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SOME OBSERVATIONS ON THE LAW OF EVIDENCE —STATE OF MIND TO PROVE AN ACT*

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Since *Sugden v. St. Leonards*¹ there has been a broad tendency in this country to admit any statements of the testator made at any time on any point relating to the execution, revocation, or contents of the will.² Whatever may have been the limiting effect of later English decisions,³ the American courts have in general adhered to that doctrine and have accepted all its implications. With the exception of a few jurisdictions impressed by the *res gestae* requirement,⁴ the philosophy of which in this

* The phrase state of mind in the law of evidence becomes important in two classes of cases: where it is said to be in issue, and where it allows the admission of words to prove an act. We are now concerned only with the second class. Here the courts confine the evidence to proof of a future act, regarding the state of mind required for the most part as plan, intention, or design. In testamentary cases, on the other hand, the phrase sometimes procures the admissibility of statements without regard to tense. We shall attempt a legal analysis of the various rules and then a logical and psychological analysis of the points raised in the legal analysis.

For the background of these articles and references to others in the series, see Hutchins and Slesinger, *Some Observations on the Law of Evidence—The Competency of Witnesses* (1928) 37 Yale L. J. 1017, star note.

¹ 1 P. D. 154 (1876).

² See Notes (1921) 6 CORN. L. Q. 201; (1925) 38 HARV. L. REV. 959; 4 CHAMBERLAYNE, MODERN LAW OF EVIDENCE (1913) § 2654; *Matter of Page*, 118 Ill. 576, 8 N. E. 852 (1886); *McMurtrey v. Kopke*, 250 S. W. 399 (Mo. 1923); Comment (1925) 19 ILL. L. REV. 577; *Behrens v. Behrens*, 47 Ohio St. 323, 25 N. E. 209 (1890); (1920) 29 YALE L. J. 681; *Barge v. Hamilton*, 72 Ga. 568 (1884); *In re Thompson's Estate*, 200 Cal. 410, 253 Pac. 697 (1927); *Maxwell v. Ford*, 103 W. Va. 124, 136 S. E. 777 (1927); (1921) 16 ILL. L. REV. 244; (1914) 27 Harv. L. Rev. 761; 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1736.

³ *Atkinson v. Morris*, [1897] P. 40; *Woodward v. Goulstone*, 11 App. Cas. 469 (1886).

⁴ (1928) 23 ILL. L. REV. 192; *In re Campbell's Will*, 138 Atl. 725 (Vt. 1927); *Pennington v. Perry*, 156 Ga. 103, 118 S. E. 710 (1923); cf. also

connection is expounded in such cases as *Throckmorton v. Holt*⁶ and *Matter of Kennedy*,⁷ our states have apparently taken the view that since the person who knows most about the will is dead, and since others are not likely to be aware of his plans, everything the testator said even remotely affecting those plans may be admitted. Some courts insist that the evidence is admissible only in corroboration of other evidence.⁷ But the usual rule seems to be unqualified. Prior, contemporaneous, or subsequent utterances of the testator are admissible to show his state of mind at the time of speaking, from which is inferred his accomplishment of an act in accordance therewith.

This amounts, in effect, to a special exception to the hearsay rule for the declarations of testators, and some courts have frankly said so.⁸ It is somewhat difficult to call the words, "My will is in that box," a statement of presently existing state of mind in the sense in which that phrase is used in other departments of the law of evidence. Ordinarily the state of mind must be plan, intention, or design. In the great decision which must be regarded as creating the exception for such declarations in non-testamentary cases,⁹ the statement was expressive of a determination to leave Wichita. The declarant's letters were competent not ". . . 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."¹⁰ This is just another way of saying that the announcement of intention is some evidence that the intention was carried out, and that the writer eventually got to Crooked Creek. If he had said, "I am in Crooked Creek," or "I have just left Crooked Creek," few courts would admit either statement. When the House of Lords admitted such a declaration,¹¹ it was severely criticized¹² as altering the scope of the hearsay rule and invading the province of the legislature. What is commonly admitted in will cases, either under a special exception or that for presently existing state of mind is inadmissible

Siln v. Beitel, 289 S. W. 1057 (Tex. Civ. App. 1926); *Kingston v. Hines*, 13 F. (2d) 406 (W. D. Mich. 1926).

⁶ 180 U. S. 552, 21 Sup. Ct. 474 (1900).

⁷ 167 N. Y. 163, 60 N. E. 442 (1901).

⁸ *Atherton v. Goslin*, 239 S. W. 771 (Ky. 1922); see *Hoppe v. Byers*, 60 Md. 381, 393 (1883).

⁹ See, for example, *In re Shelton's Will*, 143 N. C. 218, 224, 55 S. E. 705, 707 (1906).

