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## Evidence -- Fornication and Adultery -- Admissibility Under Statute of Extrajudicial Confessions for Corroboration

James L. Tapley

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plants apparently within the scope of federal control,<sup>28</sup> with many undeveloped power sites in private hands, with the absolute supremacy of the federal power of eminent domain over persons and states,<sup>29</sup> the vital question of whether compensation is to include dam site adaptability value should be decided.<sup>30</sup> If it is included, the public will have to pay for it either in rates<sup>31</sup> or on recapture after the end of fifty years.<sup>32</sup>

But the principal case has not helped at all for it indicates that the federal right involved may be recognized in a federal court but may be ignored in a state court. In a dissenting opinion written after the United States Supreme Court had affirmed the judgment of the Oklahoma Court, Chief Justice Hurst stated what must occur to all who crave simplicity in the law: "I see no reason why the rule should not be the same in both instances."<sup>33</sup>

LEONARD S. POWERS.

### Evidence—Fornication and Adultery—Admissibility Under Statute of Extrajudicial Confessions for Corroboration

The statute declaring fornication and adultery a crime<sup>1</sup> concludes with the following proviso: *that the admissions or confessions of one [participant] shall not be received in evidence against the other.* The statute has remained on the books in that same language since 1854,<sup>2</sup> and the cases that have arisen under it are numerous. The interpretation given to the proviso had been regarded as well-settled—that it meant exactly what it says. Recently, however, the court went far toward emasculating ninety-four years of construction in the case of *State v. Davis*.<sup>3</sup> Defendant, superintendent of an orphanage, and Lola Mae Reeves, a fourteen-year-old girl in his charge, were indicted under the statute. After the State had accepted the *feme* defendant's plea of *nolo contendere*, she was placed upon the stand where she testified, over defendant's objection, that she had had intercourse with the defendant on at least six occasions during a certain three month's time. Marguerite

<sup>28</sup> Gatchell, *Jurisdictional Problems Under the Federal Water Power Act of 1920*, 14 GEO. WASH. L. REV. 42 (1945).

<sup>29</sup> Dolan, *supra*, note 22, at 10; Recent Cases, 44 HARV. L. REV. 305 (1930).

<sup>30</sup> That it is no trifling matter is demonstrated by the principal case where the difference in valuation of a little over 400 acres, with and without dam site adaptability being considered, meant nearly a million dollars to the jury.

<sup>31</sup> 41 STAT. 1073 (1920), 16 U. S. C. §§812, 813 (1946).

<sup>32</sup> 41 STAT. 1071 (1920), as amended, 49 STAT. 844 (1935), 16 U. S. C. §807 (1946). The Supreme Court expressly refused to recognize these two factors as having any bearing on the point.

<sup>33</sup> Grand River Dam Authority v. Grand-Hydro, 201 P. 2d 225, 235 (Okla. 1947) (dissenting opinion).

<sup>1</sup> N. C. GEN. STAT. §14-184 (1943).

<sup>2</sup> N. C. CODE c. 34, §45 (1854).

<sup>3</sup> 229 N. C. 386, 50 S. E. 2d 37 (1948).

Wooten, the orphanage matron, was allowed to testify that the *feme* defendant previously had made a similar confession to her. This, too, was admitted over defendant's objection. Defendant was convicted, and on appeal he attacked the verdict and judgment principally on the grounds that the *feme* defendant was rendered incompetent to testify against him by the proviso in the statute, and also that the proviso was disregarded to his prejudice in the admission of Miss Wooten's testimony. The conviction was upheld in a 4-3 decision, the majority being of the opinion that the *feme* defendant was competent to testify, that "the prohibition of the statute is directed not to the person testifying but against the use in evidence of his previous admissions and confessions." It may be conceded that the case of *State v. Phipps*<sup>4</sup> was determinative of this point.

But then, after declaring the statute to inhibit the use of the extrajudicial confessions of one defendant against his co-defendant, the court proceeded to hold that it was nevertheless competent to admit Miss Wooten's testimony (as to the *feme* defendant's extrajudicial confession) for the purpose of *corroborating* the testimony of the *feme* defendant. This latter holding seems patently to ignore the language of the proviso. The statute does not speak of purpose.<sup>5</sup> The majority cited two cases in support of its holding on this point, *State v. McKeithan*<sup>6</sup> and *State v. Gore*,<sup>7</sup> and while these cases admittedly support the bald proposition that a witness's previous consistent statements are admissible to corroborate his testimony on the stand (if restricted to this purpose), neither case involved an indictment under a statute containing an inhibition similar to the one under consideration in the principal case. Hence these cases are clearly distinguishable.

