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### Determination of Admissibility of Spontaneous Statements

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inheritance taxes, and so forth. But the *Marr* case may be thought consistent with all of its predecessors upon the grounds given by the court: (1) the new preferred securities had different fiscal qualities from the old ones; and (2) it was likely that the new Delaware corporation had different powers and duties from the New Jersey one.

JAMES PARKER HALL.

EVIDENCE—SPONTANEOUS STATEMENTS—DETERMINATION OF ADMISSIBILITY.—[Missouri] A recent case<sup>1</sup> presents an interesting question on the practice involved in determining the admissibility of an alleged spontaneous statement.

Plaintiff sued the receiver of the street railway company, claiming that while she was a passenger on one of its cars, the conductor opened the doors on the platform before the car came to a stop, and that it was stopped with a sudden and unusual jerk, which caused her to lose her balance and fall from the car to the street.

Mrs. McGowan, a witness for the plaintiff, testified that she was sitting in the lobby of a hotel in front of which the accident happened, and saw the plaintiff fall, and that she immediately ran out to the car and reached the plaintiff about the same time that the conductor got to her, and that the latter then stated that he opened the door too soon.

The conductor denied making the statement, and he and several passengers testified that Mrs. McGowan did not get beyond the curb until the plaintiff had been picked up and assisted by the conductor and a young man to the sidewalk.

If the witness' version of the matter should be accepted, the alleged statement of the conductor was made so soon after the accident that it might fairly be considered spontaneous and therefore admissible under that exception to the hearsay rule.<sup>2</sup>

If the conductors' denial should be accepted, there was of course no statement at all, spontaneous or otherwise.

If the version of the other witnesses, to the effect that Mrs. McGowan did not reach the scene of the accident until the plaintiff had been picked up and assisted to the sidewalk, should be accepted, then an appreciable amount of time must have elapsed, and a statement by the conductor could hardly be regarded as spontaneous.<sup>3</sup>

1. *Rosenzweig v. Wells* (Mo. 1925) 273 S. W. 1071.

2. *Prior v. Payne* (Mo.) 263 S. W. 982.

3. *Luby v. Ry.* 17 N. Y. 131; *Ry. v. O'Brien* 119 U. S. 299; *Ruschenburg v. Ry.* 161 Mo. 70.

In the opinion, *State v. Martin* (124 Mo. 514) is cited, where statements of the wounded man were admitted though made after the lapse of several minutes. The time element is not necessarily fatal to the admission of a statement as spontaneous where the condition of the declarant is such as to make it improbable that he could have thought it over: *Hill v. Comm.* (Va.) 2 Grat. 594; *People v. Del Vermo* 192 N. Y. 470. In the principal case the conductor had not been injured, so that there was nothing to suspend his power of reflection.

The Supreme Court disposed of the difficulty on the following basis:

"The admissibility of the declaration *must be determined by the testimony of Mrs. McGowan*, and can not be tested by the testimony of the conductor, who denied making it, or by his testimony and that of several other persons to the effect that Mrs. McGowan never came near the car at all, and did not even reach the curb line until the conductor and the plaintiff's son had assisted plaintiff to that point. *In other words, whether or not the conductor made the declaration was a question for the jury.*"

If this evidence was admissible, it would, of course, become a question for the jury to determine for themselves whether they believed that the conductor made the alleged statement, and if so, whether it was in fact true.

In that sense there can be no possible doubt of the soundness of the proposition that whether or not the conductor made the declaration was a question for the jury. And it may be conceded that if the other conditions of admissibility were satisfied, the judge could not reject the evidence in question because he, the judge, did not believe that the conductor made the declaration, provided the jury might rationally find that he did.

For example, if it should once be established that an original document had been destroyed, the judge could not exclude the testimony of a witness as to its contents because he did not believe the witness' statement that he had read it, and the result would not be affected by contradictory evidence making it highly improbable that the witness had ever seen the instrument. This would be evidence bearing directly on the issue, and its admissibility would not depend on its truth. The credibility of the witness on such a question would be exclusively for the jury. So, if it should be established that no improper influence had been brought to bear on a defendant in a criminal case, the judge could not exclude evidence of an alleged confession because he did not believe that defendant had in fact<sup>4</sup> made any statement on the subject.

Granting then that evidence tending to show that the conductor did not make a declaration on the subject was not relevant to the question to be decided by the judge, namely the admissibility of the alleged declaration, it does not follow that the judge could not consider the testimony tending to show that the witness McGowan did not get out of the hotel and on the sidewalk until the accident was all over and the plaintiff had been picked up and assisted to the pavement.

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4. In the case of *Slotofski v. Boston Elevated Ry. Co.* (1913) 215 Mass. 318, the Supreme Court of Massachusetts approved the rejection of an alleged statement by a person since deceased, because the trial judge did not believe that he made it. But that case seems to turn on a statute making certain hearsay declarations admissible where the court finds that they were made in good faith on personal knowledge, etc. It was there held that the judge could not very well hold that the statement was made in good faith, etc., if he did not believe that it was made at all.