¹⁰ *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909 (1892).

¹¹ *Ibid.* 296, 12 Sup. Ct. at 913.

¹² *Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K. B. 130.

¹³ Note (1915) 28 HARV. L. REV. 299.

in other cases. Yet in these other cases if the speaker is dead at the time of trial, as he was in *Lloyd v. Powell Duffryn Steam Coal Co.*¹³ and in *Mutual Life Insurance Co. v. Hillmon*,¹⁴ the same necessity exists for the evidence that is present in litigation over a will. And on the surface, at least, there is no greater guarantee of trustworthiness in the one case than in the other.

The guarantee of trustworthiness which the courts find for statements of presently existing state of mind is a comparative guarantee. It is supposed that an utterance indicating presently existing state of mind, reported by the person who heard it, will be more accurate than the memory of that state of mind years later. The announcement, "I am going to leave Wichita," will more nearly reflect the then intention of the speaker than his recollection at a trial in 1885 of what his plans were on March 3, 1879. The jury knows that plans are frequently not carried out, and can give proper weight to expressions of them. Thus Justice Gray in the *Hillmon* case deals with the trustworthiness of the evidence as follows:

" . . . while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is *less trustworthy* than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation."¹⁵ (Italics ours).

The difficulty with Justice Gray's analysis is that he spoke as though the only problem to be discussed were the method of proving state of mind. The facts called for a decision on the relative merits of various ways of proving an act. The question in the *Hillmon* case was not whether Walters planned to leave Wichita but whether he got to Crooked Creek. "His own memory of his state of mind at a former time" is therefore unimportant. What is important is his memory of his physical location at a former time. If he is still alive and available nobody wants to know from him what his state of mind was in the first days of March, 1879. The question is where he was on March 17, 1879. The contrast, therefore, is not between his recollection of his intentions and a bystander's recollection of what he then said. It is between his recollection of his geographical position and a bystander's recollection of what he then said it was going to be. And as between these two brands of evidence there can be little choice so far as trustworthiness is concerned. The comparison is between a sworn statement of fact subject to cross-examination in the presence of the jury and an unsworn statement

¹³ *Supra* note 11.

¹⁴ *Supra* note 9.

¹⁵ *Ibid.* 295, 12 Sup. Ct. at 912.

of design made out of court, purporting at most to be a report of what the declarant said he then had in mind.

The decisions upon which Justice Gray relies indicate the source of the difficulty. In his effort to hold the evidence admissible he went back to cases where the declarant's accomplishment of some act was admitted and the only question was, what was the state of mind that accompanied it? The chief support of the decision is *Insurance Co. v. Mosley*,¹⁶ a case of declarations of present pain and of spontaneous exclamations. The declarations of present pain, or presently existing state of mind, were not used there to show that the declarant fell down stairs. That was proved by the spontaneous exclamations.¹⁷ But to uphold the introduction of plans to leave Wichita Justice Gray relies on the arguments used by Justice Swayne to admit declarations of present pain. It may be true that "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence."¹⁸ But it does not follow that where such feelings are not material to be proved the usual expressions of such feelings are admissible. If Walters were alive his feelings on the first of March would be insignificant. The significant point is where he was on the seventeenth. Aside from will cases, which as we have seen have been treated separately from other declarations of state of mind, the remaining decisions¹⁹ cited in the *Hillmon* case are chiefly concerned with state of mind in issue, not state of mind to prove an act. And the courts indicate that where state of mind is in issue the declarations of the speaker on other dates or on the same date may be admitted to prove it. Here the bystander's recollection of the state-

¹⁶ 8 Wall. 397 (U. S. 1869).

¹⁷ As to the value of these see Hutchins and Slesinger, *Some Observations on the Law of Evidence—Spontaneous Exclamations* (1928) 28 COL. L. REV. 432.

¹⁸ See *Insurance Co. v. Mosley*, *supra* note 16, at 404, quoted in *Mutual Life Ins. Co. v. Hillmon*, *supra* note 9, at 296, 12 Sup. Ct. at 913.

¹⁹ They are cases of declarations to prove a bankrupt's intent at the time of leaving the country, showing the reasons given by a person for going to a place; showing the intent of a man in going to the railroad; showing the state of affections of the husband or wife in actions for criminal conversation or alienation of affections, etc.

