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Spontaneous Exclamation Improperly Admitted To Prove Agency

CASE COMMENTS

SPONTANEOUS EXCLAMATION IMPROPERLY ADMITTED TO PROVE AGENCY

When a statement is uttered out-of-court by a person not under oath and not subject to cross-examination, the hearsay rule of evidence forbids the use of such an extrajudicial statement to prove the truth of the matter contained therein.[1] "Hearsay is excluded because of potential infirmities with respect to the observation, memory, narration, and veracity of him who utters the offered words when not under oath and subject to cross-examination."[2]

The effect of the various exceptions[3] to the hearsay rule is to permit out-of-court statements to be repeated in court by either the person who heard the utterance or by the declarant himself and to be admitted in evidence to prove the truth of the matter stated, irrespective of the fact that the speaker was neither under oath nor subject to cross-examination when the statement was uttered. For instance, if immediately after an automobile accident involving A and B, A were to tell B that "I was in a hurry to get home," this assertion would be hearsay when repeated by B in court, because A, the declarant, was not under oath and not subject to cross-examination when he uttered the statement; but it would nevertheless be admissible in evidence against A, in an action for negligence, under the spontaneous exclamation (excited utterance)[4] exception to the hearsay rule.[5] This exception, like all exceptions to the hearsay rule, is based upon two general principles:. (1) that some *special necessity* exists for resorting

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[1] 5 Wigmore, Evidence § 1361-62 (3d ed. 1940). The word "statement" has been defined as follows: " 'Statement' means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated." Uniform Rule of Evidence 62(1) (1953).

[2] Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 541 (1946).

[3] For an enumeration of thirty-one exceptions to the hearsay rule, see the Uniform Rule of Evidence 63 (1953).

[4] For purposes of this comment, the terms "spontaneous exclamation" and "excited utterance" will be used interchangeably. The writer prefers not to use the term "spontaneous declaration" because of its variegated applications. For example, one writer divides his discussion of "spontaneous declarations" into six separate topics: (1) declarations of bodily condition, (2) declarations of mental state, (3) excited utterances, (4) declarations of present sense impressions, (5) res gestae, and (6) self-serving declarations. McCormick, Evidence 561 (1954).

[5] The same statement would also be admissible in evidence against the declarant under the admission exception to the hearsay rule. See note 22 infra and accompanying text.

to the hearsay statement,[6] and (2) that the statement must have been uttered under circumstances calculated to give some *special trustworthiness* to it, thereby justifying its immunity from the usual test of cross-examination.[7]

Considering these two principles with reference to the stated hypothetical, there is a "special necessity" for admission of the statement because the declarant of the hearsay utterance, later a party to an action for negligence, would not want to testify on the witness stand that he had been in a hurry to get home. In considering the principle of special necessity as applied to the spontaneous exclamation exception, Wigmore observes: "The extrajudicial assertion being better than is likely to be obtained from the same person upon the stand, a necessity or expediency arises for resorting to it."[8] A more comprehensive analysis of the stated hypothetical is necessary to illustrate the second principle of "special trustworthiness" as applicable to the spontaneous exclamation exception: (1) the automobile collision created a startling occurrence; (2) the declarant's statement that he was in a hurry to get home was prompted by the exciting occurrence and was dominated by the nervous excitement therefrom, before the speaker had time to reflect; and (3) the statement that he was driving hurriedly threw light upon the collision. These three circumstances are the bases of the spontaneous exclamation exception to the hearsay rule.[9] The factor of special reliability is thought to be furnished by the excitement that suspends the powers of reflection and fabrication.[10] Thus, in effect, the excitement of the moment adds an in-

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[6]5 Wigmore, Evidence § 1421 (3d ed. 1940).

[7]Id. § 1422.

[8]6 id. § 1748.

