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Evidence -- Admissibility of Secondary Evidence of Collateral Writing

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pension.[10] The problem is similar to that presented by the employees' bonus cases, for both concern employment policies.[11] The latter, however, are usually offered as "an inducement to continuous service and loyalty."[12] No criticism can be made of the result reached in the instant case, but the cases relied on are those involving gifts to friends,[13] relatives,[14] and charitable institutions.[15] It would have been more accurate had the court recognized that it was dealing with an employment problem arising from a clash between the corporation's labor policy and the depression, so as to have founded its decision on the cases dealing with the relation between corporations and their employees, such as the workmen's bonus and benefit cases.

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Evidence—Admissibility of Secondary Evidence of Collateral Writing.

In a recent North Carolina case, the defendant was tried for the murder of an employee of *A* corporation. There was evidence that the defendant had made threats against the employees of *B* corporation, and secondary evidence was offered to prove the contents of a writing merging the corporations. *Held:* Secondary evidence of the writing is admissible, since the matter is collateral.[1]

A slight majority of the North Carolina cases admit secondary evidence of the contents of a writing where they are collateral to

[10] *Cf.* cases collected Am. Dig. Sys., Master and Servant, Key nos. 72, 78; Note 28 A. L. R. 338.

[11] Promises to pay sums in addition to the stipulated or contract wage, when offered to induce employees to refrain from leaving employment, are binding on the employer. Fuller Co. v. Brown, 15 F. (2d) 672 (C. C. A. 4th, 1926) (shipyard laborers); Roberts v. Mays Mills, 184 N. C. 406, 114 S. E. 530, 28 A. L. R. 338 (1922) (cotton mill operatives induced to stay, wrongfully discharged). *Contra:* Russell v. Johns-Manville Co., 53 Cal. App. 572, 200 Pac. 668 (1921) (laborer induced to stay and incur financial liability, discharged); Cowles v. Morris & Co., 330 Ill. 11, 161 N. E. 150 (1928) (workers allowed to lose amount paid as premiums for pensions, etc., bonuses, when employer absorbed by other corporation). A bonus, however, must be determinate or determinable. Donovan v. Bull Mountain Trading Co., 60 Mont. 87, 198 Pac. 436 (1921) (store manager to receive bonus "commensurate with earnings" of company).

[12] Johnson v. Fuller & Johnson Mfg. Co., 183 Wis. 68, 197 N. W. 241 (1924) (promise to factory worker of bonus in lieu of raise in wage).

[13] Richards Ex'rs. v. Richards, *supra* note 2.

[14] Kirsey v. Kirsey, *supra* note 2.

[15] Presbyterian Board of Foreign Missions v. Smith, 209 Pa. 361, 58 Atl. 689 (1904) (promise of contribution, on which missionary society has relied in assuming liabilities, is binding).

[1] State v. Casey, 204 N. C. 411, 168 S. E. 512 (1933).

the issue.[2] A minority use the same reasoning, bolstered with the makeshift that "the rule that parol evidence cannot be allowed as to the contents of a written instrument applies only in actions between the parties to the writing."[3] This, as Wigmore has shown,[4] is a confusion of two exceptions to two separate rules—the exception to the "Best Evidence" rule allowing secondary evidence where the terms of the writing sought to be proven are collateral to the case,[5] and the exception to the "Parol Evidence" rule allowing parol evidence to contradict, vary, or add to the terms of a written instrument when the suit is not between the parties to the instrument.[6]

This confusion has no important practical effect, however, for the theory of the admissibility of secondary evidence of collateral writings seems flexible enough to justify the reception of such evidence without the mistaken application of the exception to the "Parol Evidence" rule.[7]

JAMES O. MOORE.

[2] State v. Capps, 71 N. C. 93 (1874); Mulholland v. York, 82 N. C. 510 (1880); Carrington v. Allen, 87 N. C. 354 (1882) (Defendant offered to prove payment by plaintiff of a note. *Held:* rule of production does not apply, as the instrument is collateral. This reasoning is erroneous. To prove the payment is not to prove the document's contents, and therefore the rule of production does not apply).

2 WIGMORE, EVIDENCE (2d ed. 1923) §1254; Faulcon v. Johnston, 102 N. C. 264, 9 S. E. 394 (1889), 11 Am. St. Rep. 737 (1890); State v. Ferguson, 107 N. C. 841, 12 S. E. 574 (1890); McMillan v. Baxley, 112 N. C. 578, 16 S. E. 845 (1893); State v. Surles, 117 N. C. 721, 23 S. E. 324 (1895); Robinson v. McDowell, 130 N. C. 246, 41 S. E. 287 (1902); Belding v. Archer, 131 N. C. 287, 42 S. E. 800 (1902); State v. Hayes, 138 N. C. 660, 50 S. E. 623 (1905); Andrews v. Grimes, 148 N. C. 437, 62 S. E. 519 (1908); Rabon v. Atlantic Coast Line R. R. Co., 149 N. C. 59, 62 S. E. 743 (1908); State v. Neville, 157 N. C. 591, 72 S. E. 798 (1911); Herring v. Ipock, 187 N. C. 459, 121 S. E. 758 (1924); Edwards v. Nunn, 194 N. C. 492, 140 S. E. 84 (1927). This doctrine, though orthodox, gives rise to a wide variety of unpredictable results.

[3] State v. Credle, 91 N. C. 640 (1884); Carden v. McConnell, 116 N. C. 875, 21 S. E. 923 (1895); Archer v. Hooper, 119 N. C. 581, 26 S. E. 143 (1896); Ledford v. Emerson, 138 N. C. 502, 51 S. E. 42 (1905); Whitehurst v. Padgett, 157 N. C. 424, 73 S. E. 240 (1911); Holloman v. Southern Ry. Co., 172 N. C. 372, 90 S. E. 292 (1916), L. R. A. 1917C, 416, Ann. Cas. 1917E, 1069; Morrison v. Hartley, 178 N. C. 618, 101 S. E. 375 (1919); Miles v. Walker, 179 N. C. 479, 102 S. E. 884 (1920); Hall v. Giessell, 179 N. C. 657, 103 S. E. 392 (1920); Davis v. N. C. Ship-building Co., 180 N. C. 74, 104 S. E. 82 (1920); Mahoney v. Osborne, 189 N. C. 445, 127 S. E. 533 (1925).

[4] 2 WIGMORE, EVIDENCE (2d ed. 1923) §1253.

[5] *Ibid.*

[6] 5 *id.* §2446. This form of statement is criticized as not sound in principle.

[7] State v. Hayes, *supra* note 1.