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Evidence -- The Hearsay Rule -- Confession of Third Party as Admission Against Penal Interest

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River because such use injured the whole bridge, a part of which was in New York. (2) Discontinuance of a foreign nuisance, when compliance with the decree will necessitate affirmative action.⁴ In the *Salton Sea Cases* the defendant was maintaining dams in Mexico which flowed water from the Colorado River onto the plaintiff's land and into the Salton Sea in California. The federal court in California enjoined the continuance of the cause of the injury, which decree was the equivalent of an order to go into Mexico and take immediate affirmative steps to remedy the situation. (3) Cases in which the court has definitely ordered the defendant to perform some positive act in a foreign jurisdiction,⁵ as, to perform a contract for the delivery of a stallion, to install meters on irrigation ditches, or, specifically to perform a contract for laying off the boundaries of a province on another continent. (4) Injunction against going into a foreign jurisdiction to commit a tort.⁶

Therefore although the result of the present case is sound, it is respectfully submitted that the opinion did not adequately analyze the problem or the law applicable. The case is unique in being free from the usual objection that the court is interfering with another sovereign, no nation having authority over the point of dumping.⁷

ALLEN LANGSTON.

Evidence—The Hearsay Rule—Confession of Third Party as Admission Against Penal Interest.

Defendant was indicted for murder. He offered a witness to prove that a third party who was no longer available as a witness had

⁴ *Salton Sea Cases*, 172 Fed. 792 (C. C. A. 9th, 1910); Note (1910) 41 HARV. L. REV. 390; Beale, *Jurisdiction of Courts over Foreigners* (1913) 26 HARV. L. REV. 193, 283.

⁵ *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9 (C. C. A. 9th, 1917); *Madden v. Rosseter*, 114 Misc. 416, 187 N. Y. Supp. 462 (1921); *Penn v. Lord Baltimore*, 1 Ves. Sr. 444 (1750); *Contra: Miss. & Mo. Ry. Co. v. Ward*, 2 Black 485, 17 L. ed. 311 (1862); *Port Royal Railway Co. v. Hammond*, 58 Ga. 523 (1877).

⁶ *Western Union Tel. Co. v. Pittsburgh, C. C. & St. L. Ry. Co.*, 137 Fed. 435 (C. C. N. D. Ill. 1905) (a federal court having the parties before it will enjoin defendant from going into another state or district and there injuring the plaintiff's property); *Schmaltz v. York Manufacturing Co.*, 204 Pa. St. 1, 53 Atl. 522 (1902) (defendant ordered not to go into New York and remove an ice machine from a brewery); *Kempson v. Kempson*, 61 N. J. Eq. 303, 48 Atl. 244 (1901); *Id.* 63 N. J. Eq. 783, 52 Atl. 360 (1902) (equity may order a defendant not to go into another state to procure a divorce); *French v. Maguire*, 55 How. Pr. 471 (1878) (defendant in New York ordered by a court of that state not to produce a certain play in San Francisco).

⁷ JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION*. Chapter II and III.

confessed committing the crime. This evidence was rejected. *Held*: on appeal that the evidence was properly rejected as hearsay.¹

The decision is supported by the North Carolina decisions,² as well as by a great majority of the decisions of other jurisdictions.³ There can be no doubt but that the evidence is hearsay. Therefore if such evidence is to be admitted it must necessarily be done under an exception to the hearsay rule, which rule excludes extrajudicial declarations not made under oath and subject to cross examination. In this state extrajudicial declarations made against the pecuniary and proprietary interests of the declarant, if he is dead, are admitted as an exception to the hearsay rule.⁴ The court regards such evidence as especially trustworthy due to the fact that it in no way serves the declarant, but is made in contradiction to his interests. There seems to be no valid reason why the limitation of the exception should not be extended to include declarations against penal interests. The argument has been advanced that the accused could exonerate himself by procuring false testimony but all evidence is open to the same abuse.

¹ *State v. Stephen English*, 201 N. C. 295, 159 S. E. 318 (1931).

² *State v. May*, 15 N. C. 328 (1833); *State v. Duncan*, 28 N. C. 236 (1846); *State v. White*, 68 N. C. 158 (1872); *State v. Gee*, 92 N. C. 756 (1884); *State v. Jones*, 80 N. C. 415 (1878); *State v. Boon*, 80 N. C. 461 (1878); *State v. Hayes*, 71 N. C. 79 (1874); *State v. Lane*, 166 N. C. 333, 81 S. E. 620 (1914); *State v. Church*, 192 N. C. 658, 135 S. E. 769 (1926).

³ *Beach v. State*, 138 Ga. 265, 75 S. E. 139 (1912); *Kennedy v. State*, 9 Ga. App. 219, 70 S. E. 986 (1911); *Foster v. State*, 92 Miss. 257, 45 So. 859 (1908); *State v. Bailey*, 74 Kan. 873, 87 Pac. 189 (1906); *State v. Jones*, 127 La. 694, 53 So. 959 (1911); *State v. Jennings*, 48 Ore. 483, 87 Pac. 524 (1906); *Siple v. State*, 154 Ind. 647, 57 N. E. 544 (1900); *Selby v. State*, 25 Ky. Law Rep. 2209, 80 S. W. 221 (1904); *State v. Young*, 107 La. 618, 31 So. 993 (1901); *State v. Levy*, 90 Mo. App. 643 (1901); *Cox v. State*, 160 Tenn. 221, 22 S. W. (2d) 225 (1929); *Commonwealth v. Sacco*, 259 Mass. 126, 156 N. E. 57 (1927); *Moya v. People*, 79 Colo. 104, 244 Pac. 69 (1926); *Green v. State*, 153 Ga. 215, 111 S. E. 916 (1922); *Commonwealth v. Wakelin*, 230 Mass. 567, 120 N. E. 209 (1918); *Factor v. State*, 28 Okla. Cr. R. 78, 229 Pac. 154 (1924); *McCöslin v. State*, 96 Tex. Cr. R. 58, 256 S. W. 295 (1923); *Mays v. State*, 72 Neb. 723, 101 N. W. 979 (1904); *State v. Totten*, 72 Vt. 73, 47 Atl. 105 (1899); *State v. Hunter*, 18 Wash. 670, 52 Pac. 247 (1898); *Buel v. State*, 104 Wis. 132, 80 N. W. 78 (1899); *Donnelly v. United States*, 228 U. S. 243, 33 Sup. Ct. 449, 57 L. ed. 820 (1913); *Childs v. State*, 55 Ala. 25 (1876); *People v. Zimmerman*, 65 Cal. 307, 4 Pac. 20 (1884); *State v. Porter*, 74 Iowa 623, 38 N. W. 514 (1888).

