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EVIDENCE: DECLARATIONS AGAINST A PENAL INTEREST — A PLEA FOR PARITY

*The rules of evidence in the main are based on experience, logic, and common sense*¹

With these words Justice Holmes lodged a protest against the inconsistency of the rule of evidence that admits declarations against a pecuniary or proprietary interest, but excludes a declaration against a penal interest.

Holmes is not alone in the protest against the inherent absurdity of this rule, but is in the company of such giants of the legal profession as Professors Wigmore² and McCormick,³ and Chief Justice Traynor of the California Supreme Court.⁴ In addition, the American Law Institute⁵ and the Commissioners on Uniform State Laws⁶ have recommended that the declaration against a penal interest be put on parity with the declaration against a proprietary or pecuniary interest.⁷ However, neither the opinions of great legal minds nor the

¹ *Donnelly v. United States*, 223 U.S. 243, 277 (1913) (Holmes, J., dissenting).

² See 5 J. WIGMORE, *EVIDENCE* §§ 1476-77 (3d ed. 1940).

³ See C. McCORMICK, *EVIDENCE* 549-53 (1954).

⁴ *People v. Spriggs*, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964) (declaration against a penal interest is admissible).

⁵ See MODEL CODE OF EVIDENCE rule 509 (1942) which provides:

(1) A declaration is against the interest of a declarant if the judge finds that the fact asserted in the declaration was at the time of the declaration so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability . . . that a reasonable man in his position would not have made the declaration unless he believed it to be true.

(2) . . . [E]vidence of so much of a hearsay declaration is admissible as consists of a declaration against interest (Emphasis added).

⁶ See UNIFORM RULES OF EVIDENCE 63 (10).

⁷ The declaration against a pecuniary or proprietary interest

recommendations of model codes are enough to support the premise that declarations against a penal interest should be admissible into evidence. Rather, one must look to logic, history, and application of the rule of evidence concerning declarations against interest before an intelligent decision can be made. In order to accomplish this goal it would be judicious to look to both the development and current status of the majority and minority rule regarding a declaration against a penal interest.

The majority rule excluding such hearsay declarations was first expressed in England by the House of Lords in 1844 in the *Sussex Peerage* case.⁸ The holding in this case limited admissible declarations against interest to those which affected a proprietary or pecuniary interest.⁹ The United States Supreme Court adopted the rule in 1913,¹⁰ and since then it has become the rule in most United States jurisdictions.¹¹

The rationale behind the adoption of the majority rule rests on fear of perjury or fraud. This fear was expressed quite well by the Maryland Court of Appeals.¹² The court stated:

It is not difficult to see the abuses to which the general admission of such testimony might lead. Every one

is admissible in all jurisdictions. 5 J. WIGMORE, EVIDENCE § 1476 (3d ed. 1940). However, the majority rule as to declarations against a penal interest is that such statements are inadmissible. 5 J. WIGMORE, *supra*.

⁸ 8 Eng. Rep. 1034 (H. L. 1844).

⁹ For an excellent discussion of the evolution of the majority rule, see *Thomas v. State*, 186 Md. 446, 47 A.2d 43, 45 (1946).

¹⁰ *Donnelly v. United States*, 223 U.S. 243 (1913).

¹¹ *E.g.*, *Wesson v. State*, 238 Ala. 399, 191 So. 249 (1939); *Tompkins v. Fonda Glove Lining Co.*, 188 N.Y. 261, 80 N.E. 933, 148 N.Y.S. 570 (1907); *Flemming v. State*, 95 Vt. 154, 113 A. 783 (1921). For a general discussion of the majority rule as it applies to all jurisdictions, see 5 J. WIGMORE, EVIDENCE § 1476 n.9 (3d ed. 1940).

¹² *Brennan v. State*, 151 Md. 265, 134 A. 148 (1926).

accused of crime would be tempted to introduce perjured statements of some third person, then beyond the jurisdiction of the court, admitting that such third person and not the defendant had committed the crime in question, and the experience of the court renders it certain that many would yield to such a temptation.¹³

This fear has been coupled with the warning of Chief Justice Marshall that:

The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well established rule, the value of which is felt and acknowledged by all¹⁴

The result has been a reluctance to depart from the majority rule. To further understand this reluctance one must look to the reason for admitting *any* hearsay statement.

The fundamental rationale of a declaration against interest is the same as for any exception to the hearsay rule, that is, under the particular circumstances the statement is trustworthy and the declarant is unavailable for testimony, thereby creating a necessity of resorting to second hand testimony.¹⁵ As stated by Dean Wigmore:

The basis of the Exception [sic] is the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect, and is thus sufficiently sanctioned, though oath and cross-examination are wanting.¹⁶

¹³ 134 A. at 150. It should be noted at this point that the great majority of cases on declarations against a penal interest concern extrajudicial confessions in criminal cases. The question has arisen in a few reported civil cases and the distinction, if any, will be touched upon later in this article.

¹⁴ *Queen v. Hepburn*, 11 U.S. (1 Cranch) 290 (1813) in which Chief Justice Marshall was discussing the hearsay rule in general.

¹⁵ 5 J. WIGMORE, *EVIDENCE* § 1457 (3d ed. 1940).

¹⁶ *Id.*

As stated before, the courts have generally held that only a pecuniary or proprietary interest in the declarant will suffice for this exception.¹⁷ The declaration against a penal interest, according to the rationale of the majority, does not, per se, have the requisite quality of trustworthiness surrounding it and therefore all such statements should be excluded from evidence. The courts are, in effect, holding that at no time is a declaration against a penal interest harmful and therefore there can be no assumption of trustworthiness. It is as if the courts would rather take the easier course of total exclusion than to attempt to define those conditions giving rise to the presumption of trustworthiness.