The text-writers do not distinguish state of mind to prove an act and state of mind to prove state of mind on the point of unavailability. WIGMORE, *op. cit. supra* note 2, § 1714; CHAMBERLAYNE, *op. cit. supra* note 2, §§ 2643, 2657. Apparently the cases do not require a showing that the declarant is unavailable, though of course he frequently is. In *re McNamara's Estate*, 181 Cal. 82, 183 Pac. 552 (1919); *Ott v. Murphy*, 160 Iowa 730, 141 N. W. 463 (1913); *Dunham v. Cox*, 81 Conn. 268, 70 Atl. 1033 (1908); *Worth v. Chicago, M., & St. P. Ry.*, 51 Fed. 171 (C. C. A. 9th, 1892).

ment may be better than the witness's memory of the state of mind. Is the bystander's recollection of the statement better than the witness's testimony as to where he was? To hold that it is leads to interesting conclusions as to utterances of presently existing state of mind to prove a present or past fact. If the statement, "I am going to leave Wichita," is more reliable than the witness's memory years later that he had gone, then clearly his memory of an act just completed is also more reliable than his memory of it at the trial. *A fortiori*, his statement of a present fact, "I am in Crooked Creek," is more reliable than his testimony later that he was there on March 17, 1879. According to *Mutual Life Insurance Co. v. Hillmon*, if the declarant had lived, his words, "I am going to leave Wichita," could have been offered to show that he left, on the ground that his words at the time were more trustworthy than his recollection of his presence there. But "I am in Crooked Creek," or "I have just left Crooked Creek," would have been inadmissible because they are not more trustworthy than his recollection on the stand.

The absurdity of this result indicates that the hearsay exception must be justified by the supposed necessity of the evidence. Since it is admitted even if the declarant is available, it does not come in because of his death or absence from the jurisdiction. Let us assume, then, that the declarant is available. His statements of his present plans will be admitted because, "Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there is such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect."²⁰ Even if we grant that there is a necessity for admitting declarations of state of mind to show what the state of mind of the speaker was at the time, we find that these declarations are less useful than the sworn statements of the individual himself under cross-examination where a fact like physical location is in issue. If the declarant is available, he can tell where he was on March 17, 1879. There is little necessity of introducing his plan to be somewhere on that day.

In the *Hillmon* case the association of ideas which produced ambiguity on the question of trustworthiness produces the same ambiguity on the question of necessity. Because it may be neces-

²⁰ See *Insurance Co. v. Mosley*, *supra* note 16, at 404, quoted in *Mutual Life Ins. Co. v. Hillmon*, *supra* note 9, at 296, 12 Sup. Ct. at 913; see also Seligman, *An Exception to the Hearsay Rule* (1912) 26 HARV. L. REV. 146, 154. If the declarant takes the stand the extrajudicial statements, if in writing as in the *Hillmon* case, could be used to refresh his recollection; or if witness proves recalcitrant the statements, under the general rule, might be offered to impeach him. WIGMORE, *op. cit. supra* note 2, §§ 905, 758.

sary where state of mind is in issue to admit declarations of it, Justice Gray suggests that that necessity exists wherever state of mind might prove the commission of an act. When a man complains that he feels dizzy, his complaint may conceivably be necessary to show that he did feel dizzy. When he says he is going to leave Wichita, his declaration is unnecessary to prove that he did, because by hypothesis he can take the stand and prove it. To claim a necessity for such declarations as those admitted in the *Hillmon* case when the declarant is available is to overthrow again the distinction between utterances to prove future and past or present facts. If declarations of state of mind are necessary to prove a future act when the speaker is in the jurisdiction, there is no reason why they are not equally necessary to prove an act now existing or one completed long since.

There was, however, a real necessity for the introduction of this evidence in the *Hillmon* case. Walters was dead, or at least unavailable. The decision might have stopped on the question of the necessity of proving intention in this way with the words, "After his death, there can hardly be any other way of proving it. . ." ²¹ This element in the case also disposes of the matter of trustworthiness. The contrast in this view is no longer between a man's statement on the stand of his physical location on a given date, and his extrajudicial statement of where he planned to be on that date. It is now between that extrajudicial statement and no evidence from him at all. Whatever reflections may be made on the trustworthiness of such a statement, most students of evidence would be inclined to prefer some statement to none, leaving the jury to estimate the worth of what is admitted.

It is significant that the only cases relied on by Justice Gray in which words are used to prove state of mind to prove an act are cases in which the declarant is dead. And the only non-testamentary case directly in point, *Hunter v. State*,²² was one in which the declarant was the victim of the murder for which the defendant was on trial. In the three will cases cited,²³ the speaker was of course no longer in a position to take the stand. The reliance of the court on *Insurance Co. v. Mosley* ²⁴ and cases where state of mind was in issue indicates that the use of the phrase "state of mind" has obscured the real necessity, the unavailability of the declarant. The unavailability of other evi-

²¹ See *Mutual Life Ins. Co. v. Hillmon*, *supra* note 9, at 295, 12 Sup. Ct. at 912. Seligman, *op. cit. supra* note 20, overlooks the necessity created by the unavailability of the defendant.

²² 40 N. J. L. 495 (1878).