[9]Wilcox v. Berry, 32 Cal. 2d 189, 184 P.2d 939, 940-41 (1947); Perry v. Haritos, 100 Conn. 476, 124 Atl. 44, 47 (1924); Roushar v. Dixon, 231 Iowa 993, 2 N.W.2d 660, 662 (1942); Sexton v. Balinski, 280 Mich. 28, 273 N.W. 335, 336 (1937); Potter v. Baker, 162 Ohio St. 488, 124 N.E.2d 140, 145 (1955); 6 Wigmore, Evidence § 1750 (3d ed. 1940).

[10]McCormick, Evidence 579 (1954). The following passage has been quoted by the courts [Perry v. Haritos, 100 Conn. 476, 124 Atl. 44, 47 (1924); State v. McLaughlin, 138 La. 958, 70 So. 925, 927 (1916)] as a basis for finding the element of trustworthiness in a spontaneous exclamation: "This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as

gredient of trustworthiness to an otherwise inadmissible extrajudicial statement and removes the barrier to its admission in evidence before the jury.[11]

A factual pattern similar to that of the hypothetical was involved in *Murphy Auto Parts Co. v. Ball.*[12] The plaintiff, a minor, was injured when struck by a passenger car owned and operated by the defendant's employee. The plaintiff's mother testified that immediately after the injury and at the scene of the accident the defendant's employee "told me... he had to call on a customer and was in a bit of a hurry to get home."[13] The trial court held that the alleged extrajudicial statement was admissible to show that the employee was in fact engaged in his employer's business at the time of the collision with the minor plaintiff, since such statement had been an excited utterance. The Court of Appeals for the District of Columbia Circuit unanimously affirmed the holding of the trial court.

In the previous analysis of the stated hypothetical it was explained that the extrajudicial statement of anxiety to get home could have been admitted in court under the spontaneous exclamation rule in an action for negligence against the declarant. Moreover, in the principal case had the driver stated immediately after and at the

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lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts." 6 Wigmore, Evidence § 1747 (3d ed. 1940).

[11]The validity of the spontaneous exclamation exception has been questioned on the grounds that emotion often prevents the perception from being reliable. Marston, Studies in Testimony, 15 J. Crim. L., C. & P.S. 5, 8 (1924). The following passage, to be compared with the quotation from Wigmore in note 10 supra, cogently illustrates the psychological attack on the reliability of spontaneous exclamations: "One need not be a psychologist to distrust an observation made under emotional stress; everybody accepts such statements with mental reservation. M. Gorphe cites the case of an excited witness to a horrible accident who erroneously declared that the coachman deliberately and vindictively ran down a helpless woman. Fiore tells of an emotionally upset man who testified that hundreds were killed in an accident; that he had seen their heads rolling from their bodies. In reality only one man was killed, and five others injured. Another excited gentleman took a pipe for a pistol. Besides these stories from real life, there are psychological experiments which point to the same conclusion. After a battle in a classroom, prearranged by the experimenter but a surprise to the students, each one was asked to write an account of the incident. The testimony of the most upset students was practically worthless, while those who were only slightly stimulated emotionally scored better than those left cold by the incident." Hutchins and Slesinger, Some Observations on the Law of Evidence, 28 Colum. L. Rev. 432, 437 (1928) (footnote references omitted).

[12]249 F.2d 508 (D.C. Cir. 1957).

[13]Id. at 509.

scene of the accident only that he had been in a hurry to get home, such a statement would have been admissible in evidence, under the same exception to the hearsay rule, against the *employer* in an action for negligence—assuming that both the fact of employment and course of employment had been proved by independent evidence. In other words, unlike the vicarious admission rule which will be discussed later, it is immaterial in passing upon the admissibility of spontaneous exclamations that an agency relationship exists between the speaker and a party to the trial.[14]

It is to be emphasized, however, that the purpose for admitting the out-of-court assertion in the principal case (that declarant had to call on a customer and was in a hurry to get home) was to prove the fact of *course of employment.* The action for personal injury was against the declarant's employer and not against the employee; except for the hearsay statement there was no independent evidence to prove that the owner and driver of the car was in the course of his employment at the time of the injury, because the collision took place at 6:30 p.m., one and one-half hours after the regular work day had terminated.