The statement in question was hearsay, and that can not be disguised by calling it a part of the *res gestae*, or a verbal act. The speaking of words is always a verbal act, and generally a part of some larger occurrence with which it has some natural connection.

To illustrate: A trips and falls on a sidewalk and injures his hand. After he reaches home, he sends for a doctor to dress his hand, and in the natural course of events declares to the doctor that the sidewalk at a certain place was obstructed and that he fell because of it, etc. Here is a naturally connected chain of events, one of which is A's statement of the cause of the accident. If it is sought to prove the real cause of the accident by the injured man's statement of the cause, it would be the ordinary case of hearsay, the use of an unsworn, uncross-examined statement, made outside of the court, to prove the truth of the facts therein asserted.

The hearsay nature of the statement would be precisely the same if it had been made a few seconds after the fall to the first person A met, but in that event the probability of its truth would be much greater, because, in the language of Lord Holt, it would be made "before there was time to contrive anything." The great probability that the statement is true because made before there was time for deliberation has been thought a sufficient reason for dispensing with the ordinary safeguards afforded by oath and cross-examination. And accordingly it would be admissible under an exception to the hearsay rule as a spontaneous statement.<sup>5</sup>

In other words the admissibility of evidence of such a statement would depend, largely, on the time element, and that would seem to be a question of fact exclusively for the judge to decide on *all* the evidence bearing on that point.

The rule is familiar that the admissibility of secondary evidence of the contents of a written instrument depends on the fact that the original is unavailable. And in deciding that question the judge would be bound to consider all the evidence of both parties on that point. He would not be bound to credit the testimony of one or more witnesses that the document was unavailable, when opposed by other evidence tending to show that it was available.

That precise question arose in a leading English case,<sup>6</sup> and the rule was thus stated by Baron Parke:

"Now, the rule is, that secondary evidence is not admissible unless primary evidence can not be procured; and before it can be admitted, it must be shown, that reasonable efforts have been made, and have proved unavailing to procure the primary evidence. Such proof was given in this case, for the plaintiff gave sufficient evidence to let in parol proof of the contents of the instrument (a letter claimed to contain certain admissions), if the instrument itself had not been produced. But the defendant interposed by producing a document which

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5. *Thompson v. Trevanion* Skin. 402. *Hill v. Comm.* 2 Grat. 594.

6. *Boyle v. Wiseman* (1855) 11 Exch. 360.

he tendered as the original letter. Whether such was the fact was to be decided, for the mere statement of the defendant that it was is not sufficient; neither was the statement of the plaintiff's witnesses, that he saw the original letter, and that the document produced was not the original. There being these conflicting statements, the judge was bound to hear evidence on both sides, and decide whether the document tendered by the defendant was the original."

A good illustration is furnished by the practice in the case of confessions.

It would hardly be contended that if a witness for the state should testify that no promises, threats or compulsion had been applied, that testimony would bind the judge and force him to admit the confession regardless of contravailing evidence for the defense tending to show duress.

In such a case the judge would be bound to hear the evidence on both sides, and determine from all the evidence whether the confession was voluntary before admitting it.<sup>7</sup>

Likewise the admissibility of a dying declaration depends on the fact that the deceased knew and realized that death was immediately impending, and that he had no hope of recovery, etc., and accordingly the judge must decide these preliminary questions of fact on all the evidence, whether conflicting or not.<sup>8</sup>

The rule that where the admissibility of evidence depends on the existence of certain facts, the judge must hear the evidence on both sides, and decide the question on all the evidence, is not confined to confessions and dying declarations in criminal cases, but is equally applicable to civil cases.

Thus where pedigree or relationship is sought to be proved by declarations of members of the family, since deceased, the admissibility of the declaration depends on the fact that the declarant was a member of the family, and that must be determined by the judge from all the evidence bearing on that point.<sup>9</sup>

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7. *People v. Nunziato* (1922) 233 N. Y. 394; *State v. Thomas* (1913) 250 Mo. 189. The rule in the confession cases that the judge must determine the admissibility even on conflicting evidence is the same whether the court follows the orthodox common law view that admissibility is exclusively for the judge (*Burton v. State* 107 Ala. 108; *State v. Brennan* 164 Mo. 487; *State v. Monich* 74 N. J. L. 522) or whether it follows the Massachusetts variation that where the confession is admitted, the jury may be instructed to disregard it if they believe that it was not voluntary, because, as observed by Justice Holmes, "the whole purpose of the preliminary action by the judge would be lost if in all cases (of conflicting evidence) the evidence had to be laid before the jury so as to give them the last word": *Comm. v. Bishop* 165 Mass. 148.

The objection to the Massachusetts rule, now apparently followed in Missouri, is that it may easily result in the practice of admitting the confession in all cases where the evidence on the point is conflicting.

8. *State v. Zorn* (1906) 202 Mo. 12. *State v. Monich* (1906) 74 N. J. L. 522.

