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Evidence--Hearsay--Declarations Against Penal Interest Not Allowed

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EVIDENCE—HEARSAY—DECLARATIONS AGAINST PENAL INTEREST NOT ALLOWED.—Action by the plaintiff, a former sheriff, for the recovery of damages arising from an alleged libelous publication concerning him printed in the defendant newspaper. The publication was a letter written to the editor by a third person containing statements that the author's brother, now deceased, had paid protection money to the sheriff for immunity from arrest and prosecution for illegally selling liquor. The trial court permitted a number of witnesses to testify as to declarations made to them by the deceased. *Held*, reversing the lower court, that testimony of witnesses as to alleged conversations with the deceased brother were inadmissible as hearsay. *McClain v. Anderson Free Press*, 232 S.C. 448, 102 S.E.2d 750 (1958).

Hearsay as defined by Professor Wigmore is "that rule which prohibits the use of a person's assertion, as equivalent to testimony of the fact asserted, unless the assertor is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it." 5 WIGMORE, EVIDENCE § 1346 (3d ed. 1940). Other reasons which have been advanced to support its exclusion from evidence are the fact that the court and jury are unable to test its creditability by observing the demeanor of the person who made the statement and the declarant is not under a responsibility to answer for the crime of perjury in making a willful falsification. *Donnelly v. United States*, 228 U.S. 243 (1913); *Cooper Corp. v. Jeffcoat*, 217 S.C. 489, 61 S.E.2d 53 (1950). The purpose of this rule is to prevent testimony of an untrustworthy nature from being entered into evidence.

In pursuit of this purpose the courts have not excluded all hearsay evidence but have established exceptions to this rule when they have been able to find declarations made under circumstances which would greatly bolster their trustworthiness, particularly where these are the only available modes of proof. *Donnelly v. United States*, *supra*; *Roe v. Journegan*, 175 N.C. 261, 95 S.E. 495 (1918).

The court in the principal case was concerned with the exception of declarations against interest. This exception recognizes that men will not make statements prejudicial to their own interest unless the statements are true. Coupled with this adverse interest restriction are the requirements that the declarant be unavailable and that no motive for falsification be shown. Under these circumstances the courts will admit declarations although the sanction of an oath and

the test of cross-examination are wanting. *Clark & Jones v. American Mut. Liab. Ins. Co.*, 112 F. Supp. 889 (E.D. Tenn. 1953); *Smith v. Moore*, 142 N.C. 277, 55 S.E. 275 (1906).

As stated by Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 39 (1944), "On principle, the exception for declarations against interest would admit declarations contrary to any kind of interest of sufficient importance to a declarant to promote his telling the truth", but this is certainly not the rule in this country as exemplified by the many decisions limiting the exception to declarations against interest of a pecuniary or proprietary nature. See, *Weber v. Chicago, R.I. & P. Ry.*, 175 Iowa 358, 151 N.W. 852 (1915); *Aetna Life Ins. Co. v. Strauch*, 179 Okla. 617, 67 P.2d 452 (1937).

Despite the fact that no logical or sound reason exists for their elimination the great majority of jurisdictions do not recognize penal or social interest as included in this exception. The precedent for this exclusion is said to be the *Sussex Peerage case*, 11 Cl. & Fin. 85, 8 Eng. Rep. 1034 (1844), which one author has described as "nothing short of sheer nonsense," Comment, 20 ROCKY MT. L. REV. 97 (1947), and another as "utterly ridiculous." Jefferson, *supra* at 40. The above rule has been criticized by many of the text writers, particularly by WIGMORE, EVIDENCE § 1476, and McCORMICK, EVIDENCE § 255 (1954). The rule was also criticized in a dissenting opinion by Mr. Justice Holmes in *Donnelly v. United States*, *supra*.

A few progressive courts have relaxed the rule of exclusions of declarations against penal interest in particular situations. See, *People v. Lettrich*, 413 Ill. 172, 108 N.E.2d 488 (1952); *Cameron v. State*, 153 Tex. Crim. 374, 217 S.W.2d 23 (1949); *Brennan v. State*, 151 Md. 265, 134 Atl. 148 (1926). A few others have directly overruled it. See, *Newberry v. Commonwealth*, 191 Va. 445, 61 S.E.2d 318 (1950); *In re Forsythe's Estate*, 221 Minn. 303, 22 N.W.2d 19 (1946); *Sutter v. Easterly*, 354 Mo. 282, 189 S.W.2d 284 (1945); *Hines v. Commonwealth*, 126 Va. 728, 117 S.E. 843 (1923).

Other courts recognizing that most criminal offenses may also involve tort liability for the same acts have permitted the declarations to come in as declarations against pecuniary interest. See, *Weber v. Chicago, R.I. & P. Ry.*, *supra*; *Aetna Life Ins. Co. v. Strauch*, *supra*. The form may be lacking but the substance is present and if the orthodox rule were applied by all courts in this manner it would do little harm "for almost every crime against the

person or property of another creates a liability in tort." Morgan, *Declarations Against Interest*, 5 VAND. L. REV. 451, 475 (1952). The South Carolina court made no mention of this possibility in the principal case.

The MODEL CODE OF EVIDENCE rule 509 (1942), and the UNIFORM RULE OF EVIDENCE 63(10), have taken still another approach and urge that declarations against any of the four interests, pecuniary, proprietary, penal, and social, should be tested by the trial court using a reasonable man test, *i.e.*, would a reasonable man in the declarant's position have made such a statement if he did not believe it to be true?

It is submitted that the courts in following precedent have overlooked the very purpose for which this exception was brought into existence—to admit into evidence declarations made under circumstances inducive of trustworthiness. If the courts will admit a statement by a declarant that he owes a \$25.00 debt on the basis that he would not have made such a statement unless it were true would it not be more reasonable to assume that a man would not confess to the crime of murder, of much more concern and involving more serious consequences, unless it were also not true?

The judicial decisions in this area are so firmly established that most states will require legislative help to expand the rule to its proper bounds.

G. D. G.

LIABILITY INSURANCE—BREACH OF CO-OPERATION CLAUSE—FAILURE OF INSURED To TESTIFY.—Plaintiff brought suit to recover for injuries sustained while riding as a passenger in Brown's automobile. Brown was insured against personal liability by the defendant, the policy providing that Brown should co-operate with the defendant in securing and giving evidence. Brown gave the defendant a written statement of the details of the accident. Before the trial Brown informed the defendant insurer that he could no longer recall the circumstances of the accident due to traumatic amnesia, and that the written statement he had prepared earlier was based on information given him by other persons involved in the accident. *Held*, Brown had not violated the co-operation provision of the policy so as to relieve the defendant from liability. *Brown v. State Farm Mutual Life Ins. Co.*, 104 S.E.2d 673 (S.C. 1958).