²³ *Sugden v. St. Leonards*, *supra* note 1; *Woodward v. Goulstone*, *supra* note 3; *Shailer v. Bumstead*, 99 Mass. 112 (1868).

²⁴ *Supra* note 16.

dence of state of mind is significant only when coupled with the other, except when state of mind is material to be proved. State of mind becomes important in the *Hillmon* case because Walters was not on hand to tell where he was on March 17, 1879. Had he been on hand he would not have been asked what his plans were from March first to March fifth. He would have been asked his address on the seventeenth.

If the necessity that exists for the admission of a declaration of a presently existing state of mind to prove a future act is the unavailability of the declarant, the same necessity should suggest the admission of such declarations to prove past or present facts. This is, of course, the result in will cases under the majority rule.²⁵ Where the speaker is dead, "I am going to leave Wichita" is no more necessary to show his location at a certain time than his statement that he has just been there or a letter saying that he is there. The declarant is equally dead in all cases. If it is necessary to use the phrase "state of mind" to justify the admission of this evidence, the will cases show that it can be done. Those cases frequently hold that "My will is at my lawyer's office" is admissible to show the state of mind of the testator, from which is inferred the execution and the continued existence of the document. Whether this results in a new exception to the hearsay rule for the declarations of unavailable persons even though not against interest, or is regarded as an extension of the existing exception for declarations of presently existing state of mind seems unimportant, except that verbal difficulties may be avoided by admitting all such statements, irrespective of technical alignment within the category "state of mind."

The first objection that has been registered against such a development is that it breaks down the hearsay rule.²⁶ But the hearsay rule is already broken down by some thirteen exceptions²⁷ to which this would not greatly add. It is said that if memory is admitted as a state of mind, then the hearsay rule is gone. But it is now gone in will cases where the only state of mind that the testator can be thought of as describing by his words is his memory or belief. If in non-testamentary cases the exception is confined to situations where the declarant is unavailable, the innovation is no more startling than the admission of post-testamentary declarations. Indeed it is not as startling. A will is a solemn document, the requirements for which are

²⁵ See *supra* note 2.

²⁶ See Seligman, *op. cit. supra* note 20, at 156-158; see also reply of Maguire, *infra* note 57.

²⁷ WIGMORE, *op. cit. supra* note 2. Hinton lists nine in his casebook, and Maguire the same number in his. Our suggestion is substantially the Massachusetts hearsay statute, Gen. Laws (1921) c. 233, § 65.

prescribed by law. Everybody knows the weakness of parol evidence of any kind in will contests. It was to be expected that every effort would be made to limit the scope of such testimony. Instead the declarations of the testator at any time are freely admissible.

In the second place it is urged that statements of present or past facts are usually cast in testimonial form, so that the jury may attach too much weight to them.²⁸ How true this is in will cases. "My will is in that box" is a direct assertion of the existence and location of the will. "I am writing from Crooked Creek" is a direct assertion of the location of the writer. Unless there is an overwhelming difference between will cases and other cases where the declarant is unavailable, it would appear that in will cases the courts have faced or disregarded the testimonial form of the declarations when used to prove past or present facts. They might do the same when a will is not involved.

It may be argued that even when the declarant is unavailable there is no real reason for permitting evidence of his declarations showing his state of mind. Assuming that state of mind is relevant to show a future act, do we need to admit declarations in order get it? When the speaker is alive and in the jurisdiction, he may, except in Alabama,²⁹ testify to his own previous state of mind.³⁰ Where he is unavailable the only method of discovering it is through his "countenance, attitude, or gesture, or by sounds or words"³¹ as reported by others. Looks and gestures are a trifle inadequate as reflecting state of mind. Particularly is this true where the opinion rule operates as vigorously as it does in most states. One may describe the appearance of another, but may not conclude that he was joking, angry, or in the fear of death.³² Under these circumstances, the words of the declarant are of such importance as to induce the creation of an exception to the hearsay rule to provide for their admission.

The logic of this legal analysis cuts both ways. We may argue on the basis of it, either for the admission of all statements, regardless of tense, when the declarant is unavailable and his

²⁸ Book Review (1924) 37 HARV. L. REV. 513, 519; Chafee, *The Progress of the Law, 1919-1921: Evidence* (1922) 35 HARV. L. REV. 302, 443.

²⁹ *Lawler v. State*, 115 So. 420 (Ala. 1928); (1924) 22 MICH. L. REV. 486.

³⁰ *Powell v. Powell*, 260 Mass. 505, 157 N. E. 639 (1927); *State v. Asal*, 79 Mont. 385, 256 Pac. 1071 (1927); *Cannon v. Seattle Title Trust Co.*, 142 Wash. 213, 252 Pac. 699 (1927); *People v. Sheasbey*, 82 Cal. App. 459, 255 Pac. 836 (1927); *Smith v. State*, 262 Pac. 507 (Okla. Cr. App. 1928).