On its face, the principal case appears to be contrary to an overwhelming weight of authority which holds that the out-of-court declaration of an agent is not admissible in court against his employer to prove either the fact of agency or course of employment.[15] But this majority proposition is limited to the vicarious admission exception to the hearsay rule which must be analyzed in terms of the principal case to distinguish it properly from the spontaneous exclamation exception. Under the vicarious admission exception, assuming that *both* the fact of agency and course of employment have been established by independent evidence, extrajudicial admissions of an agent, who is authorized to make statements concerning the

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[14]6 Wigmore, Evidence § 1756(a) (3d ed. 1940). Note, 22 Minn. L. Rev. 391, 405 (1938). See quote from Tiffany in note 23 infra.

[15]American Nat. Bank v. Bartlett, 40 F.2d 21, 23 (10th Cir. 1930); Commercial Solvents v. Johnson, 235 N.C. 237, 69 S.E.2d 716, 719 (1952); 4 Wigmore, Evidence § 1078 (3d ed. 1940); McCormick, Evidence 519 & n.14 (1954). Restatement (Second), Agency § 285 (1958); 20 Am. Jur. Evidence § 597 (1939). For an exhaustive collection of cases see Annot., 3 A.L.R.2d 602 (1950).

It must be remembered, however, that the majority rule does not preclude an alleged agent from testifying in court to the fact of agency or course of employment because such testimony would not be offered as a vicarious admission. Shama v. United States, 94 F.2d 1, 5 (8th Cir. 1938); Daly v. Williams, 78 Ariz. 382, 280 P.2d 701, 703-04 (1955); Wilson v. Savino, 10 N.J. 11, 89 A.2d 399, 402 (1952); Midland Credit Co. v. White, 175 Pa. Super. 314, 104 A.2d 350, 352 (1954); 4 Wigmore, Evidence § 1078 & n.8 (3d ed. 1940); McCormick, Evidence 519 (1954).

subject matter of the utterance, are admissible in evidence against the principal[16] on the theory that the identity of interests between a principal and his agent is a sufficient guarantee of the reliability of such statements as evidence.[17] For example, if A is employed as an agent to make out-of-court settlements of automobile claims against his insurance company and in performance of this employment makes an admission that acknowledges the carelessness of his insured in an automobile accident, it is evident that such an admission was uttered during A's employment and within the scope of his authority. Consequently, A's admission could be used in court as evidence against the insurance company, having satisfied the requirements of the vicarious admission exception. However, the utterance by the defendant's employee in the *Ball* case, that he had to call on a customer and was in a bit of a hurry to get home, would not satisfy the vicarious admission exception for two reasons. Firstly, there was no independent evidence introduced to prove that the employee had any authority whatsoever to call on customers after the termination of the work day; without such evidence the fact of course of employment could not be proved. With this in mind Wigmore explains "that the *fact* of agency [or course of employment] must of course be somehow evidenced *before the alleged agent's declarations* can be received as admissions; and therefore the use of the alleged agent's hearsay assertions that he is agent would for that purpose be inadmissible, as merely begging the very question."[18] Secondly, even assuming that course of employment had been proved by independent evidence, the employee's statement as to his anxiety to get home would not satisfy the prevailing view that for a vicarious admission to be admitted in evidence against the principal, the agent must have had authority to make statements concerning the subject matter of the utterance.[19]

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[16]United States v. United Show Mach. Corp., 89 F. Supp. 349, 352 (D. Mass. 1950); Friedman v. Forest City, 239 Iowa 112, 30 N.W.2d 752, 759 (1948); Sacks v. Martin Equip. Corp., 333 Mass. 274, 130 N.E.2d 547, 550 (1955); Restatement (Second), Agency § 286 (1958). But cf. note 20 infra.

