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Hearsay, Testator's Declarations of Revocation. [Leemon v. Leighton, 314 Ill 407]

Edward W. Hinton

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to the interest of the survivors, in case of death of one of them, the rule became very pertinent.

ELMER M. LEESMAN.

EVIDENCE—HEARSAY—TESTATOR'S DECLARATIONS OF REVOCATION.—In a proceeding to probate an alleged lost will, defendants contended that the will had been destroyed by the testatrix *animo revocandi*, and to sustain that contention, were permitted to prove statements of the testatrix to the effect that her will was unsatisfactory and that she had put it in the stove and destroyed it. *Held*: that such statements were properly received.¹

In support of this ruling the opinion quotes the following passage:

"The declarations of a testator after the execution of his will are admissible, in the event of its loss, to show that it had not been cancelled. (In the matter of *Page* 118 Ill. 574.) Under the same circumstances they are admissible to show that the loss or destruction was in accordance with the testator's purpose."²

The case of *Holler v. Holler* was a proceeding to probate a lost will, but the declarations of the testator there admitted simply expressed his dissatisfaction with his will and implied an intention to die intestate. There is a familiar exception to the hearsay rule under which statements of a person expressly or impliedly asserting his then present state of mind or feelings are admissible when such mental state is a proper fact to be proved. The reason for this hearsay exception is the practical difficulty of proving a mental state in any other way.

"The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at the time is as direct evidence of the fact as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it."³

Since a man's acts are generally the result of his intentions and feelings, such mental states may be proved as a basis for an inference as to his probable conduct.

"The declaration of a party that he intends to do a certain act, or pursue a certain course of conduct, is always admissible when the issue is whether the party making the declaration did the act or followed the course of conduct, because the declaration proves that those feelings exist which prompt the act or the course of conduct."⁴

Accordingly, declarations of intention to prove conduct have been admitted in a great variety of cases.

Thus, on the issue of self defense, uncommunicated threats by the deceased are admissible to show that he was probably the aggressor.⁵

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1. *Leemon v. Leighton* (1924) 145 N. E. (Ill.) 631; 314 Ill. 407.
 2. *Holler v. Holler* (1921) 298 Ill. 418.
 3. *Mutual Life Ins. Co. v. Hillmon* (1891) 145 U. S. 285.
 4. *Mills v. Lumber Co.* (1893) 63 Conn. 103.
 5. *Campbell v. People* (1854) 16 Ill. 17.

For the same reason, threats of suicide by the deceased are admissible to prove self-destruction.⁶

Statements of an intention to take a certain trip have been admitted to prove that the declarant did so.⁷

Declarations by a testator of his intention to dispose of his property in a certain way have been admitted to prove that an interlineation in a will was probably made at the time of execution.⁸

The *Holler* case is strictly in line with these precedents in admitting declarations by the testator, showing his intention to revoke his will, for the purpose of proving that its disappearance was probably the result of that intention.

Whereas in the principal case the declarations directly asserted a *past* intention and a *past* act. For this purpose hearsay is not generally receivable. Statements to prove some mental state of the speaker are limited to such as indicate the state of mind at the time the words were spoken.⁹

From the speaker's state of mind at the time of making the declaration it may be possible to infer his past state of mind; as in one of the bankruptcy cases¹⁰ where the debtor's statements as to his then fear of action by his creditors was admitted to show that his prior departure from England was for the purpose of hindering or delaying creditors. But such cases do not involve the admission of declarations directly asserting past matters, whether subjective or objective. In a number of the lost will cases, declarations by the testator expressing satisfaction with his will and referring to it as in existence have been admitted to negative revocation.¹¹

So far as these cases involve declarations by the testator of his satisfaction with his will, the reasoning is the same as in the other cases of inferences from a mental state to probable conduct. If the testator was satisfied with his will, as his declarations indicate, he would not be apt to revoke it, and hence its disappearance was probably due to some other cause.

