of the deceased to assault or kill the accused.<sup>70</sup>

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(TO BE CONTINUED)

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tion, (Statements of Mental Condition), and is yet not thought of as fatal. Moreover, the notion of 'making,' that is, 'manufacturing' evidence, assumes that the statements are false, which is to beg the whole question." WIGMORE, EVIDENCE (2nd ed. 1923) §1732.

It has been held that defendant may show friendly conduct towards the deceased to disprove he did the act. 2 WHEARTON'S CRIMINAL EVIDENCE (10th ed. 1912) §948. See *Pogue v. State* (1882) 12 Tex. Cr. App. 283. As was well said in an early California case, *People v. Ah Fung* (1861) 17 Cal. 377: "The fact of motive or the absence of motive is always an important inquiry in an issue of this kind."

If conduct of the accused is admissible to show no motive, no logical reason is seen why declarations should not be received to show absence of motive. See Notes 90-91 for California cases where the question is discussed whether the State may show declarations of the deceased in homicide cases to show an intent not to assault the accused.

<sup>69</sup> *People v. Palassou* (1910) 14 Cal. App. 123, 111 Pac. 109; WIGMORE, EVIDENCE (2nd ed. 1923) §102, 105, 1732.

<sup>70</sup> See *infra* note 95 (May issue of the *Review*).