There are three possible explanations for the court's holding that the use of such admissions and confessions is allowable if restricted to purposes of corroboration. First, in holding that the statutory inhibition was directed not to the person testifying but to the use of his previous admissions and confessions, the court admitted that such a construction was, in effect, to declare the proviso a mere codification of the general

<sup>4</sup>76 N. C. 203 (1877). After a *nolle prosequi* had been entered as to the *feme* defendant, she was introduced as a witness against the male defendant. The opinion, however, makes no mention of the statutory proviso under consideration in the principal case. Apparently the general rules of evidence were held to be controlling.

<sup>5</sup>Compare *State v. Rinehart*, 106 N. C. 787, 11 S. E. 512 (1890) (apparently holding that the admissions or confessions of one defendant are not admissible against the other defendant for any purpose) *with* *State v. Roberts*, 188 N. C. 460, 124 S. E. 833 (1924) (where admissions of the *feme* defendant were admitted because spoken in the presence of the male defendant).

<sup>6</sup>203 N. C. 494, 166 S. E. 336 (1932) (prosecution for procuring a person to burn a dwelling house).

<sup>7</sup>207 N. C. 618, 178 S. E. 209 (1934) (involved prosecution as accessory before the fact of murder).

rule of evidence which prohibits the use of such admissions and confessions as hearsay.<sup>8</sup> But this "mere codification" idea gets out of hand when the court goes on to hold that the admissions and confessions of one defendant are competent for purposes of corroboration simply because this is also the usual rule.<sup>9</sup> Second, the holding might be justified upon an examination of the theory behind the use of previous consistent statements for purposes of corroboration. Such statements are available to establish the credibility of the witness, not as substantive evidence to prove the fact asserted in the confession,<sup>10</sup> and on this basis it might be argued that they are not used against the defendant. But this is pure theory. The practical result of such a practice is to use them against the defendant if, without them, the witness will not be believed by the jury.<sup>11</sup> Third, the court in its haste to see justice done might have felt the objection more technical than substantial. Since the defendant could not show he was prejudiced by the testimony (how could he ever show prejudice in such a case?), the verdict was not to be overturned. But the statute is clear. If it has been disregarded, this alone is reason enough to grant a new trial.<sup>12</sup>

JAMES L. TAPLEY.

### Insurance—Automobile Liability Policy—Scope of Loading and Unloading Clause

The question of coverage afforded under "loading and unloading" clauses in automobile insurance policies has been a center of controversy since the inception of such contracts.<sup>1</sup> The usual policy of this type contains a liability clause for injuries sustained from accidents "arising out of the ownership, maintenance or use" of the vehicle, with "use" further defined to include "loading and unloading."

In *London Guarantee & Accident Co. v. C. B. White and Bros.*<sup>2</sup> the Supreme Court of Appeals of Virginia brings to focus the disputations

<sup>8</sup> *Commonwealth v. Epps*, 298 Pa. 377, 148 Atl. 523 (1930); *State v. Allison*, 175 Minn. 218, 220 N. W. 563 (1928); 4 WIGMORE, EVIDENCE §1076 (3rd ed. 1940).

<sup>9</sup> 4 WIGMORE, EVIDENCE §§1125-1126, 1131 (3rd ed. 1940); STANSBURY, NORTH CAROLINA EVIDENCE §52 (1946 ed.).

<sup>10</sup> STANSBURY, NORTH CAROLINA EVIDENCE §51, 52 (1946 ed.).

<sup>11</sup> Justice Stacy dissented vigorously in the principal case, saying pointedly that the suggestion that Miss Wooten's testimony was not offered against the defendant "has at least the merit of novelty."

<sup>12</sup> *Hooper v. Hooper*, 165 N. C. 605, 81 S. E. 933 (1914); *Broom v. Broom*, 130 N. C. 562, 41 S. E. 673 (1902); *State v. Gee*, 92 N. C. 756, 762 (1885); *State v. Ballard*, 79 N. C. 627 (1878).

<sup>1</sup> For other discussions on this problem of coverage see Gibson B. Witherspoon, *What Protection Is Afforded Under the "Loading and Unloading" Clause of an Automobile Insurance Policy?*, 52 COM. L. J. 58 (1947); see Note, 160 A. L. R. 1259 (1946).

<sup>2</sup> 49 S. E. 2d 254 (Va. 1948).