Evidence—Hearsay—Mental State Exception To Prove Subsequent Intention—Administrative Procedure—[Illinois].—The deceased, a sales manager of the plaintiff, while allegedly on vacation was killed in a collision with a train while driving between Louisville and Indianapolis. A druggist in Louisville testified that the deceased made a call on him and several others testified that the deceased told them on the day of the accident and the day before that he was going to make business calls in Indianapolis. In a proceeding under the Workmen's Compensation Act to review a judgment confirming an award of the Industrial Commission for the claimant, *held*, reversed and award set aside. The above testimony concerning statements of the deceased are inadmissible because they are hearsay and not a part of the *res gestae*. *Boyer Chemical Laboratory Co. v. Industrial Commission*.[1]

Res gestae as a criterion for admitting hearsay has been completely discredited,[2] yet Illinois[3] and other jurisdictions[4] persist in its use to the exclusion of the proper explanation for their conclusions. A correct analysis of the instant case involves two steps: first, the *hearsay step* which consists of the declarations in Louisville to prove an existing intention to call on customers in Indianapolis the next day; second, the *inference step* which involves the implication that the intention to call on customers continued during the trip from Louisville to Indianapolis, which would characterize the act of driving as being in the course of deceased's employment.

The *hearsay step* should be no barrier to the admission of the evidence, since there is a well recognized exception to the hearsay rule which permits declarations of present intention to show declarant's state of mind at the time.[5] This hearsay exception is founded on necessity and relatively high probative value.[6] If the deceased were alive,

[1] 366 Ill. 635, 10 N.E. (2d) 389 (1937).

[2] Morgan, Res Gestae, 12 Wash. L. Rev. 91 (1937); Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L. J. 229 (1922); 3 Wigmore, Evidence § 1767 (2d ed. 1923); Hinton, States of Mind and the Hearsay Rule, 1 U. of Chi. L. Rev. 394, 400 (1934).

[3] In general: Hoffman v. Stephens, 269 Ill. 376, 109 N.E. 994 (1915); Chicago Consol. Traction Co. v. Mahoney, 230 Ill. 562, 82 N.E. 868 (1907); Swanson v. Chicago R. Co., 242 Ill. 388, 90 N.E. 210 (1909).

The Illinois cases on hearsay to prove subsequent intention and act are in great confusion. See, for example, the inconsistent positions maintained in the following: Siebert v. People, 143 Ill. 585, 32 N.E. 431 (1892); Howard v. People, 185 Ill. 552, 57 N.E. 441 (1900); Nordgren v. People, 211 Ill. 425, 71 N.E. 1042 (1904); Clark v. People, 224 Ill. 554, 79 N.E. 941 (1906); Greenacre v. Filly, 276 Ill. 294, 114 N.E. 536 (1916); People v. Ahrling, 279 Ill. 70, 146 N.E. 764 (1917); but see Maguire, The Hillmon Case—Thirty-Three Years After, 38 Harv. L. Rev. 710, 711, fn. 7 (1925).

[4] Sanborn v. Income Guaranty Co., 224 Mich. 99, 221 N.E. 162 (1928); Hines v. Foster, 166 Wash. 165, 6 P. (2d) 597 (1932); Aetna Life Ins. Co. v. Kern-Bauer, 62 F. (2d) 477 (C.C.A. 10th 1933).

[5] 3 Wigmore, *op. cit. supra* note 2, §§ 1714, 1725; Hinton, *op. cit. supra* note 1; Morgan, Res Gestae, 12 Wash. L. Rev. 91, 104 (1937); see Hunter v. State, 40 N.J.L. 496 (1878); Com. v. Trefethen, 157 Mass. 185, 31 N.E. 961 (1892); Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 12 S. Ct. 908 (1892).