⁴ *Smith v. Moore*, 142 N. C. 277, 55 S. E. 275 (1906); *Peace v. Jenkins*, 32 N. C. 355 (1849); *Brantley v. Marshbourn*, 166 N. C. 527, 82 S. E. 959 (1914); *Ratcliff v. Ratcliff*, 131 N. C. 425, 42 S. E. 887 (1902); *Dill-Cramer-Truitt Corp. v. Downs*, 201 N. C. 478, 160 S. E. 492 (1931).

The North Carolina decisions require that the declarant be dead at the time the declarations are offered as evidence. It would seem that any other form of unavailability should serve equally as well.

A distinction is made between declarations against interest and admissions. 2 WIGMORE, EVIDENCE (2d. ed. 1923) §1048.

Although most jurisdictions still follow the rule in the principal case it has been severely criticized.⁵ Justice Brogden recognizes the injustice of the rule as is manifest by his apologetic reason for the decision.⁶ It would seem that there should be no hesitancy in overruling an arbitrary rule of law, based on erroneous reasoning, created as a historical accident, and so unjust as to be termed barbarous by so great a writer as Mr. Wigmore and roundly assailed by so eminent a jurist as Judge Holmes.

DALLACE McLENNAN.

Juries—Challenge for Racial Prejudice.

A negro was tried and convicted of the murder of a white man. Upon the *voir dire* examination of prospective jurors, the trial judge overruled the defendant's request that a question relative to racial prejudice be propounded to each and every juror. *Held*, the ruling of the trial court was erroneous and the judgment of conviction must be reversed.¹

The propriety of such an inquiry to determine a disqualifying state of a juror's mind has been generally recognized with reference to the negro race,² other races,³ and the defendant's nationality.⁴

⁵ 2 WIGMORE, EVIDENCE (2d ed. 1923) §§1476, 1477; *Donnelly v. United States*, *supra* note 4, Judge Holmes' dissenting opinion.

⁶ "The writer of this opinion speaking for himself strings with the minority but it is the duty of the trial judge to apply the law as it is written." If this is true can this rule ever be changed by judicial decision?

¹ *Aldridge v. U. S.*, 283 U. S. 308, 51 S. Ct. 470, 75 L. ed. 628, 73 A. L. R. 1203 (1931) [reversing 47 F. (2d) 407 (Ct. of App. D. C. 1931)].

² *Pinder v. State*, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75 (1891); *Hill v. State*, 112 Miss. 260, 72 So. 1003 (1916); *State v. McAfee*, 64 N. C. 339 (1870); *Fendrick v. State*, 39 Tex. Cr. R. 147, 45 S. W. 589 (1898); *State v. Sanders*, 103 S. C. 216, 88 S. E. 10 (1916); *People v. Decker*, 157 N. Y. 186, 51 N. E. 1018 (1898); *State v. Brown*, 188 Mo. 451, 87 S. W. 519 (1905); *Johnson v. State*, 88 Neb. 565, 130 N. W. 282, ANN. CAS. 1912B 965 (1911); *Bass v. State*, 59 Tex. Cr. R. 186, 127 S. W. 1020 (1910); *Moore v. State*, 52 Tex. Cr. R. 336, 107 S. W. 540 (1907); *State v. Casey*, 44 La. Ann. 969, 11 So. 583 (1892); *Hamlin v. State*, 101 Ark. 257, 142 S. W. 151 (1911); *Cavitt v. State*, 15 Tex. App. 190 (1883); *Brumfield v. Consolidated Coach Corporation*, 40 S. W. (2d) 356 (Ky. 1931); *Strong v. State*, 85 Ark. 536, 109 S. W. 536, 14 ANN. CAS. 229 (1908); *Lester v. State*, 2 Tex. App. 432 (1877). But see *Crawford v. U. S.*, 59 App. D. C. 356, 41 F. (2d) 979 (1930).

³ *Horst v. Silverman*, 20 Wash. 233, 55 Pac. 52, 72 Am. St. Rep. 97 (1898) (Jews); *Potter v. State*, 86 Tex. Cr. R. 380, 216 S. W. 886 (1919) (Jews); *People v. Car Soy*, 57 Cal. 102 (1880) (Chinese).

⁴ *State v. Stafford*, 89 W. Va. 301, 109 S. E. 326 (1921) (Italian); *People v. Potigan*, 69 Cal. App. 257, 231 Pac. 593 (1924) (Armenian); *State v. Guidice*, 170 Iowa 731, 153 N. W. 336, ANN. CAS. 1917C 1160 (1915) (Italian); *People v. Reyes*, 5 Cal. 347, (1885) ("foreigners"); *cf. Watson v. Whitney*, 23 Cal. 375 (1863) "squatters").