[17]47 Colum. L. Rev. 1227, 1228 (1947). Another basis for reliance on the extrajudicial statements of a "speaking-agent" has been suggested: "Such reports, when of facts within the reporter's knowledge, are likely to have a high degree of trustworthiness as to matters of advantage to the opponent. They are usually the result of careful investigation by a person whose duty demands accurate observation and narration; they are not likely to contain false statements disserving to the master. Thus they stand on the same basis as most other entries in the course of business and duty." Morgan, The Rationale of Vicarious Admissions, 42 Harv. L. Rev. 461, n.4 (1929).

[18]4 Wigmore, Evidence § 1078 (3d ed. 1940). Accord, 2 Jones, Evidence 1748 (1926).

[19]See note 16 supra.

In other words, under the prevailing view, the employee is the agent of the principal only for the purpose of operating the vehicle and not for the purpose of making statements concerning its mode of operation.[20]

From the previous discussion it is evident that the vicarious admission rule and the spontaneous exclamation rule are based upon two distinct and unrelated principles. The vicarious admission exception is derived from the substantive rule of agency that an agent may bind his principal when he has authority to speak, for the utterance becomes that of the principal.[21] Superimposed upon this rule of agency is the admission rule of evidence that a person's own hearsay may be used against him. This exception to the hearsay rule is based upon the theory that a party, having made a statement which by chance operates against his interest at the time of the trial, cannot object to its reception as evidence for the reason that he has the full opportunity to put himself on the stand and explain his former assertion.[22] The spontaneous exclamation exception, on the other hand, is not dependent upon any rule of agency; rather it is purely a rule of evidence and is just as applicable in a proper case to one who was not an agent as to one who was an agent.[23] "The theory is that

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[20]Assuming that both the fact of agency and course of employment have been established by independent evidence, there is a minority trend, embodied in the Model Code of Evidence rule 508(a) (1942) and in the Uniform Rule of Evidence 63(9)(a) (1953), which permits extrajudicial statements of an agent, whether authorized or not, to be admitted in evidence against the principal if naturally made in the course of the agency and before the termination thereof. Silfka v. Johnson, 161 F.2d 467, 469 (2d Cir. 1947); Whitaker v. Keogh, 144 Neb. 790, 14 N.W.2d 596, 600 (1944); 4 Wigmore, Evidence § 1078 (3d ed. 1940); McCormick, Evidence 580 (1954).

[21]Restatement (Second), Agency § 286 (1958).

[22]2 Wigmore, Evidence § 1048 (3d ed. 1940). A second theory underlying the admission exception is one of estoppel: once a person has said something, he is then estopped to deny, in a subsequent trial, having made his former assertion. 37 Ky. L.J. 417, 421 (1949).

It is necessary to emphasize that the admission exception must be distinguished from the declaration against interest exception to the hearsay rule. The admission exception permits in evidence the out-of-court statement of a party opponent whether or not the utterance was against his interest when made. Morgan, Admissions as an Exception to the Hearsay Rule, 30 Yale L.J. 355, 358-59 (1921). For additional distinctions between the two exceptions see 4 Wigmore, Evidence § 1049 (3d ed. 1940).

[23]2 Mechem, Agency § 1793 (1914). For examples of one judge who was particularly mindful of the distinction between vicarious admissions and excited utterances see Chantry v. Pettit Motor Co., 156 S.C. 1, 152 S.E. 753 (1930) (dissenting opinion) and Snipes v. Augusta-Aiken Ry. & Elec. Corp., 151 S.C. 391, 149 S.E. 111 (1929) (dissenting opinion). The following passage from a treatise clearly distinguishes the two rules: "On the one hand, declarations made at the time of the act