³¹ See *Mutual Life Ins. Co. v. Hillmon*, *supra* note 9, at 295, 12 Sup. Ct. at 912.

³² *State v. Holland*, 193 N. C. 713, 138 S. E. 8 (1927); *Prince v. State*, 215 Ala. 276, 110 So. 407 (1926); *State v. Phillips*, 279 S. W. 749 (Mo. App. 1926); *cf. Hall v. State*, 216 Ala. 336, 113 So. 64 (1927).

state of mind an important link in the chain of evidence; or for the abolition of the hearsay exception. In the first instance we are merely raising the wills exception to the dignity of a general rule based on necessity due to unavailability not only of the declarant, but of other evidence on an important point; in the second the hearsay rule, based upon the untrustworthiness of all extrajudicial statements is maintained in full force. Before deciding which major premise to accept it is pertinent to inquire into the relative probative force of the legal "state of mind" to prove an act in the future, present or past. There is not only logic but legal precedent for either course of action. In order to reach a rational conclusion we must consider the legal concept in its psychological setting.

It is clear that something which lawyers call state of mind, the very existence of which is denied by many respectable psychologists, is regarded as an integral part of the law. The preceding paragraphs, which assume the legal existence of this phenomenon, in no way attempt to define it. The courts do not attempt to define it; the text-writers rarely. It is a primary datum of experience, like consciousness. As we have observed, the elusive state of mind is legally evidenced by words, although the inference is not directly from the words to the mental state. It is rather through the introspection of twelve jurymen. The juror, on hearing the report of the state of mind of another, says to himself in effect, "Had I spoken thus, it would have meant that I intended so." The only guarantee of the accuracy of the result is that it requires the unanimous agreement of twelve separate introspectors. In those cases where the process of introspection is not so obvious, we generally find a situation so often repeated as to seem to warrant a direct inference from the words to the mental state. Thus the simple assertion, "I am going to leave Wichita," seems to be immediately taken to mean that the speaker "intended" to leave; or the declaration, "I made a will," appears to be taken directly as evidence that the testator at the time "thought" he made a will, thus possibly justifying the further inference that the will was in fact made. In the law, then, words are said to indicate mental states. Our problem now is to ascertain to what psychological picture these legal assumptions correspond and whether the two disciplines cast any illumination upon each other.

The classic method of psychology, like that of law, is introspective,³³ words playing a part of the utmost importance. In order to determine, for instance, what differences in light intensity

³³See TITCHENER, TEXT BOOK OF PSYCHOLOGY (1917) 20 *et seq.* for a clear account and justification of introspection as a psychological method.

were just perceptible to the subject,³⁴ he was asked to look at a light and tell the examiner, who was gradually increasing its intensity, the precise moment at which he noticed any change. Students of animal psychology could not, of course, depend on the words of their subjects, and had to invent other ways of determining when a dog or cat just perceived an increase or decrease in intensity or a change in color. Pavlov, Watson, and Lashley elaborated a method of inquiry, entirely objective, which could be applied not only to animals, but also to human beings.³⁵ From then on the use of words and the introspective method were viewed with suspicion.³⁶ Because of their vague inaccuracies, the psychologist studied not what the subject said, but what he did. To find out if a person were emotionally upset by a sudden sharp noise the psychologist did not ask him whether he was upset. He felt his pulse, measured his respiration curve, and made a chemical analysis of his blood. In general it was found that where they could be obtained these involuntary acts were more reliable than words because of their greater invariability. There were times when a subject would honestly report that he was quite stirred emotionally, although physiological analysis showed him to be untouched.³⁷ The advantage of the new method is obvious; its limitation lies in the fact that in its present stage of development it is applicable to only a small part of the field covered by psychology. We are driven to less exact methods for the most part, subject only to a statistical check. The bulk of intelligence testing involves verbal response,³⁸ and the whole of psychoanalysis is based upon words. The

³⁴ This experiment is a familiar part of every laboratory course. WATSON, *op. cit. infra*. note 35, at 35.

³⁵ The conditioned reflex is well described in WATSON, *PSYCHOLOGY FROM THE STANDPOINT OF A BEHAVIORIST* (1919) 28 *et seq.* Pavlov has written a whole book about it. PAVLOV, *CONDITIONED REFLEX* (1928). The phenomenon is so widely known that a detailed description of it is superfluous. It is enough to say that a subject (human or animal) is so trained that, for example, his secretion of saliva increases when he is stimulated by a light of given intensity. He can be further trained so that although he will react to an intensity of A , $A + 1$ will cause no salivary flow. Thus by decreasing the difference between the intensities of the two stimuli, a point is reached where differential training is no longer possible. The saliva flows equally at A and $A + .01$. Just beyond that point, then, are the just perceptible differences the old experiment sought to ascertain introspectively.

