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Evidence -- Testimony of Interested Survivor in Accident Litigation

F. M. Parker

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from the hearsay rule only declarations of present bodily feelings.⁷ Indeed some of them expressly exclude declarations of past pain.⁸ Hence it would seem that the North Carolina cases clearly permit declarations of present pain and exclude such evidence of past bodily feelings.

The ruling of the instant case advances beyond precedent by receiving a declaration of past pain. It is conceivable that our court intends only a slight modification of preëxisting doctrine to the effect that declarations of past pain may be received where they are made to a physician for purposes of treatment. It is possible that the court intends a total abandonment of its former limitations by receiving declarations of past bodily feelings made to anyone. The language of the court suggests a third interpretation, namely: that where the time between the pain and the declaration thereof is of short duration (probably an half hour or less in this case), it is still to be considered a declaration of present pain. This interpretation is frustrated by the obvious inconsistency of calling past pain present pain. In any event, the court has not applied the well established rule borne out by a long line of North Carolina cases.⁹

It is submitted, however, that the court in the principal case properly admitted the declaration, notwithstanding the consequent perplexity of the law on the subject. The declaration, although of past pain, was made to a physician for purposes of treatment and as such is a satisfactory testimonial of its own trustworthiness. Such a declaration meets the two requirements underlying recognized exceptions to the hearsay rule—that the declaration be necessary and trustworthy.¹⁰ It may thus be hoped that the instant ruling lays the foundation for a new exception to the hearsay rule for statements made by patient to physician.

E. D. KUYKENDALL, JR.

Evidence—Testimony of Interested Survivor in Accident Litigation.

While a married couple were riding together, the car skidded from a curve and turned over, the husband being killed and the wife injured. The wife sued her husband's estate for injuries caused by his negligence. C. S. 1795 provides that in an action against the administrator

⁷ Bell v. Morrisett, 51 N. C. 178 (1858); Henderson v. Crouse, 52 N. C. 623 (1860); State v. Harris, 63 N. C. 6 (1868).

⁸ Martin v. Hanes, 189 N. C. 644, 127 S. E. 688 (1925).

⁹ Wallace v. McIntosh, 49 N. C. 434 (1857); State v. Harris, 63 N. C. 6 (1868); Howard v. Wright, 173 N. C. 339, 91 S. E. 1032 (1917); Martin v. Hanes, 189 N. C. 644, 127 S. E. 688 (1925).

¹⁰ 3 WIGMORE, EVIDENCE (2d ed. 1923) §1718 *et seq.*

of a deceased person an interested party shall not be examined as a witness "concerning a personal transaction or communication between the witness and the deceased." *Held*, the wife is incompetent to testify concerning the accident, since C. S. 1795 applies to actions in tort as well as to actions in contract, and since the accident constituted a "personal transaction" within the meaning of the statute.¹

All except some nine of the states have statutes similar to our C. S. 1795.² By many of these the witness is incompetent to testify concerning a "personal transaction." Those states which have passed on the subject hold this statute applicable to actions in tort as well as to actions in contract.³ However, one state has recently amended its statute so as to make it inapplicable "in actions for personal injury, death or damage to property by negligence or tortious act."⁴ But there is no such unanimity as to just what constitutes a "personal transaction" in such cases. In offering a definition, some of the cases require that there be mutual participation by the witness and the deceased.⁵ Other cases, perhaps a majority, have no requirement of bilateral behavior, but declare that a "transaction" is something done in the decedent's presence to which if alive he could testify of his own knowledge.⁶ Still a third

¹ *Boyd v. Williams*, 207 N. C. 30, 175 S. E. 832 (1934).

² In Conn., Mass., and R. I., the interested survivor is entirely competent. In N. M., Or., and Va., he may testify but no judgment may be based on his uncorroborated testimony. In Ariz. he may testify "if required by the court." And in N. H. he may testify "when it clearly appears to the court that injustice may be done without the testimony of the party." MORGAN, LAW OF EVIDENCE (1927) 29. In Montana, by REV. CODE (1921) §10535, subd. 3, he may testify in the court's discretion where exclusion will result in injustice.