In the cases where statements referring to the will as in existence have been admitted there was a fair implication of an absence of intention to revoke, as where the testator tells the members of his family that his will is in the keeping of his banker or his lawyer, or is among his papers, etc. It has also been suggested that such statements show his belief in the existence of the will, which he could not have if he had theretofore intentionally destroyed it, thus negating prior *intentional* destruction by him. It is to be noted that even on this theory the statements are not admitted to prove that the will was then actually in existence, but merely that testator

6. *Commonwealth v. Trefethen* (1892) 157 Mass. 180; *State v. Ilginfrites* (1915) 263 Mo. 615. On this question the Supreme Court of Illinois requires that the statements of intention be very closely connected in point of time with the alleged act; *Greenacre v. Filby* (1916) 276 Ill. 294.

7. *Mutual Life Ins. Co. v. Hillmon* (1891) 145 U. S. 285.

8. *Doe v. Palmer* (1851) 16 Q. B. 747.

9. *Salem v. Lynn* (1847) 13 Metc. 544.

10. *Rawson v. Haight* (1824) 2 Bing. 99.

11. *Whitley v. King* (1864) 17 C. B. (N. S.) 756; *Sugden v. St. Leonards* (1876) 1 Pro. Div. 154; *In re Page* (1886) 118 Ill. 576.

so believed. This is quite different from using the testator's statement of a past physical act, to prove that such act really occurred, i. e., his statement that at some previous time he destroyed his will, to prove that he actually destroyed it.

That is the typical sort of evidence that the hearsay rule shuts out unless it falls within one of the recognized exceptions. The older cases do not recognize any exception for such statements by a testator any more than in the case of any other person.

On this ground the English Court of Probate rejected statements by a testator that he had revoked his will.¹²

In another case,¹³ it was sought to prove the contents of a lost will by the declarations of the testator showing what disposition he had made of his property. In holding the statements inadmissible Sir J. P. Wilde observed:

"The court has sought in vain for any principle or authority to justify the reception of such statements in evidence for the purpose of proving the actual contents of the absent will. It is familiar practice enough to receive the unsworn declarations of the testator in evidence, for the purpose of arriving at his general intentions where his competency is in dispute, or where there is any imputation of fraud in the making of his will. For in such cases the state of his mind and affections is in itself a material fact, of which such statements are the fair exponents. But where these declarations are vouched to prove, not only the testator's intentions, but the fact that he had declared and embodied those intentions in a certain will, they have no other title to confidence than the statements of any other person who had seen the will and could speak to its contents. In this aspect they became mere hearsay, and open to the well known rule excluding them as such."

The first suggestion in England of an exception in favor of a testator's declarations of a past fact occurred in the famous case of *Sugden v. St. Leonards*.¹⁴ The will of the late Lord Chancellor St. Leonards had disappeared under very suspicious circumstances. The evidence made it highly improbable that the testator had destroyed it. The difficulty was in proving its contents. The main evidence on this point was given by one of the legatees who took a large interest under the will.

In the court of probate declaration by the testator as to the contents of his will were received though not considered by Hannen, J., because he thought them inadmissible. The will was accordingly admitted to probate on the balance of the evidence which was clearly unobjectionable. The court of appeal agreed with Hannen, J., that there was sufficient evidence of the contents without the testator's declarations. Chief Justice Cockburn observed, however, that he was glad to find corroboration of the direct evidence of Miss Sugden, and that the testator's declarations were admissible for that purpose, because in a number of instances declarations of deceased persons were admitted where such persons had peculiar

12. *Staines v. Stewart* (1861) 2 Sw. and Tr. 320.

13. *Quick v. Quick* (1864) 3 Sw. and Tr. 442.

14. (1876) 1 Prob. Div. 154.

means of knowledge and no motive to misstate, as in case of declarations by deceased members of a family in pedigree matters.

The pedigree exception is, of course, as old as the hearsay rule itself, but was never before successfully invoked to justify the admission of a very different sort of hearsay in a non-pedigree case.¹⁵

Jessell, M. R., examined a number of the hearsay exceptions and found that in each the declarant was unavailable as a witness; that he had peculiar, or at least, personal knowledge of the facts; and that he had no motive to misstate, or at least was not speaking in his own interest. As all these conditions seemed to exist in the case of declarations by a testator as to the contents of his will, he thought that they should also be admitted.

It is doubtless true that in most of the recognized hearsay exceptions the testimony of the declarant cannot be obtained, and there is some guaranty of the truth of the statement. For example, in the case of dying declarations, the guaranty is found in the condition of the declarant.