³⁶ See, for instance, the preface to WATSON, *op. cit. supra* note 35; *ibid.* 39 *et seq.*

³⁷ Syz, *Observations on the Unreliability of Subjective Reports of Emotional Reactions* (1920) 17 BRIT. JOUR. PSYC. Gen. Sect. 119-26.

³⁸ The army tests and various revisions of the Binet are cases in point. There are a number of non-language tests, but vastly more which use words.

scientific psychologist wishes it were otherwise; often he goes to the extent of declaring that only what can be studied objectively is the proper field of his investigation.³⁹ That is a position which the lawyer and judge can hardly take in the present state of our knowledge.

Since we cannot overlook the importance of verbal symbols, and since it would be futile to use these symbols to spin out an elaborate terminological dispute, let us forget the phrase state of mind and consider the facts. If many psychologists shy away from the term mind, let the lawyer ask them to tell him something about the relation of words to other overt acts. What is the basis of the law's inference from words to deeds? If psychology finds that there is a good one, the law may, if it likes, substitute for words the term state of mind. Whether or not there is such a thing as state of mind, except as a *tertium quid*, is immaterial in this view.

A definition of a psychological act may clarify the matter somewhat. Our musculature is in a constant state of phasic and tonic contraction. The physiologist can isolate a single muscle band and call each separate contraction, for his purpose, a complete act. That is because he is interested for the moment only in the chemical changes in muscle contractions. But such behavior is without significance psychologically, where a longer history of an act is essential. It is sometimes possible to trace the genesis of an adult habit pattern back to remote infancy,⁴⁰ or even, according to some psychologists, to prenatal life.⁴¹ The stopping point of one's research into the history of an act depends upon the immediate purpose. To cure a neurosis it may be necessary to delve into the subject's earliest memories. But when we merely wish to ascertain whether a certain event occurred, our search ends when we have reached an item of behavior frequently if not invariably correlated with it. That item of behavior may precede the act at issue, as the obtaining of a passport precedes a trip abroad; or it may follow it, like the return journey. Thus every act has a past, present, and a future; the observable parts of that total history may be muscle contractions, glandular secretions, or words.

Words are important, not because they indicate a state of mind, but because they are part of a total situation. From the words one may, perhaps, infer other parts of the situation. They are not as accurate as a conditioned reflex would be. Besides the variation in their meanings, the possibilities of lying and unconscious motivation have to be faced. But the fact remains that

³⁹ See WATSON, *op. cit. supra* note 35, at 41 *et seq.*

⁴⁰ FREUD, *INTRODUCTORY LECTURES ON PSYCHOANALYSIS* (1922) 168 *et seq.*

⁴¹ FLÜGEL *THE PSYCHOANALYTIC STUDY OF THE FAMILY* (1926) c. 3.

whatever the problem raised by their use, at present they are one of the best means we have of studying the behavior of an individual with a view to telling what he has done or is going to do.⁴²

This brings us back to the legal distinction between statements to prove a future and a past or present act. Professor Chafee has suggested as a possible psychological justification for the distinction that "intention is a dynamic mental state with a force of its own, like remorse, whereas memory is static, a mere reflection of past events."⁴³ The suggestion seems interesting, but at the moment superfluous, because we are not concerned with intention, mental states, remorse, or memory, but with the connection between words and other overt acts. The problem is not one of dynamics and statics, but one of the relevancy of words to prove past, present, or future acts. In the *Hillmon* case a complete account of Walters's behavior during the week which made him an important figure in legal history might have been something like this: first the writing of a letter to his fiancée, stating that he was leaving Wichita shortly; the packing of a bag, giving a forwarding address to the post office, and boarding the Crooked Creek Express, if there had been one, at two-ten. Since no doubt was cast upon the veracity of Walters, it was reasonably safe to assume from these items that when the two-ten arrived in Crooked Creek Walters was where the insurance company said he was. But it is obvious that various unforeseen events may have led to a different consummation of all these preparatory acts.⁴⁴ The hack that took our protagonist to the train may have broken down; he may have got on the wrong train by mistake; he may have fallen off before he got to Crooked Creek. But since these events are rather remote contingencies, it is fairly safe to let the testimony go to the jury. Still it must be remembered that even when we have the facts supposed in addition to his statement of his plans, there yet remains a slight though definite possibility that he never arrived in Crooked Creek.

There is not even that possibility when we are dealing with statements referring to past or present facts. A letter to his betrothed saying, "I am in Crooked Creek," or "I was in Crooked Creek," allows the introduction of no remote contingencies. The event is either happening or has happened, and no accident can change it. Even if nothing is known of antecedent circumstances, even if for days before the whereabouts of the declarant had been shrouded in mystery; even though nothing were known of his errand, or his Crooked Creek address, or the date

⁴² That is, in fact, the method of psychoanalysis.

