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Evidence-The Rule Against Hearsay

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EVIDENCE—THE RULE AGAINST HEARSAY—This action was brought by the personal representative of a decedent to recover for his wrongful death. It was alleged that the defendant had caused the death by negligently striking and running over the decedent with an automobile. During the course of the trial, evidence of conversations between unidentified persons shortly after the accident was admitted over the defendant's objection. The witness testified that the declarants had said the defendant was drunk and had driven upon the wrong side of the road "to kill a man". Held, the evidence was admissible.¹

The only objections made to the admission of this evidence at the trial were that it was "unfair", "not proper", and others equally general. There court held that there was no error in admitting the evidence over such objections, since they were so general that they did not point out the error the defendant wishes to present. An examination of the cases cited in the opinion demonstrates that the court was entirely correct in so holding.

The court, however, failed to stop at this point but went on to say that it was necessary for it to find some ground upon which the evidence was

¹⁸ Hall v. Jackson (1913), 24 Colo. App. 225, 134 Pac. 151.

¹⁹ Wright et al. v. Hollywood Cemetery Corporation (1901), 112 Ga. 884, 38 S. E. 94.

²⁰ Renihan v. Wright (1890), 125 Ind. 536, 25 N. E. 822.

²¹ Koerber v. Patek (1905), 123 Wis. 453, 102 N. W. 40; Larson v. Chase (1891), 47 Minn. 238, 50 N. W. 238.

²² Harper, A Treatise on the Law of Torts (1933), pp. 43, 605, 583, 557.

¹ Garner v. Morgan, Appellate Court of Indiana, Jan. 26, 1933, 183 N. E. 916.

properly admissible in order to sustain the result below. It is submitted that this conclusion was erroneous. A bill of exceptions, to present any question to an appellate court upon the admissibility of evidence, must show that proper objections were made.² Objections should not be considered unless they were made to the court below.³ A verdict may be sustained upon hearsay evidence if no proper objection is made.⁴

The court further held that the evidence was properly admissible. It said that the declarations were admissible as "a part of a general conversation in which the defendant engaged."

When evidence does not derive its reliability solely from the credit to be given to the witness himself, but rests also in part upon the veracity and competency of another person, it is hearsay.⁵ This type of evidence is generally inadmissible⁶ under the general rule.⁷ Where the fact that a statement was made is in issue, rather than the truth or falsity of such statement, the testimony of one who heard it made is not hearsay, for he is a direct witness to the fact that the words were spoken.⁸ But, the evidence admitted in the principal case was clearly hearsay. It was the truth of the declarations that was in issue, not the mere fact that they were made, and the truth obviously depended upon the veracity and competency of a person not before the court. The declarations, then, were inadmissible unless they fell into one of the several recognized exceptions to the rule against the admission of hearsay evidence.⁹ These exceptions only exist where there is a necessity for them and where there is some substitute for the guaranties of reliability to be found in the oath, in the attendant liability for perjury, and in cross-examination.¹⁰ As enumerated by Professor Wigmore, the recognized exceptions are: dying declarations, statements against interest, declarations about family history, attestation of a subscribing witness, regular entries in the course of business, sundry statements by deceased persons, reputation, official statements, learned treatises, sundry commercial documents, affidavits, statements by a voter, declarations of a mental or physical condition, and spontaneous declarations. This list is chosen because it is decidedly more liberal than the exceptions usually set out by courts and other writers. The last named exception seems to be a somewhat extended recognition of what most courts term the "res gestae" doctrine.¹²

The only one of these exceptions under which it could be urged with any semblance of reason that this evidence was admissible is that of *res gestae*, although the court expressly refused to hold it admissible under that doc-

² *Clay v. Clark* (1881), 76 Ind. 161.

³ *L. I. & W. R. R. Co. v. Parker* (1883), 94 Ind. 91.

⁴ *Metropolitan Life Ins. Co. v. Lyons* (1912), 50 Ind. App. 534, 98 N. E. 824.

⁵ *Jones* (3rd Ed.), § 297; *Morell v. Morell* (1901), 157 Ind. 179, 60 N. E. 1092.

⁶ *Morell v. Morell* (1901), 157 Ind. 179, 60 N. E. 1092; *Pulaski County v. Shields* (1891), 130 Ind. 6, 29 S. E. 385; *Parker v. State ex rel. Town* (1846), 3 Black. 292; *Depew v. Robinson* (1883), 95 Ind. 109; *Railroad Co. v. Howorth* (1920), 73 Ind. App. 454, 124 N. E. 687; *Snyder v. Snyder* (1920), 76 Ind. App. 9, 131 N. E. 248; *Johnson v. Brady* (1921), 77 Ind. App. 177, 126 N. E. 250.

⁷ *Jones*, Evidence (3rd Ed.), Section 297.

⁸ *Jones*, Evidence (3rd Ed.), Section 300.

⁹ *Metropolitan Life Ins. Co. v. Lyons* (1912), 50 Ind. App. 534, 98 N. E. 824.

¹⁰ *Wigmore*, Evidence (2nd Ed.), Sections 1420-1424.

¹¹ *Wigmore*, Evidence (2nd Ed.), Section 1426.

¹² *Wigmore*, Evidence (2nd Ed.), Sections 1757, 1768.

trine. While the term "res gestae" has been used in a variety of ways and has often been used as a convenient excuse for the admission of hearsay when the court thinks that the jury should hear it,¹³ properly applied, it means words or acts, or a combination of them, that are incidental to or so closely connected with some main fact which is admissible that it would not be properly understood without them.¹⁴ The guaranty of reliability lies in the requirement of spontaneity, which negatives the danger of design and deliberation.¹⁵ The doctrine is limited to impulsive statements which elucidate or explain the principal act in such a way as to be a part of it.¹⁶ In Indiana the doctrine is quite properly limited to those who participate in some way in the occurrence, and have thus taken a part in the principal act with which the res gestae evidence is connected.¹⁷ The declarations in the principal case were made by unidentified persons who apparently had no other connection with the occurrence. There were, therefore, no principal acts of the declarants to be explained. The statements, then, were clearly not admissible under the res gestae doctrine as it is applied in this state.

