

wife. The evidence sought to be used was the testimony of the deceased wife who said that she had some liquor from a bottle immediately before she became ill that tasted odd and, further, that "Dr. Shepard has poisoned me." These statements were inadmissible: "Declarations, of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if this distinction were ignored."⁴³

The *Hillmon* situation involved a forward-looking statement of intent: Mr. Walter said he was going somewhere, so he probably went there after making the statement. Evidence Rule 803(3) carves out these forward-looking statements of intent as a general hearsay rule exception, not just an exception because the statement relates to a testamentary instrument. This exception, of course, applies equally to showing testator or settlor intent.⁴⁴

Evidence Rule 803(3) appears to permit, however, backward-looking declarations of intent if these declarations relate to the terms of the declarant's Will. This is at variance to the Shepard-type prohibition which may well end the hearsay exception as to a testator's statements. Backward-looking statements related to the declarant's Will were carved out based on expediency:

"The carving out, from the exclusion mentioned in the preceding paragraph, of declarations related to the execution, revocation, identification, or terms of the declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic."⁴⁵

3.2 Modern Application of the Hearsay Rule. A Maryland case illustrates the backward-looking element of 803(3) and how statements by a testatrix after execution of a will

⁴³ *Id.* at 106. Nor did the statements qualify as a dying declaration under the facts of the case.

⁴⁴ *In re Sayewich's Estate*, 413 A.2d 581 (N.H. 1980); *Engle v. Siegel*, 377 A.2d 892 (N.J. 1977). Both cases permitting the scrivener to testify as to what the testator wished to accomplish in his Will as long as this testimony did not contradict the terms of the Wills.

⁴⁵ The Advisory Committee Notes for the 1972 proposed Rule 803(3) gives the game away.