⁴³ See Book Review (1924) 37 HARV. L. REV. 513, 519.

⁴⁴ WOODWORTH, DYNAMIC PSYCHOLOGY (1918) 36 *et seq.*

of his arrival, the statement in the present or past tense would be more reliable than an equally honest statement in the future tense.⁴⁵ As we have seen, the courts realize this and act upon the realization in will cases; there is no logical or psychological reason for not extending the rule to cover all statements made either subsequent to or contemporaneous with the act in issue. The words are not cause or effect of the main act; they are part of the total situation, with a reasonably high probability of correlation with the other parts. Since the probability is only reasonably high, it might be misleading to admit the statements without corroboration. But when corroborated they are just as valuable, whether referring to past, present, or future.

In the situation that we have been discussing the stimuli and responses have been on the conscious level. But another situation is possible and is represented by such a case as *Greenacre v. Filby*.⁴⁶ The defendant argued that the deceased had committed suicide. The plaintiff contended that he had been run over by a train without any desire for that consummation on his part, and offered evidence that on leaving the saloon where he had been drinking he told his friends that he was going to kiss the wife and babies and go to bed. That he may have been deliberately lying is of course a possibility. But the probability in this instance is rather more difficult to grasp. Indeed the explanation about to be set forth is more than occasionally met by the derisive comment of distinguished psychologists. It cannot be too strongly pointed out that the explanation is merely an hypothesis; it does not pretend to be either complete or exclusive; it does not aim to furnish a criterion for the admissibility of words as proof in certain situations. Its only purpose is to indicate a possibility of which the tribunal should be aware.

The explanation is based on the psychoanalytic theory that not all motivation is conscious.⁴⁷ To avoid other terminological pitfalls we may say that although frequently a state of readiness⁴⁸ in a human mechanism is accurately reflected by the verbal expressions emanating therefrom, there are times when the words

⁴⁵ Any doubt cast upon the veracity of Walters renders all three statements equally untrustworthy. The fallibility of memory is also important in this connection. For all spoken hearsay statements must be remembered by some one on the stand. To the psychologist that is the real reason for the rule, not its untrustworthiness on other grounds.

⁴⁶ *Greenacre v. Filby*, 276 Ill. 294, 114 N. E. 536 (1916); (1917) 11 ILL. L. REV. 573; (1917) 26 YALE L. J. 798.

⁴⁷ The aim of psychoanalysis, in contradistinction to that of the other forms of psychology, is exploration of the unconscious instead of the conscious mind. See, among many others, FREUD, *op. cit. supra* note 40, particularly 82-93. There are too many general expositions to make it worth while listing them here.

⁴⁸ WOODWORTH, *supra* note 44, at 35 *et seq.*

give an impression exactly opposite to the actual situation. The psychoanalytic explanation is that the motivation is unconscious; that a mental censor⁴⁹ prevents the real reason for a course of activity from becoming conscious. We are not now interested in this hypothesis. Our sole desire is to study the observable facts reported by psychoanalysts to see the relationship between their facts and the case of Mr. Greenacre.

There are a number of cases like the following. A woman announced that she was going abroad to become a nurse in the American army. She added that she was going to confine her attention to blind soldiers. Her conscious reason was her great pity for the unfortunate blind. But more study of her case brought out the fact that she thought she was terribly homely, and chose the blind for that reason.⁵⁰ An old bachelor had the strange habit of catching a certain insect, keeping it for a few weeks and then throwing it away. He had no scientific interest in the subject, and could give no reason for his strange collecting mania. On inquiry it was found that the insect was of the *lobalis* species, designated in the bachelor's native dialect as "maiden." His unconscious motive in this case differed greatly from the mere desire to collect insects.⁵¹ A woman forgot the married name of one of her best friends. She honestly tried to remember it, and gave all sorts of sincere reasons for her lapse of memory. The real reason appeared later on when she admitted that she intensely disliked the husband of her friend, and had strongly objected to the marriage.⁵² Innumerable other examples might be given, but perhaps these will serve to make the point clear. The point is simply that sometimes the reasons honestly given for behavior do not reveal the actual motive. Regardless of why this is so the fact is undeniable. For our present purpose only the fact is important; a whole controversial literature has grown up about the explanation.

