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Evidence -- Rules of Evidence in Preliminary Controversies As to Admissibility of Testimony

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admissible if it is a statement of opinion. The theory behind the opinion rule is that wherever the witness can state the facts on which he bases his opinion, the jury is equally competent to draw the inferences and the witness' conclusion is superfluous.\textsuperscript{22} \textit{Wigmore} in his treatise on Evidence argues that the rule should not be applied to dying declarations because the declarant is dead and it is not possible to obtain from him the data on which he based his inference.\textsuperscript{23} In \textit{State v. Watkins}\textsuperscript{24} the North Carolina Supreme Court, in effect, reached such a result by holding that if there were any doubt as to whether the declaration was opinion or fact the judge should submit it to the jury with instructions to disregard it if they should find that it was intended to be a statement of opinion. The opinion rule is thus obviated because once the evidence is submitted to the jury it is, practically speaking, impossible for them to disregard it altogether even though they do decide that it is a statement of opinion.

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Evidence—Rules of Evidence in Preliminary Controversies
As to Admissibility of Testimony.

\textit{H} was charged with the murder of his wife, \textit{W}, and his defense was that the shot was fired accidentally. Over his objection the trial court permitted a witness for the state to testify that immediately after the shooting \textit{W} had said that she was not going to live, that she wouldn't live to get to the hospital if they didn't hurry, and that \textit{H} had shot her. \textit{W} died three days after these statements were made. On appeal the North Carolina Supreme Court held that the evidence had been properly admitted as a dying declaration.\textsuperscript{1}

As a general rule the unsworn declarations of a deceased person are admissible as an exception to the "hearsay rule" if made while the declarant was fully aware of his impending death.\textsuperscript{2} In determining whether a certain declaration falls within the exception the trial judge must first make a finding of fact on which to base his decision.\textsuperscript{3} In the instant case the only facts upon which he ruled that the declarant was under an apprehension of death were those contained in the hearsay

\begin{itemize}
  \item \textsuperscript{22} \textit{Wigmore}, Evidence (2nd ed. 1923) §1447.
  \item \textsuperscript{23} \textit{Wigmore}, loc. cit. supra, note 22.
  \item \textsuperscript{24} 159 N. C. 480, 75 S. E. 22 (1912). This rule was followed in: \textit{State v. Williams}, 168 N. C. 191, 83 S. E. 714 (1914) ; \textit{State v. Beal}, 199 N. C. 278, 154 S. E. 604 (1930).
  \item Another peculiarity of this rule is that the jury is applying a rule of evidence. Ordinarily the application of the rules of evidence is left to the trial judge. \textit{State v. Williams}, 67 N. C. 12 (1872).
\end{itemize}

\begin{itemize}
  \item \textsuperscript{1} \textit{State v. Carden}, 209 N. C. 404, 183 S. E. 898 (1936).
  \item \textsuperscript{2} \textit{State v. Mills}, 91 N. C. 581 (1884) ; \textit{Note} (1936) 14 N. C. L. Rev. 380.
  \item \textsuperscript{3} \textit{State v. Williams}, 67 N. C. 12 (1872).
\end{itemize}
declaration itself, and the decision is thus open to the objection that the finding of fact was predicated upon incompetent evidence. It may be argued that there can be no better evidence to show that the declarant was conscious of the nearness of death than the very fact that he did die. However, the court did not seem to rely upon that evidence, and it is rendered impotent by the fact that three days elapsed between the making of the statement and the declarant’s death.

If, as Professor Wigmore contends, the rules of evidence are not employed in preliminary hearings before the court this objection is obviated. The basis of the Wigmorean theory is that the rules of evidence were formulated for the protection of the jurors and that there is no comparable necessity for protecting the judge when he sits as the trior of the facts. However, certain commentators have indicated that Wigmore is not in accord with the weight of authority and that the foundation of his theory is questionable. But what of the North Carolina situation? Are the rules of evidence applicable in the North Carolina courts when the judge is receiving testimony on which to make a finding of fact preliminary to determining the competency of certain evidence for the jury?

Apparendy the North Carolina courts do apply the rules of evidence in preliminary hearings of this nature. Although no direct authority could be found a study of the procedure followed in certain cases indicates that such is the practice. For example, in State v. Tilghman the “opinion rule” was applied in a preliminary hearing held to determine the admissibility of a dying declaration. The “hearsay rule” was employed in Justice v. Luther to reject parol proof of the contents of a writing when the only evidence that it had been lost was the unsworn declaration of the person in whose hands the writing had been deposited for safekeeping. The rule that the declarations of an agent cannot be

1 Wigmore, Evidence (2nd ed. 1923) §4b; 3 Wigmore, Evidence (2nd ed. 1923) §1385.
2 Maguire and Epstein, Rules of Evidence in Preliminary Controversies as to Admissibility (1927) 36 Yale L. J. 1101; Note (1928) 42 Harv. L. Rev. 258.
3 33 N. C. 513 (1850). In deciding whether the declarant was under an apprehension of death the court refused to consider the testimony of the declarant’s wife to the effect that in her opinion he did not think he was going to die. On appeal this action was approved.

See State v. Layton, 204 N. C. 704, 169 S. E. 650 (1933). In the preliminary hearing the court allowed a doctor to testify that in his opinion the declarant thought she was going to die. On appeal this testimony was held to be an immaterial error because the declarant had also stated her belief that she was dying. The “opinion rule” was likewise employed in Avery v. Stewart, 134 N. C. 287, 46 S. E. 519 (1904) where the plaintiff was trying to establish the loss of a written instrument so that he could prove its contents by oral testimony.