³ *Southern Natural Gas Co. v. Davidson*, 225 Ala. 171, 142 So. 63 (1932) (personal injury); *Ogden v. Keck*, 253 Ill. App. 444 (1929) (wrongful death); *Hollowach v. Priest*, 113 Me. 510, 95 Atl. 146 (1915) (wrongful death); *Rock v. Gannon Grocery Co.*, 246 Mich. 545, 224 N. W. 752 (1929); *Dougherty v. Garrick*, 184 Minn. 436, 239 N. W. 153 (1931); *Leavea v. Southern Ry. Co.*, 266 Mo. 151, 181 S. W. 7, (1915) (partially overruled in *Freeman v. Berberich*, 332 Mo. 831, 60 S. W. (2d) 393 (1933), holding statute not applicable to actions ex delicto for personal injuries, except as to actual parties to cause of action and on trial); *Priest v. Business Men's Protective Ass'n*, 117 Neb. 198, 220 N. W. 255 (1928); 5 JONES, EVIDENCE (2d ed. 1926) §2228.

In those states where the statute makes the surviving party incompetent in suits "founded on contract with or demand against the ancestor," the statute is held not applicable to an action in tort. *Cincinnati, H. & I. R. Co. v. Cregor*, 150 Ind. 625, 50 N. E. 760 (1898).

A few states, while applying the statute to actions ex delicto generally, hold that it does not apply to actions for wrongful death on the ground that, in the particular jurisdiction, the action does not involve the estate of the deceased. *Kuykendall v. Edmondson*, 205 Ala. 265, 87 So. 882 (1921); *Robb v. Woosley*, 175 Ark. 43, 295 S. W. 13 (1927); *State ex rel. Thomas v. Daves*, 314 Mo. 13, 283 S. W. 51, (1926); *Notes* (1925) 36 A. L. R. 959; (1926) 41 A. L. R. 345.

⁴ Kentucky, by Acts 1932, c. 59, sec. 1.

⁵ *Krause v. Emmons*, 6 Boyce 104, 97 Atl. 238 (Del. 1916) *Seligman v. Orth*, 205 Wis. 199, 236 N. W. 115 (1931).

⁶ *Odum v. McArthur*, 165 Ga. 103, 139 S. E. 870 (1927); *Hlavaty v. Blair*, 101 Neb. 414, 163 N. W. 330 (1917); *Bankers' Trust Co. v. Bank of Rockville*

group lay down the catch-all that a transaction "includes every method by which one person can derive impressions or information from the conduct, condition, or language of another."⁷ Under this holding it seems there may be a "personal transaction" despite the fact that one of the parties was entirely unconscious at the time.⁸

As these varying definitions would indicate, the authorities differ as to whether the circumstances surrounding an accident constitute a "personal transaction." In automobile collision cases most courts seem to hold the concurring conduct of the two drivers a "personal transaction."⁹ In cases, as the present, where the guest is suing for the negligence of the driver, if the guest took no active part by giving directions, the driver's separate acts in managing the car have been held not to constitute a personal transaction.¹⁰ These cases proceed upon the theory that the driver's acts would have been the same regardless of the presence of the guest. The instant case is in line with these authorities in so far as it excludes testimony of what the wife said to the husband regarding the speed of the car. However, it seems a little extreme in holding the husband's separate acts, uninfluenced by the wife's presence, a "personal transaction."

The purpose of the statute is said to be to effect fair play in the situation where death has closed the lips of one party by automatically closing the lips of the other and so to protect the estates of the dead from raids by the perjured living.¹¹ It is submitted that the statute accomplishes its protective purpose quite as often at the expense of an honest claimant as of a lying one and that there is very little fair play in the situation, as in the present case, where the surviving party has

Center Trust Co., 114 N. J. Eq. 391, 168 Atl. 733 (1933); *White v. Evens*, 188 N. C. 212, 124 S. E. 194 (1924).

⁷ *Bright v. Virginia and Gold Hill Water Co.*, 270 Fed. 410 (C. C. A. 9th, 1921); *Kentucky Utilities Co. v. McCarty's Adm'r* 169 Ky. 38, 183 S. W. 237 (1916); *Stephens v. Short et al.*, 41 Wyo. 324, 285 P. 797 (1930).