by the parties participating therein and part of the res gestae—that is, of the surrounding circumstances—are admissible, irrespective of whether the participants are servants of the person sought to be held responsible for the act, and by whomsoever made. On the other hand, the statement of a servant or agent is admissible as an admission, if it is made when he is engaged in some authorized transaction, and it is within the scope of his authority in that transaction to make the statement. To illustrate: In an action against a railway company, by a person injured by a collision, the declaration of the engineer, referring directly to and characterizing or explaining the occurrence, made at the time or immediately afterwards, under its immediate influence, may, under the circumstances of the case, be held part of the res gestae, and admissible against the company upon that ground. It might be, however, that some subsequent statement of the engineer as to the cause of the accident, although not part of the res gestae, would be evidence against the company as an admission, as, for example, if it happened to be made by him in the course of his duty in making a report of the accident to a superior officer. In the one case the declaration of the engineer is admissible as a circumstantial fact, as part of the res gestae, because it is the spontaneous utterance of a participant in the event. In the other case his statement is admissible against the company as an admission, because it is made at a time and under circumstances when the engineer has authority to make it. If the statement is not admissible, either as a declaration forming part of the res gestae, or as an admission, it cannot be received." Tiffany, Agency § 106 (1924) (footnote references omitted).

The above passage also illustrates the commingling of the phrases "spontaneous exclamation" and "res gestae." Whenever an utterance qualifies as a spontaneous exclamation, it is admissible in evidence under that exception to the hearsay rule; and any reference to the term "res gestae" is not only confusing but superfluous. As Wigmore explains: "The phrase 'res gestae' has long been not only entirely useless, but even positively harmful. It is useless, because every rule of Evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in terms of that principle .... It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology." 6 Wigmore, Evidence § 1767 (3d ed. 1940). For a sampling of courts confusing the spontaneous exclamation rule by referring to it as "part of the res gestae," see Vicksburg & Meridian R.R. v. O'Brien, 119 U.S. 99, 105 (1886) (statement by engineer between ten and thirty minutes after a railway accident held not admissible as part of res gestae); Foster v. Pestana, 77 Cal. App. 2d 885, 177 P.2d 54, 57 (1947) (spontaneous exclamation of foreman, made immediately after accident, was admissible under res gestae rule against employer and his foreman); Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N.W.2d 643, 647 (1953) (statement by driver immediately after an accident that he was driving too fast held admissible as part of res gestae);Beaule v. Weeks, 95 N.H. 453, 66 A.2d 148, 152 (1953) (statement by truck driver one-half hour after accident not admissible as part of res gestae); Rice v. Turner, 191 Va. 601, 62 S.E.2d 24, 27 (1950) (statement made some time after accident held not admissible as part of res gestae). It may be noted that in each of the cases cited admissibility of the statement turned upon its proximity to the occurrence which provoked it. Consequently, the courts were in reality analyzing the spontaneous exclamation exception under the label of "res gestae." Morgan observes: "The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as 'res gestae.' It is probable that this troublesome expression owes its existence and persistence in our law of evidence to an inclination of judges and lawyers to avoid the toilsome exertion of exact analysis and precise thinking." Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229 (1922).

the spontaneous utterances of one who speaks under the excitement of the moment and before he has had time to deliberate—to concoct a self favoring story—are likely to be true."[24]

With the above distinction between the two rules clearly in mind, the *Ball* case analyzed the hearsay statement, that the employee had to call on a customer and was in a hurry to get home, with reference to the three usual requirements of the excited utterance exception: (1) an exciting event; (2) an utterance prompted by the exciting occurrence without time to reflect; and (3) an illumination of the exciting event by the utterance.[25] The court encountered difficulty with the third requirement because, needless to say, the fact that the employee previously had to call on a customer no more elucidated the automobile collision than if the employee had stated that he had been to the movies and was in a hurry to get home. To overcome this requirement of "illumination," the court relied heavily upon the reasoning of Wigmore, to the effect that the third element is a spurious one,[26] and concluded: "The test for receiving the utterance, therefore, should be whether it meets the first two requirements of a spontaneous declaration or excited utterance.... In other words, the very fact that the utterance is not descriptive of the exciting event is one of the factors which the trial court must take into account in the evaluation of whether the statement is truly a spontaneous, impulsive expression excited by the event."[27] The decision in the principal case, then, adopted the liberal view advocated by Wigmore that the essence of the spontaneous exclamation exception is, as its name implies, the element of *spontaneity*.[28] In emphasizing this element, the court decided that even though the utterance went beyond a description of the exciting event and dealt with past facts, this is merely one of the factors to be considered by the trial judge in evaluation of whether the statement was spontaneous. In effect, the court embraced the principle that if the statement is determined by the trial court to be spontaneous and relevant, then it is admissible in evidence, irrespective of its subject matter.[29]

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[24]2 Mechem, Agency § 1793 (1914).