[6] 3 Wigmore, *op. cit. supra* note 2, §§ 1714, 1421 and 1422; Hinton, *op. cit. supra* note 2, 402 ff. (1934); see Elmer v. Flessenden, 151 Mass. 359, 24 N.E. 208 (1890); Sugden v. Lord St. Leonards, 1 Prob. Div. 154 (1890).

the contested testimony should be admissible as having a greater value than that which he would give on a witness stand under the influence of an interest in the outcome of the case,[7] *a fortiori* it should be admissible when he is dead and there is the added factor of the impossibility of obtaining other evidence. Moreover, the circumstances under which the instant statements of the deceased were made indicate no motive for fabricating his existing intention.[8]

As for the *inference step*, there is no question but that evidence of present intention is always relevant to show subsequent intention,[9] although it is not always material. The probative value of the inference—on which materiality depends—is contingent on lapse of time, affirmative corroboration, and absence of circumstances tending to show that the intention would not continue. The probative value of the evidence here seems high. The contested statements of the deceased's intention occurred from a maximum of twenty-four hours to only a few hours before the intention sought to be proved.[10] Moreover the intention to call on druggists does not appear to be subject to any contingencies or conditions;[11] it was the type of intention which in the normal course of events would be likely to continue. Since, however, the value of the affirmative corroborative evidence, i.e., the call on the druggist in Louisville and the unfinished trip from Louisville to Indianapolis, is not high, the result of the case may possibly be justifiable.

By statute in many jurisdictions, administrative bodies are not bound by the hearsay rule and other technical[12] exclusionary rules,[13] and in a few states there are dicta to the effect that their findings of fact will not be reversed even though based solely on such evidence.[14] On the other hand, the majority of states do hold that even where the statute completely frees the administrative body from statutory and common law rules of evidence, if the findings are based solely on evidence incompetent in an ordinary court they will be reversed on appeal.[15] Administrative bodies, however, should be regarded

[7] Hadley v. Carter, 8 N.H. 40 (1835); Elmer v. Flessenden, 151 Mass. 359, 24 N.E. 208 (1890); Hinton, *op. cit. supra* note 2, 415; 3 Wigmore, *op. cit. supra* note 2, § 1714.

[8] Elmer v. Flessenden, 151 Mass. 359, 24 N.E. 208 (1890); Hinton, *op. cit. supra* note 2, 413; see also Northern Pac. Ry. Co. v. Urlin, 185 U.S. 271 (1894); but see Hutchins and Slesinger, State of Mind to Prove an Act, 38 Yale L. J. 283, 296 (1929).

[9] 1 Wigmore, Evidence § 102 (2d ed. 1923); see Cook v. Moore, 11 Cush. (Mass.) 213, 216 (1835).

[10] Maguire, *op. cit. supra* note 3, 721 (1925); Hinton, *op. cit. supra* note 1, 394, 413 fn. 53; see Moloy v. Chicago Rapid Transit Co., 335 Ill. 164, 166 N.E. 530 (1929).

[11] 1 Wigmore, *op. cit. supra* note 2, § 102; Hinton, States of Mind and the Hearsay Rule, 1 U. of Chi. L. Rev. 394, 413 fn. 53 (1934).

[12] Hearsay not a technical rule of evidence: Englebretson v. Ind. Com., 170 Cal. 793, 151 Pac. 421 (1915); McCouley v. Imperial Woolen Co., 261 Pa. 312, 104 Atl. 617 (1918).

[13] Ross, Applicability of Common Law Rules of Evidence in Proceedings before Workmen's Compensation Commissions, 36 Harv. L. Rev. 263 (1923); 1 Wigmore, *op. cit. supra* note 9 § 4(c) p. 45; Stephens, Administrative Tribunals and the Rules of Evidence 3 (1933).

[14] Ross, *op. cit. supra* note 13, 290; *cf.*, 1 Wigmore, *op. cit supra* note 9, § 4(c) p. 48; Reid v. Automatic Electric Washer Co., 189 Ia. 964, 179 N.W. 323 (1920); see Jillson v. Ross, 38 R.I. 145, 94 Atl. 717 (1915).

