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Evidence - Testimony of Physicians as to Mental Capacity

J. M. S.

is laid the evidence serves no purpose, because the defendant has already proved that he acted in self defense.[11]

The question of whether a particular hostile demonstration was of such a nature as to place the defendant in a reasonable fear of immediate death or bodily injury is one which must be determined by the jury. Thus the inquiry is directed to the situation as it appeared to the defendant at the time of the killing. Evidence of prior threats by the deceased which are known to the defendant, or evidence of his bad character, is important only in determining the reasonableness of the defendant's belief that the defensive measures were necessary. If this has already been established by other testimony, proof of prior threats and dangerous character of the assailant would be superfluous. Hence, this evidence is excluded by the Louisiana courts in the only situation in which it could be of real value to the defendant. A better rule requires proof of some overt aggressive act as a condition precedent; however, the hostile demonstration need not be one which, taken alone, would reasonably warrant extreme defensive measures.[12]

H. W.

EVIDENCE—TESTIMONY OF PHYSICIANS AS TO MENTAL CAPACITY —Eleven months after conveying his farm to defendant, the grantor was pronounced incapable of caring for his estate because of old age and physical infirmities. He was not found to be insane. His conservator sought to set aside the conveyance, contending that the grantor was mentally incompetent when it was made. Physicians and laymen who were acquainted with the

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of 1921, which states: "The appellate jurisdiction of the Supreme Court shall also extend to criminal cases on questions of law alone . . ." Art. 19, § 9 states: ". . . The jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge." He argues that where the defendant invokes a plea of self-defense, the question of whether the deceased was the aggressor in the fatal difficulty is a question of fact upon which the guilt or innocence of the defendant depends, and that proof of prior threats are admissible only for the purpose of showing who was the aggressor when the question is in doubt, and to allow the judge to withdraw that question from the jury and decide it is in violation of Art. 19, § 9; and for the Supreme Court to review such a decision is in violation of Art. 7, § 10. The courts have refused to hold this a question of law. State v. Sandiford, 149 La. 933, 90 So. 261 (1921); State v. Brown, 172 La. 121, 133 So. 383 (1932); State v. Stracner, 190 La. 457, 182 So. 571 (1938).

11. For example, in State v. Williams, 46 La. Ann. 709, 711, 15 So. 82, 83 (1894), the court said: "In order to constitute the overt act that would justify the taking of human life there must be some demonstration made by the deceased against the accused of such a character as to impress upon him that he was in imminent danger of his life or some great bodily harm."

12. State v. Padula, 106 Conn. 54, 138 Atl. 456 (1927).

grantor were allowed to give their opinions as to his mental capacity. *Held,* that the testimony of physicians was entitled to no more weight than that of laymen of good common sense and judgment. *Wharton v. Meyers,* 371 Ill. 546, 21 N.E. (2d) 772 (1939).

Because of confusion regarding the opinion rule, the decision in the present case might at first appear erroneous. However, an analysis[1] of admissable *opinion* demonstrates its soundness.[2] Without attempting a philosophical distinction between opinion and fact,[3] it can be said that *admissable "opinion"* may be divided into two classes: (1) that which is *not* opinion, strictly speaking, and (2) that which *is* opinion.

Into the first group fall those cases in which the witness is allowed to state an opinion because it would be difficult or impossible to state the facts observed.[4] This is sometimes termed a "compendious statement" or "shorthand statement of fact."[5] It is under this classification that the "opinion" of non-experts is admitted in insanity cases.[6] The Massachusetts rule, limiting the non-expert to the use of certain words,[7] is thus an unreasoned reaction to the uncertain meaning given to the word "opinion."

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1. For a similar classification see Dougherty v. Milliken, 163 N.Y. 527, 57 N.E. 757 (1900).

2. The rule has been consistently followed by the Illinois courts: Carpenter v. Calvert, 83 Ill. 62 (1876); Austin v. Austin, 260 Ill. 299, 103 N.E. 268 (1913); Sharkey v. Sisson, 310 Ill. 98, 141 N.E. 427 (1923); McGregor v. Keun, 330 Ill. 106, 161 N.E. 99 (1928); Kasbohm v. Miller, 366 Ill. 484, 9 N.E. (2d) 216 (1937).

3. L. Hand, Cir. J., in Central R. Co. of New Jersey v. Monahan, 11 F. (2d) 212, 214 (1926) suggests: "The line between opinion and fact is at best only one of degree. . . ." Wigmore states that there is no virtue in any distinction resting on a contrast between "opinion" and "fact." Wigmore, Evidence (2 ed. 1923) § 1919. It is hoped that the present attempt at a "rule of thumb" does not violate the principles of Wigmore's "Rule of Superorogatory Exclusion." Wigmore, op. cit. supra, at § 1918.

