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## Evidence -- Declarations of Intention

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### Evidence—Declarations of Intention

In *Little v. Hower Brake Co.*,<sup>1</sup> a proceeding for workmen's compensation, the plaintiff sought to recover for the death of her husband. The deceased, a traveling salesman employed by the defendant corporation, was killed in an automobile accident outside his regular selling territory and after his regular working hours. As a defense the defendant alleged that the deceased at the time of his death was not acting in the course of his employment, and, therefore, that the injury was not compensable as it neither arose out of nor occurred in the course of his employment.<sup>2</sup> From a denial of recovery below, the plaintiff appealed assigning as error the exclusion of certain statements made by the deceased prior to his death relating to his purpose in making the trip in question.<sup>3</sup> These statements were offered to show that the purpose of the trip was to see customers in nearby towns and thereby establish that the deceased was acting in the course of his employment at the time of the accident. The North Carolina Supreme Court affirmed the trial court, holding that such statements were properly excluded because they did not constitute part of the *res gestae*.

The court relied on *Gassaway v. Gassaway & Owen, Inc.*<sup>4</sup> where certain statements made by the deceased two days and one day prior to his departure, which tended to show that at the time of his death he was engaged in his work as an employee, were held inadmissible as not constituting a part of the *res gestae*.

Although the court decided the principal case solely on the *res gestae* exception to the hearsay rule, it recognized that this theory of admission may not be the only applicable one and possibly "not as well reasoned as the theory that the declarations are admissible as original evidence."<sup>5</sup> This "well reasoned theory" is the rule

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<sup>1</sup> 255 N.C. 451, 121 S.E.2d 889 (1961).

<sup>2</sup> The defendant contended that the deceased had left his regular sales area and was enroute to visit relatives in a nearby town at the time the accident occurred.

<sup>3</sup> These, in summary, were: (a) a statement to a customer that the deceased had to "see a customer" in Whiteville, made about nine hours before leaving on the trip; (b) a statement of the same intent made to a service station attendant only thirty minutes before his departure; and (c) a statement of similar intent made to his wife over the telephone approximately thirty minutes before he left.

<sup>4</sup> 220 N.C. 694, 18 S.E.2d 120 (1942).

<sup>5</sup> 255 N.C. at 455, 121 S.E.2d at 891.

followed in a growing number of jurisdictions that a declaration by the deceased of an intent to perform some act is admissible as original evidence to show that the act was performed.<sup>6</sup> This rule is generally recognized as a completely separate exception to the hearsay rule which is in no way connected with the *res gestae* exception.<sup>7</sup>

The landmark case on admission of declarations of intent is *Mutual Life Ins. Co. v. Hillmon*.<sup>8</sup> In that case one Walters wrote letters to his family declaring his intention to leave for Colorado and other unknown parts with a certain Mr. Hillmon. An unidentified body which the insurance beneficiaries of Hillmon claimed to be that of their insured was later found. The insurance company denied liability, claiming that the deceased man was not Hillmon, but Walters. The United States Supreme Court held that the letters were admissible as evidence that Walters had the intention of accompanying Hillmon on the trip. This case established the rule that declarations of intention could be admitted to show that the act intended was performed.<sup>9</sup> Although some writers feel that its application should be restricted,<sup>10</sup> *Hillmon* has been, for the most part,

<sup>6</sup> By the declaration "a mental state is proved not as an end in itself, but as a basis for the further inference that the mental state found outlet in conduct." McCORMICK, EVIDENCE § 270, at 571 (1954). See also 6 WIGMORE, EVIDENCE § 1725 (3d ed. 1940).

<sup>7</sup> *State v. Journey*, 115 Conn. 344, 161 Atl. 515 (1932); *State v. Long*, 32 Del. 380, 123 Atl. 350 (1923); *People v. Fritch*, 170 Mich. 258, 136 N.W. 493 (1912); *State v. Farnam*, 82 Ore. 211, 161 Pac. 417 (1916). Start, C.J., in a concurring opinion in *State v. Hayward*, 62 Minn. 474, 497, 65 N.W. 63, 70 (1895), stated: "[I]t is relevant to the issue to show that [the deceased] did meet the defendant, and evidence of her declarations of an intention and purpose to meet him was admissible as original evidence to prove that she did in fact intend to meet him . . . . To sustain it on ground that the statement of the deceased was part of the *res gestae* is . . . to assign a wrong reason for a correct conclusion, which may lead to complications in future cases." (Emphasis added.) This quotation was cited with approval and made the basis of the opinion in *Commonwealth v. Marshall*, 287 Pa. 512, 135 Atl. 301 (1926).

<sup>8</sup> 145 U.S. 285 (1892).