9. *Doe dem. Jenkins v. Davies* 10 Ad. & El. (N. s.) 314.

Where it is sought to use the statement of an alleged agent against a party as an admission, the question of agency is one for the judge.<sup>10</sup>

The cases dealing with the function of the judge in deciding questions of fact involved in the admissibility of evidence are digested under so many scattered topics that it is impracticable, if not impossible, to make an exhaustive collection, but a sufficiently comprehensive grouping was made by Taft, J.<sup>11</sup>

"It is not by any means true that all questions of fact in a jury trial must be left to the jury. Numerous instances where the court passes upon such questions can readily be called to mind, e. g., whether a witness is an expert; or a dying declarant entertained hopes of recovery; or a writing to be used as a test in comparison of handwriting is proved; or a witness has sufficient mental capacity to testify, or is the husband or wife of a party; or *declarations are so far a part of the res gestae as to be admissible*; or a confession was induced by threats; or sufficient search has been made for a lost document to warrant the introduction of secondary evidence. Many other instances might be given."

Suppose in the principal case there had been no dispute about the fact that the conductor made the declaration in question, but the controversy was limited to whether it was made after such a lapse of time as to make it a mere narrative and therefore objectionable according to the general hearsay rule.

In that case it seems clear from all the analogies that the judge would not be bound to admit it on the testimony of one witness that no more than ten seconds had elapsed, when the other evidence made it more probable that the lapse of time was nearer ten minutes. According to the cases, the judge should consider all the evidence and exclude the statement unless convinced that the time elapsed between the occurrence and that the statement was very short.

That problem is not affected by the accidental circumstance that there was also a controversy as to whether any statement at all was made.

For example, the judge would not be hampered in excluding an alleged dying declaration, if not satisfied that the deceased realized that death was impending, although there might also be a dispute as to whether the dying man made any statement at all. In that event the judge would assume that some statement had been made and then determine as a fact whether the deceased was aware of his condition.

So in the principal case, assuming that the conductor made a statement, the judge could properly take into account the evidence tending to show that the witness McGowan did not reach the scene of the accident until an appreciable time after it was all over, for

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10. "When agency is relied on as a basis of recovery, the question is for the jury. But when the declarations of an alleged agent are offered as evidence upon the main issue, the question whether he was in fact acting as an agent is for the court": *Gomez v. Hartwell* (Vt. 1923) 122 Atl. 461.

11. *Cairns v. Mooney* 62 Vt. 172.

in that case any statement made by the conductor might well be held a mere narrative. If the court had held that the statement was admissible though a few minutes must have elapsed, there would be no particular occasion for comment because there can be no hard and fixed rule about the time limit.

But the implication that the trial judge had nothing further to decide if the testimony of a single witness tended to show a spontaneous statement seems unsound and dangerous.

E. W. HINTON.

PROPERTY — ESTATES — VESTED SUBJECT TO BE DIVESTED — POWER OF APPOINTMENT—EXERCISE OF POWER—INHERITANCE AND ESTATE TAXES.—[Rhode Island] In *Manning v. Board of Tax Commissioners*<sup>1</sup> upon the question of inheritance and estate taxes to be imposed, there was involved a limitation in a will as follows:

"X, testatrix, to A for life then to the child or children of A then living and if A dies without surviving child or children, then to such persons as A should by will appoint and in default of child surviving A or of appointment by A, then to C in fee 'my homestead estate. . .'"

In that condition of the will of X, A died without child or children but leaving a will containing a provision which the court on a construction of A's entire will, held intended as an exercise of the power of appointment thus: A, testator, to C in fee, "my homestead estate. . ."

The question to be determined was whether C took the estate by virtue of the limitation in the will of X, as on default of children of and of appointment by A, or took by virtue of the exercise of the power by A. In deciding in favor of the former alternative, the court argues that C took a vested estate upon the death of X, subject only to be divested (1) upon the death of A, leaving a child surviving, or (2) upon A's exercise of his power of appointment in favor of someone other than C. The court cites three Rhode Island cases in support of this position, *Moore v. Diamond*,<sup>2</sup> *Grosvenor v. Bower*<sup>3</sup> and *Kenyon, Petitioner*.<sup>4</sup>

It will be remarked that each of these cases, including the principal case under comment, is an example of a contingent remainder, the principal case being of the type of a contingent remainder with a double aspect.<sup>5</sup> It should be noted also that a contingent remainder is descensible where the contingency is not as

1. (1925) 127 Atl. 865.

2. 5 R. I. 121, where the limitation was X, testatrix to A for life, then to her children with power to devise at her discretion, but if she die without exercising the power, then to her children.

3. 15 R. I. 549, where the limitation was X, testatrix, to A for life, then to such persons as A might by will appoint and in default of appointment, then to X's heirs at law.

4. 17 R. I. 149, where the limitation was X, testator, to trustee in trust for A for life with power of sale and conveyance in trustee, and after A's death to X's heirs.

5. *Golladay v. Knock* 235 Ill. 423; ILL. LAW REV. XIX 457.