4. An exhaustive collection of cases allowing a layman to give his *opinion* appears in L.R.A. 1918A 681 et seq.

5. Viewed under the present analysis the following matters admitted as exceptions to the opinion rule are more properly facts: House was damaged "mighty bad" (Louisville & N. R. Co. v. Lynne, 199 Ala. 631, 75 So. 14 (1917)); witness could smell gasoline (King v. Ohio Valley Fire and Marine Ins. Co., 212 Ky. 770, 280 S.W. 127 (1926)); floor was slippery (Blake v. Great Atlantic & Pacific Tea Co., 266 Mass. 12, 164 N.E. 486 (1929)).

6. Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U.S. 612, 4 S.Ct. 533, 28 L. Ed. 536 (1884).

7. Witness may state that the acts of the person whose sanity is at issue were "rational" or "irrational." Fayette v. Chesterville, 77 Me. 28, 52 Am. Rep. 741 (1885); Williams v. Spencer, 150 Mass. 346, 23 N.E. 105 (1890); People v. Strait, 148 N.Y. 566, 42 N.E. 1045 (1896). But Massachusetts allows an attending physician to give his "opinion," though not an expert on mental diseases. Hastings v. Rider, 99 Mass. 622 (1868). Foster, C. J., in Hardy v. Merril, 56 N.H. 227, 252 (1875), characterized the rule as "mere, sheer logomachy."

Generally, the non-expert states (1) his opportunity for observation of the person whose mental condition is in issue, (2) facts and circumstances (insofar as possible), and then (3) his opinion.[8] This should be regarded not as a reasoned opinion but as an impression of fact.[9]

In the second class is the opinion of experts[10] based upon hypothetical or observed facts.[11] Admission of such opinion is allowed because of the realized inability of the court and jury to draw a technical conclusion.[12] This is the true exception to the opinion rule. The jury remains the sole judge of facts. It is only when the facts as determined by the jury coincide with those hypothetical and observed facts upon which the opinion is based[13] that the opinion of the expert is pertinent.

Furthermore, the opinions of skilled witnesses as to observed facts which the layman would not be able to discern would be admitted under the first classification,[14] while the opinion as to the cause or result of such facts, if a proper field for expert testimony, would be classified under the second.[15]

Under the above analysis, the opinion of the physicians in the present case clearly comes within the first class. Being mere statements of fact, their testimony as witnesses was entitled to no more weight than that of other witnesses who had the same opportunity for observation.

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8. 20 Am. Jur. § 853 (1939); Wigmore, Evidence (2 ed. 1923) § 1922. Wigmore thinks that the rule is in no way sound because it cumbers examination.

9. Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U.S. 612, 4 S.Ct. 533, 28 L. Ed. 536 (1884).

10. The majority of jurisdictions admit any practicing physician as an expert on insanity. See cases collected in (1928) 54 A.L.R. 860. The better view requires that an expert be specially qualified: State v. Doiron, 150 La. 550, 90 So. 920 (1922); White v. McPherson, 183 Mass. 533, 67 N.E. 643 (1903); Russell v. State, 53 Miss. 367 (1876); Watson v. State, 133 Tenn. 198, 180 S.W. 168 (1915). The growth of legislation creating boards of alienists illustrates the value of this requirement. See Weihofen, An Alternative to the Battle of Experts (1935) 2 Law & Contemp. Prob. 419.

11. When facts are observed, the physician should state all the facts before giving an opinion. Foster v. Fidelity & Casualty Co., 99 Wis. 447, 75 N.W. 69 (1898). See cases collected in L.R.A. 1915A 1065.

12. For an historical outline see Rosenthal, The Development of the Use of Expert Testimony (1935) 2 Law & Contemp. Prob. 403.

13. The witness cannot be asked his opinion upon the *evidence* in the case. People v. McElvaine, 121 N.Y. 250, 24 N.E. 465 (1890).

14. An example would be testimony as to the existence of a disease, determinable only by a physician. Lay *opinion* would not be admissible. Aetna Life Ins. Co. v. Kelley, 70 F. (2d) 589 (1934); Grattan v. Metropolitan Life Ins. Co., 80 N.Y. 281 (1880).

15. The probable cause of death: Strangulation (Miller v. State, 9 Okla. Crim. Rep. 255, 131 Pac. 717 (1913)); shock or disease (Equitable Life Assur. Soc. of U. S. v. Gratiot, 45 Wyo. 1, 14 P. (2d) 438 (1932)).