<sup>9</sup> "The letters in question were competent, not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention." 145 U.S. at 295-96. (Emphasis added.)

<sup>10</sup> See, e.g., Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146 (1912). Limitations have also been placed on this doctrine by statute. See, e.g., MASS. GEN. LAWS ch. 233, § 65 (1956), which provides that death or unavailability of the witness furnishes a basis for admission of declarations evidencing intention of the declarant.

wholly endorsed by text writers,<sup>11</sup> and is often referred to as the weight of authority.<sup>12</sup>

Apparently the *Hillmon* rule has been applied by the North Carolina court in certain situations, yet the court has cited *Hillmon* in only one case.<sup>13</sup> Perhaps the best example of its application is in homicide cases where the court has held it reversible error to exclude declarations of the deceased showing the presence or absence of suicidal intent.<sup>14</sup> Conversely, it has been held error in such cases to exclude threats by the accused<sup>15</sup> or by the deceased where they are corroborative.<sup>16</sup> Declarations of intention to perform a certain act have also been allowed to show that the act was or was not performed in the following cases: the making of a contract,<sup>17</sup> the signing of a deed,<sup>18</sup> the marriage of the parties,<sup>19</sup> and the making of a gift.<sup>20</sup> In admitting this evidence, the court seems to be directly in accord with the holding in *Hillmon*.

In accepting the *Hillmon* rule, the courts of other jurisdictions have applied it in different situations. Declarations of intention have been allowed as evidence in the following cases: in homicide cases,

<sup>11</sup> McCORMICK, EVIDENCE § 270 (1954); 6 WIGMORE, EVIDENCE § 1725 (3d ed. 1940); Maguire, *The Hillmon Case—Thirty Three Years After*, 38 HARV. L. REV. 709 (1925); McBaine, *Admissibility in California of Declarations of Physical or Mental Condition*, 19 CALIF. L. REV. 231 (1931); Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L. J. 229 (1922).

<sup>12</sup> In applying the *Hillmon* rule the court in *People v. Alcalde*, 24 Cal. 2d 177, 148 P.2d 627 (1944), stated that it was following what "is deemed to be the weight of authority." Although there are specific areas in many jurisdictions where declarations of intention are admitted, there seems to be only eleven states which have consistently followed the *Hillmon* rule in all areas. These states are Connecticut, Delaware, Louisiana, Massachusetts, Michigan, Minnesota, New York, Oregon, Pennsylvania, Texas and Utah. See Annot., 113 A.L.R. 268, 288 (1938).

<sup>13</sup> In *State v. Davis*, 177 N.C. 573, 98 S.E. 785 (1919), the court cited language directly from *Hillmon*, apparently with some degree of approval, but decided the case by use of the old standby, the *res gestae*.

<sup>14</sup> *State v. Lagerholm*, 208 N.C. 195, 179 S.E. 664 (1935); *State v. Prytle*, 191 N.C. 698, 132 S.E. 785 (1926). It is of interest to note that in *State v. Prytle* the court relied on *Commonwealth v. Trefethen*, 157 Mass. 180, 31 N.E. 961 (1892), wherein *Hillmon* was cited.

<sup>15</sup> *State v. Shook*, 224 N.C. 728, 32 S.E.2d 329 (1944); *State v. Allen*, 222 N.C. 145, 22 S.E.2d 233 (1942). See generally STANSBURY, NORTH CAROLINA EVIDENCE § 162 (1946).

<sup>16</sup> *State v. Dickey*, 206 N.C. 417, 174 S.E. 316 (1934); *State v. Exum*, 138 N.C. 599, 50 S.E. 283 (1905).

<sup>17</sup> *Poindexter v. McCannon*, 16 N.C. 373 (1830).

<sup>18</sup> *Summerlin v. Cowles*, 101 N.C. 473, 7 S.E. 881 (1888).

<sup>19</sup> *Forbes v. Burgess*, 158 N.C. 131, 73 S.E. 792 (1912).

<sup>20</sup> *Bynum v. Fidelity Bank*, 219 N.C. 109, 12 S.E.2d 898 (1941).

to show an intent to go to a certain place,<sup>21</sup> or to commit suicide,<sup>22</sup> or to show that the killing was necessitated by self-defense;<sup>23</sup> in murder by abortion cases, to show an intention to submit to the operation;<sup>24</sup> in wills cases, to show an intent to exclude a certain person as a beneficiary,<sup>25</sup> or to destroy or alter a will;<sup>26</sup> and in insurance cases declarations of the insured have been admitted to identify the proper beneficiary where the beneficiary named in the policy was ambiguous.<sup>27</sup> Declarations of intention have also been admitted to show that the declarant actually made the intended trip;<sup>28</sup> that he delivered the deed or made the gift of which he spoke;<sup>29</sup> that he changed his domicile with intent to remain outside the jurisdiction;<sup>30</sup> and that he went to the intended place.<sup>31</sup>

There are also a great number of workmen's compensation cases in which declarations of intention have been allowed to show that the employee was acting in the scope of his employment at the time of the accident.<sup>32</sup>

<sup>21</sup> *State v. Journey*, 115 Conn. 344, 161 Atl. 515 (1932); *Shirley v. State*, 168 Ga. 344, 148 S.E. 91 (1929); *State v. Vial*, 153 La. 883, 96 So. 796 (1923).