4 94 N. C. 793 (1886). Smith, C. J., said, “The loss of the paper, traced to the hands of a depository, cannot be proved by his unsworn declaration of the fact. The evidence addressed to the court, must be reasonably sufficient to account for the absence of the original, and this must be under oath, not hearsay.”
used to establish the fact of the agency was applied in *Jennings v. Hin-nton*\(^8\) as the basis for the exclusion of certain preliminary testimony. It was argued in *Johnson v. Prairie*\(^9\) that the admission of certain declarations of an alleged agent was not error because they were offered, not to the jury, but for the consideration of the court. The court held that if the evidence was not competent for the jury, it would not be proper for the court in deciding the competency of other testimony to act upon it. In *State v. Whitener*\(^10\) the court held that in a preliminary hearing to determine the admissibility of a confession the defendant has a right to introduce evidence to show that it was not made voluntarily, and by way of *dicta* said, "It is the duty of the judge to hear all such competent evidence on this preliminary question as the defendant may see fit to offer." In certain other cases there is language to the effect that the judge's finding of fact preliminary to the admission of evidence is conclusive on appeal but what evidence he allows to establish those facts is a question of law subject to review.\(^11\) What measuring rod will the appellate court use other than the common law rules of evidence?

\(^8\) 128 N. C. 214, 38 S. E. 863 (1901). The wife assigned her interest as beneficiary in a life insurance policy upon her husband's life to the defendant, mortgagee of the husband's property. Later there was an absolute sale of the interest in the policy, and the wife now seeks to have the sale cancelled for fraud. While on the stand the wife was asked whose agent her husband was on the day the sale was made, and she answered that he was the defendant's agent. She was then asked what he said on that occasion. The defendant objected, and the court ruled that the question was improper. The ruling was based upon the reasoning that the second question was not proper if the first was incompetent, and the first was incompetent because the only information upon which the wife could have based her answer was what her husband, the alleged agent, had told her.

\(^9\) 91 N. C. 159 (1884).

\(^10\) 191 N. C. 659, 132 S. E. 603 (1926). The result of this case was approved and followed in *State v. Blake*, 198 N. C. 547, 152 S. E. 632 (1930).

It should be noted that the language quoted from this case was a portion of a longer excerpt quoted with approval by the North Carolina Supreme Court from *State v. Kinder*, 96 Mo. 548, 10 S. W. 77 (1888). The italics were inserted by the author of this note.

A similar case is *State v. McRae*, 200 N. C. 149, 156 S. E. 800 (1931) where the defendant was charged with murder. In the preliminary hearing to determine the competency of the defendant's alleged confession an officer testified that the prisoner made the confession voluntarily after his wife had related the entire story to the officers in the prisoner's presence. The court ruled that the confession was properly admitted and that this procedure did not violate the rule that a wife cannot testify against her husband.

\(^11\) *State v. Andrew*, 61 N. C. 205, 206 (1867). Pearson, C. J., said, "What facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the judge in the court below can be reviewed by this Court; so what evidence the judge should allow to be offered to him to establish those facts is a question of law. So whether there be any evidence tending to show that the confession was not made voluntarily is a question of law. But whether the evidence is true and proves these facts, and whether the witnesses giving testimony to the court touching these facts are entitled to credit or not, and in case of conflict of testimony which witness should be believed by the court, are questions of fact to be decided by the judge, and his
In view of these authorities which indicate that the North Carolina courts do apply the rules of evidence in preliminary hearings the ruling in the instant case appears subject to a "legal criticism." That ruling, however, is supported by numerous decisions involving both dying declarations and other exceptions to the hearsay rule in which the facts upon which the judge ruled the evidence admissible were established by the hearsay declaration itself. It is anomalous that in these cases the opportunity to apply the rules of evidence has been consistently refused, but this can probably be explained by the fact that the dying declarant’s own statement is the best and often the only evidence of his knowledge of his condition. If the rules of evidence were applied in the preliminary hearing to exclude such statements the number of cases in which dying declarations could be successfully introduced would be materially decreased. Now, in the first place, the reasons for allowing the jury to consider the unsworn and uncrossexamined statements of a dead man were necessity and public policy, and in view of these motives the court’s inconsistency can be justified.

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decision cannot be reviewed in this Court, which is confined to questions of law.” (Italics by the author of this note.)

Similar language can be found in the opinion written by Walker, J., in Avery v. Stewart, 134 N. C. 287, 292, 46 S. E. 519, 521 (1904).

Support for the contention that the rules of evidence do apply in preliminary hearings before the judge may be found in the language used in the following cases: Smith v. Kron, 96 N. C. 392, 396, 2 S. E. 533, 535 (1887); Gillis v. Wilmington, Onslow, and Eastern Carolina Ry. Co., 108 N. C. 441, 443, 13 S. E. 11, 12 (1891).


(b) Declarations evidencing present pain: Howard v. Wright, 173 N. C. 339, 91 S. E. 1032 (1917); Martin v. Hanes Co., 189 N. C. 644, 127 S. E. 688 (1925). It should be pointed out that the North Carolina Supreme Court has apparently abandoned the requirement that the declaration must relate solely to present pain. See Moore v. Summers Drug Co., 206 N. C. 711, 175 S. E. 96 (1934); Comment (1935) 13 N. C. L. Rsv. 228.


(e) Confessions (although confessions are not really among the bona fide exceptions to the hearsay rule they are included here because the problem discussed in this note is sometimes present in cases involving them): State v. Cruse, 74 N. C. 491 (1876); State v. Sanders, 84 N. C. 729 (1881); State v. Page, 127 N. C. 512, 37 S. E. 66 (1900).