In the case of statements against interest by deceased persons, it is self-interest which gives weight to the statement.

In the pedigree cases it is the absence of any motive to misstate family relationship. In the case of entries in the regular course of business, it is the fact that the entry is made at the time of the transaction according to a regular practice.

But it was never before contended that the hearsay exceptions could be extended indefinitely by analogy. Dying declarations are not admitted in civil cases.¹⁶ Statements against interest do not include the confession of a crime by a third party.¹⁷ Such examples might be multiplied to great length. The traditional view of the hearsay exceptions was thus expressed by Mellish, J., in the *St. Leonard's* case:

"I think it would be a highly desirable improvement in the law if the rule was that all statements made by persons who are dead respecting matters of which they had personal knowledge, and made ante litem motam, should be admissible.¹⁸ There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence. But the difficulty I feel is this, that I cannot satisfactorily to my own mind find any distinction between the statements of a testator as to the contents of his will, and any other statement of a deceased person as to any fact peculiarly within his knowledge, which, beyond all question, as the law now stands, we are not as a general rule entitled to receive."

In a later case,¹⁹ the House of Lords doubted the soundness

15. *Rex v. Erith* (1807) 8 East. 539.

16. *Marshall v. Ry.* (1868) 48 Ill. 475.

17. *Connolly v. U. S.* (1913) 228 U. S. 243.

18. This suggestion appears to have been embodied in the Massachusetts statute, R. L. ch. 175, sec. 66: "A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."

19. *Woodward v. Goulstone* (1886) 11 A. C. 469.

of the dicta in *Sugden v. St. Leonards*, and left the question undecided. In this country the *St. Leonards* case has been quite generally accepted as establishing the admissibility of a testator's declarations as to the contents of his will to corroborate other evidence of contents, though not per se sufficient to establish the contents of a lost will.²⁰

If a testator's declarations as to the contents of his will are admitted as corroborative proof of contents; it is difficult to find any satisfactory distinction which would exclude his declarations of any other fact connected with his will. Accordingly, subsequent declarations of revocation have been admitted to prove that a mutilation of a will by the testator was done *animo revocandi*.²¹

The principal case takes the last step and admits a declaration by a testator that he had destroyed his will to prove that it was really destroyed by him.

The wisdom of creating such an exception to the hearsay rule may be doubted. It will probably be invoked to admit declarations of the testator to prove that fraud was practiced on him or that some legatee influenced him, although up to this time they have not generally been received for this purpose.²²

The proof of statements of deceased persons by interested witnesses always involves danger of fabrication, which is hard to controvert because the alleged conversation usually takes place when no third person was present. And even where the statements were really made, their value is difficult to estimate because they may have been made for a purpose, for example, to pacify a dissatisfied legatee. Doubtless, much the same dangers exist in the case of other exceptions to the hearsay rule. But that fact would suggest caution in multiplying the exceptions.

E. W. HINTON.

LAND LEASES—COVENANTS RUNNING WITH THE LAND IN LEASES.—In *Atwood v. Chicago, Milwaukee & St. Paul Ry. Co.*,¹ a lease from the railroad company of land upon which the lessee erected a grain elevator, contained a clause exempting the lessor from liability for destruction of the elevator by fire caused by lessor's negligence or otherwise. The lessee assigned his rights under the lease to his son who brought action against the lessor for negligence whereby the elevator caught fire from sparks emitted by lessor's locomotives. One of the questions in the case was whether or not the covenant of non-liability bound the assignee. This, therefore, involved the inquiry, "Did the burden run with the leasehold?" and this was to be answered by the answer to the query, "Does that covenant touch the land demised?"

20. In re *Page* (1886) 118 Ill. 576; *Griffith v. Higginbotham* (1914) 262 Ill. 126; *Mann v. Balfour* (1905) 187 Mo. 290; *Clark v. Turner* (1897) 50 Neb. 290; *Cantway v. Cantway* (1925 Ill.) 146 N. E. 148.

21. *Burton v. Wylde* (1914) 261 Ill. 397.

22. *Wigmore "Ev."* (2 ed.) sec. 1738.

1. (1924) 313 Ill. 59.