<sup>22</sup> *Commonwealth v. Trefethen*, 157 Mass. 180, 31 N.E. 961 (1892); *State v. Ilgenfritz*, 263 Mo. 615, 173 S.W. 1041 (1915).

<sup>23</sup> *State v. Long*, 2 Del. 380, 123 Atl. 350 (1923); *State v. Farnam*, 82 Ore. 211, 161 Pac. 417 (1916).

<sup>24</sup> *People v. Northcott*, 46 Cal. App. 706, 189 Pac. 704 (Dist. Ct. App. 1920); *People v. Fritch*, 170 Mich. 258, 136 N.W. 493 (1912); *State v. Paschall*, 182 Wash. 304, 47 P.2d 15 (1935).

<sup>25</sup> *Atherton v. Gaslin*, 194 Ky. 460, 239 S.W. 771 (1922); *Buchanan v. Davis*, 12 S.W.2d 978 (Tex. Comm'n App. 1929).

<sup>26</sup> *In re Estate of Oates*, [1946] 2 All E.R. 735; *In re Laver's Estate*, [1957] 21 West. Weekly R. (n.s.) 209, 10 D.L.R.2d 279 (Sask.).

<sup>27</sup> *John Hancock Mut. Life Ins. Co. v. Menson*, 97 F. Supp. 320 (W.D. Ark. 1951); *Crawford v. Center*, 193 Ark. 287, 100 S.W.2d 83 (1936).

<sup>28</sup> *Wibye v. United States*, 87 F. Supp. 830 (N.D. Cal. 1949); *Lake Shore Ry. v. Herrick*, 49 Ohio St. 25, 29 N.E. 1052 (1892).

<sup>29</sup> *Feore v. Trammel*, 213 Ala. 293, 104 So. 808 (1925); *Walters v. Lawler*, 297 Ill. 63, 130 N.E. 335 (1921); *Kessler v. Von Bank*, 144 Minn. 220, 174 N.W. 839 (1919).

<sup>30</sup> *King v. McCarthy*, 54 Minn. 190, 55 N.W. 960 (1893); *Wilbur v. Calais*, 90 Vt. 335, 98 Atl. 913 (1916).

<sup>31</sup> *Southern Ry. v. Tudor*, 46 Ga. App. 563, 168 S.E. 98 (1933); *Parker v. State*, 91 Tex. Crim. 68, 238 S.W. 943 (1921).

<sup>32</sup> See, e.g., *Alexander Film Co. v. Industrial Comm'n*, 136 Colo. 486, 319 P.2d 1074 (1957); *Lewis v. Lowe & Campbell Athletic Goods Co.*, 247 S.W.2d 800 (Mo. 1952); *Ervin v. Myrtle Grove Plantation*, 206 S.C. 41, 32 S.E.2d 877 (1945); *Liberty Mut. Ins. Co. v. Nelson*, 174 S.W.2d 103 (Tex. Civ. App. 1943); *Prater v. Traders & Gen. Ins. Co.*, 83 S.W.2d 1038 (Tex. Civ. App. 1935).

In *Smith v. Firestone Tire & Rubber Co.*, 119 Conn. 483, 177 Atl. 524 (1935), the court admitted declarations of the deceased employee to show that he was actually working along a certain road where the accident occurred. In admitting this testimony the court quoted *State v. Journey*, 115

*American Sec. Co. v. Minard*,<sup>33</sup> which is directly on point with the *Little* case, allowed as evidence statements made by the deceased prior to his accident tending to show that he was acting in the scope of his employment at the time of the accident. This case, and others so holding, have allowed these declarations, not under any pretenses of the *res gestae*, but under the *Hillmon* rule. Some courts, although not allowing these declarations as original evidence under *Hillmon*, will still allow them to corroborate other evidence which tends to prove or disprove the fact in issue.<sup>34</sup>

The argument in favor of admission of declarations of intention as another exception to the hearsay rule is quite strong. Proponents of the *Hillmon* doctrine point out that if it is properly limited,<sup>35</sup> there is no more danger of allowing improper evidence than with any other exception to the hearsay rule. In many cases, where the declaration of the declarant is the only direct evidence bearing on the issue, its necessity is apparent.