This fact does not affect the general relevancy of words to prove state of mind. It becomes important only sometimes, and, it might be added, only with some people. How can these times and these people be discovered? Disregarding unusual situations where the psychoanalytic approach might conceivably have value, we shall for the present best answer this question by examining cases which are fairly frequent and indicating their analogy to the psychoanalytic examples already given. The two kinds of cases that stand out are those of suicide, and those of threats to prove an act of violence. Suicide, both statistically and psychologically in our civilization may be considered an abnormal

⁴⁹ FREUD, *supra* note 40, at 248 *et seq.*

⁵⁰ BRILL, FUNDAMENTAL CONCEPTIONS OF PSYCHOANALYSIS (1921) 98.

⁵¹ *Ibid.* 103.

⁵² FREUD, *op. cit.* *supra* note 40, at 41.

act,⁵³ and the expressions concerning it on the part of those who attempt or commit it should be received with skepticism. Death, one's own or that of somebody else, is a common infantile symbolic way of solving vexatious problems.⁵⁴ Almost any one can resurrect from his past day dreams in which his own self-inflicted death played some part. At times these dreams develop into ridiculous, abortive attempts which are more a mechanism for getting attention than a death wish. An adolescent girl, for instance, having resolved to end everything, ate a box of aspirin tablets, and then dramatically lay down to die. Another neglected by her family attempted suicide in their presence but contrived to be saved in the nick of time. For days thereafter she was the center of attention.⁵⁵

On the other hand, there are cases more nearly like *Gretnaere v. Filby*,⁵⁶ where the suicidal impulse is unconscious; indeed in some of them the subject seems to love life only too well. But we find him constantly facing danger, stupidly at times. Intensive study of him over a long period may reveal the hitherto unconscious wish to die. From the words alone in *Gretnaere v. Filby* it is impossible to tell whether that was such a case. Those words may or may not have indicated that he intended to commit suicide. The same correlation that exists in the ordinary case between words and acts cannot be looked for here. But it must not be assumed that the words always mean the opposite from what they seem to mean. They may mean exactly what they say. It is important, therefore that the tribunal be able to differentiate cases where the probable correlation between words and other overt acts is high from those where it is low, or possibly negative. In the doubtful ones it is necessary to insist on more corroborative evidence and frequently evidence of a special sort, amounting to an abbreviated case history of the declarant.

Cases in which a threat is used to prove the future commission of the act threatened also belong to what we may call the psycho-analytic type of situation.⁵⁷ Very often it amounts to nothing more than compensation for a bruised ego. A person, suffering from what one school of psychiatry has described as an inferiority complex frequently talks big to justify himself not only to

⁵³ By abnormal act we mean either an act seldom performed in a given civilization, or any act of an abnormal person.

⁵⁴ FREUD, *op cit. supra* note 40, at 282, 119.

⁵⁵ These cases are taken from unpublished psychiatric material.

⁵⁶ *Supra* note 46.

⁵⁷ Threats as evidence are of sufficient importance to warrant fuller treatment. We are discussing them from other points of view in a subsequent article. In the present paper we are confining our attention to those threats upon which doubt may be cast because of the discrepancy between the real and expressed wish.

the world but to himself as well.⁵⁸ The probative force of that sort of threat would seem to be relatively slight and therefore to require much evidence in corroboration. Again it must be insisted that the evidence, though, weak may not be weak enough to be excluded. Only the court should be thoroughly aware of the relative strength of that type of evidence as compared with others.

We find, then, that any dispute between lawyer and psychologist as to the meaning and significance of state of mind can be avoided by considering, not the term, but the facts which the lawyer takes it to describe, a result which allows the lawyer to make what use of the phrase he can in order to admit relevant facts without breaking the rules of the game. The courts are justified in their belief that a high correlation exists between words and other overt acts. But they have probably not gone far enough. Their insistence in non-testamentary cases that the words should precede the act at issue is open to question. It seems safe and rational to establish a special exception to the hearsay rule for non-testamentary cases analogous to that now existing in most jurisdictions for utterances relating to a will.⁵⁹ But the variability of words may make it inadvisable to let them stand alone, especially in dealing with threats of violence and declarations of an intention to commit suicide. In these cases counsel should make every effort to obtain as complete a history of the declarant as possible, and the tribunal should be wary of accepting the statements at their face value.

⁵⁸ For discussion of that type of behavior see ADLER, *NEUROTIC CONSTITUTION* (1921) 100, 133, and ADLER, *UNDERSTANDING HUMAN NATURE* (1927) 212.

⁵⁹ Cf. Maguire, *The Hillmon Case—Thirty-three Years After* (1925) 38 HARV. L. REV. 709, 732; "The obscure elaborations of the *Hillmon* case prove for the hundredth time that we ought to have further intelligent legislation to clear the old deadwood from the evidential field."

We should perhaps add that in our proposed extension of the hearsay exception to make admissible presently existing state of mind to prove past or present facts, we should expect the judge to have the same discretion to exclude remote and suspicious statements, as he has in dealing with utterances referring to the future.