[15] Carroll v. Knickerbocker Ice Co., 169 App. Div. 450, 155 N.Y. Supp. 1 (1915); State *ex rel.* Berquist v. Dist. Ct. of Beltranin County, 145 Minn. 127, 176 N.W. 165 (1920); Streeters'

as having sufficient discretion to evaluate such proof;[16] appellate courts should only interfere where there has been a clear abuse of discretion as where completely irrelevant testimony is the sole basis for the decision of the board.[17] In any event, even if there were some doubt, in an ordinary court, as to the admissibility of the particular hearsay evidence in question here, it is a highly questionable practice for an appellate tribunal to reverse a decision of an administrative board admitting such evidence.

Execution—Installment Satisfaction of Judgment—Imprisonment for Debt—[New York].—The defendant, a federal employee, was ordered to pay a judgment in installments of $20 per month, in accordance with § 793 of the New York Civil Practice Act[1] which provided that "notwithstanding the [garnishment statutes] . . . . the court may order the judgment debtor to pay to the judgment creditor . . . . in installments, such portion of his income, however or whenever earned or acquired, [as may be just] after due regard [has been had] for the reasonable requirements of the judgment debtor and his family, if dependent upon him, as well as any payments required to be made by the judgment debtor to other creditors. . . . . The court may . . . . modify an order made under this section upon application of either party upon notice to the other." The defendant earned $230 per month, had no children, no financial obligations, aside from $48 per month rent and other living expenses; the whereabouts of his wife was unknown. Upon his refusal to pay, he was adjudged in contempt of court and committed under § 801.[2] On appeal the defendant contended that such commitment was a deprivation of due process and an interference with a federal instrumentality. *Held*, § 793 is not unconstitutional, in absence of a showing that order directing payment was unreasonable, or made without regard to ability to pay. *Reeves v. Crownshield.*[3]

Section 793 was designed primarily to aid creditors.[4] Prior to its enactment, approximately seventy-five per cent of money judgments in New York were never paid.[5]

Dependents v. Hunter, 93 Vt. 483, 108 Atl. 394 (1919) Connolly v. Industrial Accident Com., 73 Cal. 405, 160 Pac. 239 (1916); see Ross, *op. cit. supra* note 13, especially p. 290.

See Ill. Rev. Stat. 1937, c. 148, § 153. The provision is not as liberal and has received no more liberal an interpretation than the statutes in other states: Chicago Packing Co. v. Ind. Board, 282 Ill. 497, 118 N.E. 727 (1918); Chicago and A. R.R. Co. v. Ind. Board, 247 Ill. 336, 113 N.E. 629 (1916).

[16] Freund, Administrative Powers over Persons and Property 169 (1928); 1 Wigmore, *op. cit. supra* note 9, § 4(b) p. 28; see Dickinson, Administrative Justice and the Supremacy of the Law 35 (1927); Henderson, Federal Trade Commission 64 (1924).

[17] See Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harv. L. Rev. 909, 922 (1937).

[1] Cahill's N.Y. C.P.A. § 793 (6th ed., 1931), Laws of 1935, c. 630.

[2] Cahill's N.Y. C.P.A. § 801 (6th ed., 1931), Laws of 1935, c. 630; see § 793 as amended by Laws of 1937, c. 586.

[3] 274 N.Y. 74, 8 N.E. (2d) 283 (1937), annotated 111 A.L.R. 392.

[4] Metropolitan Life Ins. Co. v. Zaroff, 157 Misc. 796, 797, 284 N.Y. Supp. 665, 666 (1936); Reeves v. Crownshield, 274 N.Y. 74, 8 N.E. (2d) 283 (1937).

[5] Compton & Co. v. Williams, 248 App. Div. 545, 547, 290 N.Y. Supp. 984, 986 (1936); Survey of Litigation in New York, Johns Hopkins Univ. Inst. of Law (1931); Levien, The