The uncertainty in North Carolina has arisen not from any complete denunciation by the court of the *Hillmon* rule, but from the application of it in some cases, such as the homicide cases, and not in others, such as the principal case.<sup>36</sup> No doubt this results from the fact that the court feels this area is adequately covered by the

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Conn. 344, 351, 161 Atl. 515, 517 (1932), to the effect that "a declaration indicating a present intention to do a particular act in the immediate future, made in apparent good faith and not for self-serving purposes, is admissible to prove that the act was in fact performed. It is admissible, not as part of the *res gestae* but as a fact relevant to the fact in issue." 119 Conn. at 490, 177 Atl. at 528.

<sup>33</sup> 118 Ind. App. 310, 77 N.E.2d 762 (1948). See also *Indiana Steel Prods. Co. v. Leonard*, 126 Ind. App. 669, 131 N.E.2d 162 (1956). Both of these cases cited *Hillmon* as the basis for the admission of the declaration of the deceased employee.

<sup>34</sup> *Associated Gen. Contractors v. Cardillo*, 106 F.2d 324 (D.C. Cir. 1939) (based on statutory interpretation); *Altschuller v. Bressler*, 289 N.Y. 463, 46 N.E.2d 886 (1943). It is pointed out in LARSON, *WORKMEN'S COMPENSATION LAW* § 29.73 (1952), that the trend seems to be to allow these declarations in corroboration either by statutory amendment or judicial decision.

<sup>35</sup> *People v. Alcalde*, 24 Cal. 2d 177, 148 P.2d 627 (1944), the court set up the following requirements for the admissibility of such declarations under the *Hillmon* rule: (a) that the declaration must tend to prove the declarant's intention at the time it was made; (b) that it must have been made under circumstances which naturally give verity to the utterance; and (c) that it must be relevant to the issue in the case. See generally 6 WIGMORE, *EVIDENCE* § 1725 (3d ed. 1940).

<sup>36</sup> It should be noted that the *Hillmon* rule was never directly presented to the court in the principal case, as this case was not cited by the appellant. Brief for Appellant, pp. 3-9, *Little v. Hower Brake Co.*, 255 N.C. 451, 121 S.E.2d 889 (1961).

*res gestae* doctrine. However, the *res gestae* doctrine is not adequate in cases like the principal case where the application of the *Hillmon* rule might have given some potentially valuable information to the jury.

It is submitted that the North Carolina court should accept the *Hillmon* doctrine completely by extending it beyond its present limited scope in this state to cover such cases as the principal case.

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### Mortgages—Absolute Deeds Construed As Security Transactions

In *Isley v. Brown*<sup>1</sup> the plaintiffs sought to have an absolute deed of conveyance construed as a security for a debt. The plaintiffs contended that they had signed the deed with the understanding that the defendant, the grantee under the deed, would pay off an indebtedness and allow them to repay him in monthly installments. On appeal to the supreme court a judgment for the plaintiffs was reversed (1) because of plaintiffs' failure to allege and prove that the clause of redemption was omitted by mistake and (2) because of plaintiffs' negligence in failing to read the instrument of conveyance before signing it.

Generally, a deed of conveyance, although absolute on its face, will be construed as a mortgage if it is given as security for a debt and if the property was intended by the parties to stand as security.<sup>2</sup> In the majority of jurisdictions this rule follows upon proof that the parties intended a security transaction.<sup>3</sup> However, North Carolina has long required, in addition to proof of an intent to create a security, that it be shown that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage. Moreover, the former had to be shown by facts and circumstances *dehors* the deed.<sup>4</sup>

In the principal case the Court, in giving its first reason for reversal, stated that in order for the grantor of the absolute deed to

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<sup>1</sup> 253 N.C. 791, 117 S.E.2d 821 (1961).

<sup>2</sup> See, *e.g.*, *Hill v. Day*, 231 Ark. 550, 331 S.W.2d 38 (1960). See generally Annot., 79 A.L.R. 937 (1932); Note 26 N.C.L. REV. 405 (1948).

<sup>3</sup> See, *e.g.*, *Newell v. Pate*, 264 Ala. 644, 89 So. 2d 170 (1956).

<sup>4</sup> See, *e.g.*, *Perkins v. Perkins*, 249 N.C. 152, 105 S.E.2d 663 (1958); for cases prior to 1939, see Notes, 26 N.C.L. REV. 405 (1948); 16 N.C.L. REV. 416 (1938). See also *Jones v. Brinson*, 231 N.C. 63, 55 S.E.2d 808 (1949) (parel trust); *Williams v. Joines*, 228 N.C. 141, 44 S.E.2d 738 (1947) (action for specific performance).