[25]See note 9 supra.

[26]249 F.2d at 511. The court referred to Wigmore's belief that the requirement that the utterance illuminate the occurrence preceding it has been mistakenly borrowed from the verbal act doctrine. 6 Wigmore, Evidence §§ 1752, 1754 (3d ed. 1940). Unfortunately, however, the court failed to realize that there are situations where the requirement becomes a real one, even under the analysis of Wigmore. See especially the text accompanying notes 30, 31, 32 and 33 infra.

[27]249 F.2d at 511.

[28]6 Wigmore, Evidence § 1749 (3d ed. 1940).

[29]Morgan appears to embrace the same principle: "If spontaneity of itself is

It is submitted that the *Ball* case has extended the application of the spontaneous exclamation rule beyond the permissible bounds advocated by Wigmore and beyond the scope of sound reasoning. While it is true that Wigmore states that the third requirement, that the statement elucidate the exciting event, "is perhaps a cautionary rather than a logically necessary restriction,"[30] he later qualifies himself with the following positive statement: "There is, however, one aspect in which the limitation becomes a real one; for the matter to be 'elucidated' is, by hypothesis, *the occurrence* or *act which has led to the utterance,* and not some distinctly separate and prior matter."[31] It is manifest that the part of the utterance of the principal case, that the employee had to call on a customer, was a reference to something not directly connected with the accident at all. The fact that the driver was returning from a "call" does not in any way emanate from or explain the accident but is rather a reflective narrative of a past event. Surely no one would contend, if the employee had stated in the principal case that he had been to the movies and was in a hurry to get home, that the statement relative to the movies would have had any connection whatsoever with the accident. In like manner, the statement which is claimed to prove course of employment relates to a wholly different and distinct transaction from the accident itself.[32] Thus, under Wigmore's analysis of the spontaneous exclamation rule, the statement could not, by hypothesis, be admitted in evidence irrespective of the fact that it was a spontaneous utterance prompted by an exciting event.[33] In discussing the spontaneous

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to be accepted as a guaranty of trustworthiness, then the subject matter of the declaration should not be limited to the startling event which operated to still the reflective faculties." Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229, 239 (1922).

[30]6 Wigmore, Evidence § 1750(c) (3d ed. 1940).

[31]Id. § 1754.

[32]The following cases have made a similar analysis and have held that such an utterance as that of the principal case was not admissible to prove agency or course of employment: Cook v. Hall, 308 Ky. 500, 214 S.W.2d 1017, 1018 (1948); Wenell v. Shapiro, 194 Minn. 368, 260 N.W. 503, 506 (1935); Shepson v. Alhambra Lounge & Restaurant, Inc., 110 N.E.2d 619, 621 (Ohio App. 1952); Deater v. Penn. Mach. Co., 311 Pa. 291, 166 Atl. 846, 847 (1933); Lewis v. J. P. Word Transfer Co., 119 S.W.2d 106, 108 (Tex. Civ. App. 1938). The analysis in the cited cases is weakened, however, by the insistence of the courts on commingling the terms "spontaneous exclamations" and "res gestae." See the comments following the quotation from Tiffany in note 23 supra.

[33]Wigmore offers the following example which is believed to be an excellent parallel to the utterance of the principal case: "Suppose, for example, an injured passenger in a railway collision, thinking of his family's condition, exclaims, 'I hope that my insurance-premium, which I mailed yesterday, has reached the