Some courts have developed a phase of the res gestae doctrine which Professor Wigmore terms "the spontaneous exclamation exception to the hearsay rule".¹⁸ Under it the declarations of mere bystanders are admissible.¹⁹ Here again the guaranty of reliability is spontaneity.²⁰ The requirements of the doctrine are (1) a startling occurrence, (2) a statement made before time to fabricate, (3) relating to the circumstances of the occurrence.²¹ But, it is submitted that even in those jurisdictions in which that exception is recognized, the evidence in question would not have been admissible. There was a startling occurrence, and statements made concerning it, but there was no showing that there was such spontaneity as made fabrication unlikely. Indeed, since the declarants were not identified, it does not appear that they even had an opportunity to witness the occurrence. This is necessary,²² for otherwise the declarants would not only have had no shock which would tend to make their evidence reliable, but would not have had an opportunity to know the facts of which they were speaking.

So we must conclude that the evidence admitted fell into none of the recognized exceptions. As pointed out above, the court held that it was admissible "as a part of a general conversation in which the defendant engaged." The court cited no cases to sustain the existence of such an ex-

¹³ Chamberlayne, Evidence, Section 2935.

¹⁴ Jones, Evidence (3rd Ed.), Section 344; Indianapolis St. R. R. v. Whitaker (1903), 160 Ind. 125, 66 N. E. 433.

¹⁵ Greener v. General Electric Co. (1913), 209 N. Y. 135, 102 N. E. 527; Ill. Cent. R. R. v. Lowery (1913), 184 Ala. 443, 448, 63 So. 952.

¹⁶ Alling Co. v. Alderman (1916), 90 Conn. 241, 96 Atl. 944; Jones, Evidence (3rd Ed.), Section 358.

¹⁷ Indianapolis St. R. R. v. Whitaker (1903), 160 Ind. 125, 66 N. E. 433; Indianapolis St. R. R. v. Taylor (1904), 164 Ind. 155, 72 N. E. 1045.

¹⁸ Wigmore, Evidence (2nd Ed.), Section 1745 et seq.

¹⁹ Wigmore, Evidence (2nd Ed.), Section 1755.

²⁰ Wigmore, Evidence (2nd Ed.), Section 1749.

²¹ Wigmore, Evidence (2nd Ed.), Section 1750.

²² Wigmore, Evidence (2nd Ed.), Section 1751; State v. Elkins (1890), 101 Mo. 344, 14 S. W. 116.

²³ Woodward v. Goulstone (1866), L. R. 11 App. Cas. 469.

ception, and the writer has been unable to find any. Would it be a wise policy to add this exception to the list of recognized exceptions? As stated above, all recognized exceptions have a basis of necessity, and offer some substitute for the guaranties of reliability to be found in the oath, in the attendant liability for perjury, and in cross-examination. It will be noted that there is no particular necessity for the exception in question. It does not appear that there is any reason why the declarant could not be found and brought before the court to testify to what he saw, nor does the evidence derive any peculiar value from the circumstances under which the statements were made. There is no substitute for the guaranties of reliability offered by other evidence. Such a rule might lead to the most astonishing results. It is common knowledge that the members of the large crowd which invariably gathers around the scene of an accident are prone to take sides and argue about the causes and discuss the question of who was at fault. During such arguments it is common for wild statements to be made, through prejudice and excitement, which have no foundation in fact. They are often made by persons who did not even see the occurrence and have no first hand information as to the facts which they are asserting. Yet, under the doctrine of the principal case, if one of the participants made reply he would make these reckless statements admissible against him. And aside from this natural propensity of people to be careless about their statements under such circumstances, there is the danger of intentional fabrication of evidence. There would be nothing to prevent a declarant from deliberately making damaging evidence against a person whom he disliked, and there would be no chance to bring out the prejudice and bias upon cross-examination.

It is submitted that it would be poor policy to add to the list of recognized exceptions to the hearsay rule, since such evidence is always dangerous, and that the one proposed in the principal case is particularly objectionable.

W. H. H.

HUSBAND AND WIFE—LOSS OF CONSORTIUM—Appellant sued appellee for injuries inflicted upon the husband of appellant by an agent of appellee. Appellee operated a garage in the city of Indianapolis, storing automobiles for owners and users. Appellant alleged that while her husband was in said garage, a servant of appellee ran an automobile against him, seriously injuring him, in consequence of which appellant has lost the consort, companionship, society, affection, and support of her husband. Appellee's demurrer to the complaint was sustained. Appellant appealed. Held, demurrer was properly sustained, since a wife has no cause of action for loss of consortium of husband caused by the negligence of a third party.¹

By the great weight of authority at common law and under modern statutes the husband may recover for the loss of his wife's consortium caused by a tort against the wife whether such injury was the result of negligence or not.² Apparently only four states have taken a different

¹Boden v. Del-Mar Garage, Supreme Court of Indiana, May 19, 1933, 185 N. E. 860.

²Brahan v. Meridian Light & Ry. Co. (1919), 121 Miss. 269, 83 So. 467; Tommee v. Pullman Co. (1922), 207 Ala. 511, 93 So. 462; Guevin v. Manchester Street Ry. (1916), 78 N. H. 289, 99 Atl. 298; Selleck v. City of Janesville (1899), 154 Wis. 570, 80 N. W. 944; Baltimore & O. R. Co. v. Glenn (1902), 66 Ohio St.