⁸ *Barnett's Adm'r. v. Brand*, 165 Ky. 616, 177 S. W. 461 (1915) (in action for malpractice defendant doctor incompetent to testify as to what happened during operation when patient was unconscious).

⁹ *Southern Natural Gas Co. v. Davidson*, 225 Ala. 171, 142 So. 63 (1932); *Van Meter v. Goldfarb*, 317 Ill. 620, 148 N. E. 391 (1925); *Miller v. Walsh's Adm'r*, 240 Ky. 822, 43 S. W. (2d) 42 (1931); *Burns v. Polar Wave Ice and Fuel Co.*, 187 S. W. 145 (Mo. App. 1916); *Knickerbocker v. Athletic Tea Co.*, 285 S. W. 797 (Mo. App. 1926); *cf. Minor v. Scholton*, 250 Mich. 645, 231 N. W. 120 (1930) (auto accident within statute excluding matter "equally within knowledge of" a decedent). *Contra: Seligman v. Orth*, 205 Wis. 199, 236 N. W. 115 (1931).

¹⁰ *McCarthy v. Woolston*, 210 App. Div. 152, 205 N. Y. S. 507 (1924); *Waters v. Markham*, 204 Wis. 332, 235 N. W. 797 (1931); *Krantz v. Krantz*, 211 Wis. 249, 248 N. W. 155 (1933); *cf. Waggoner v. Gummerum*, 180 Minn. 391, 231 N. W. 10 (1930) (under statute excluding evidence of conversation with or admission by a decedent, driver not allowed to testify that deceased guest made no protest). *Contra: Stephens v. Short*, 41 Wyo. 324, 285 P. 797 (1930).

¹¹ *In re Will of Brown*, 203 N. C. 347, 166 S. E. 72 (1932).

no other method of proving his claim. The weapon of cross-examination and the good sense of the jury should sufficiently protect the estate of deceased persons from mendacious claimants.¹² As cases previously cited indicate, the statute has proved difficult to interpret and a great source of expense and delay. To date this statute has come before the North Carolina Supreme Court for interpretation two hundred and sixty-two times, and as the instant case shows, its meaning is not yet entirely clear.

In view of this confusion and the doubtful validity of the statute in the first place, it is submitted that it should be abolished or at least modified.¹³ The necessity of interpreting such a statute leads the courts into such peculiar positions as that of the Michigan court in a recent automobile negligence case.¹⁴ The words of the Michigan statute render the surviving party incompetent to testify as to any facts "equally within the knowledge" of the witness and the deceased.¹⁵ The defendant driver wished to testify that he blew his horn; this evidence was excluded under the statute. On appeal the upper court held that the evidence should have been submitted to the jury but with instructions that if they found the deceased heard the horn, so that it was equally within the knowledge of the parties, they were not to consider it. In other words, the effect of the court's holding is that if the defendant blew his horn loud enough to do any good—*i.e.*, so that the deceased could hear it—then the jury could not consider it, but if he blew his horn, but only ineffectually, then the jury could consider it.

F. M. PARKER.

Injunctions—Mandatory Injunction to Compel Skyscraper Setbacks Required by Zoning Law.

Defendant erected a twenty-story apartment building separated by an alley from the four-story apartment buildings of the plaintiffs, in violation of a Chicago zoning ordinance requiring certain setbacks according to height. The building permit had been granted over the objections of the plaintiffs, under a section of the state zoning act which gave the zoning board of appeals the power to vary the requirements of the ordinance. The state Supreme Court, in litigation carried on by these plaintiffs, subsequently had held that section of the act unconstitutional. Plaintiffs had then sought a mandatory injunction in a Federal District Court to force the defendants to reconstruct the building, which had been completed in the meantime, so as to make it conform to the zoning

¹² *St. John v. Lofland*, 5 N.D. 140, 64 N. W. 930 (1895).

¹³ *Proposals for Legislation in North Carolina* (1932) 11 N. C. L. Rev. 51, 61.

¹⁴ *Noonan v. Volek*, 246 Mich. 377, 224 N. W. 657 (1929).

¹⁵ MICH. COMP. LAWS (1929) §14219.