Fortunately not all jurisdictions have taken this ostrich-like approach. Instead a small minority of courts have either defined those circumstances under which this declaration will be admitted¹⁸ or have put this declaration on parity with a declaration against a pecuniary or proprietary interest, that is, admissible because of its very nature.¹⁹ In order to gain an insight into the logic of the minority's holdings it would be advisable to briefly look at these holdings.

The first exception to the majority rule was *Hines v. Commonwealth*.²⁰ In this case the Supreme Court of Virginia held that a confession by a third party is admissible when

¹⁷ See note 7 *supra*.

¹⁸ *E.g.*, *People v. Lettich*, 413 Ill. 172, 108 N.E.2d 488 (1952); *Cameron v. State*, 153 Tex. Crim. 29, 217 S.W.2d 23 (1949); *Hines v. Commonwealth*, 136 Va. 728, 117 S.E. 843 (1923).

¹⁹ *Deike v. Great A. & P. Tea Co.*, 3 Ariz. 430, 415 P.2d 145 (1966); *People v. Spriggs*, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964); *Sutter v. Easterly*, 354 Mo. 282, 189 S.W.2d 284 (1945); *Band Refuse Removal v. Fair Lawn*, 62 N.J. Super. 552, 163 A.2d 465 (App. div. 1960).

²⁰ 136 Va. 728, 117 S.E. 843 (1923).

there are other facts which tend to support that confession.²¹ The court also stated that the declarant must be unavailable for testimony before the admissibility of the statement will be considered. This exception of the extrajudicial confession coupled with substantiative evidence, though limiting by its nature, nevertheless has found acceptance in a few jurisdictions in one form or another.

Those jurisdictions which have departed from the majority rule have done so only under limiting circumstances. For example, where the prosecution is relying solely upon the repudiated confession of the defendant and that confession does not conform to the known facts;²² where there are unusual circumstances surrounding the case and there are exsistant safeguards against perjury and fraud;²³ and where the evidence is purely circumstantial and there are other facts tending to show the third party's guilt.²⁴ It can be seen from the foregoing that only under the most special of circumstances will *some* courts relax the majority rule. There, however, has been a small crack in the dike of resistance to change.

The first jurisdiction to make what appears to be a complete break with the majority rule was Missouri in the case of *Sutter v. Easterly*.²⁵ In this case the Supreme Court of

²¹ The court also stated:

[W]e are disposed to think that the evidence of *even a bare confession* by a deceased or unavailable witness ought to go to the jury for what it is worth; but as our decision here must be regarded as out of line with the current of authority, we will expressly limit its effect as a precedent in this court to the particular facts of the case in hand. 117 S.E. at 848 (emphasis added).

It is indeed unfortunate that the court lacked the strength of its convictions.

²² *People v. Lettich*, 413 Ill. 172, 108 N.E.2d 488, 491-92 (1952).

²³ *Brennan v. State*, 151 Md. 265, 134 A. 148 (1926).

²⁴ *Cameron v. State*, 153 Tex. Crim. 29, 217 S.W.2d 23 (1949).

²⁵ 354 Mo. 282, 189 S.W.2d 284 (1945).

Missouri was faced with the affidavit of a witness in a prior damage suit who now swore that he had conspired with the plaintiff's lawyer in that action to commit perjury and therefore, that the judgment had been obtained through fraud. In this equitable action to set aside the judgment the question before the court was whether the affidavit was admissible since the affiant was unavailable because of his refusal to testify on grounds of self-incrimination. The court first held that the affiant was unavailable in the legal sense, thereby qualifying the affidavit under the declaration against interest exception to the hearsay rule. The court then looked to whether this declaration was one which would qualify under that exception. In holding that the affidavit was admissible as a declaration against a *penal* interest, the court firmly rejected the majority concept of limiting declarations against interest to pecuniary or proprietary interests. Instead the court recognized that a declaration against a penal interest was of such character as to be "against one's interest" and "unlikely to be either deliberately false or heedlessly incorrect"²⁶ because of the possibility of resulting criminal implication. This view, however, has been somewhat tempered by the holding of this same court in *State v. Brown*²⁷ wherein it was held that the rule of *Sutter* was not applicable in criminal cases. The court stated that the facts in this case did not come up to the rule expressed in *Sutter* because the defendant had not shown the unavailability of the declarant. In addition the court noted that the general rule in criminal cases is that declarations against a penal interest are inadmissible. This distinction between civil and criminal cases though difficult to understand does merit examination.

The *Sutter* case is one of two civil cases that have put the declaration against a penal interest on parity with a dec-

²⁶ 189 S.W.2d at 290.

²⁷ 404 S.W.2d 179 (Mo. 1966).

laration against a pecuniary or proprietary interest.²⁸ In the few remaining civil cases where such declarations have been admitted, it has been accepted on some basis other than their penal character.²⁹ Instead the courts have looked to the effect that such statements would have on the declarant's pecuniary or proprietary interest. If any effect could be found the statement would be held admissible.³⁰ Obviously the courts involved do not accept the logic of admitting the declaration against a penal interest and therefore feel it necessary to characterize such declarations as something else. Therefore, with the exception of Missouri and New Jersey, the courts have strongly adhered to the majority's position regardless of whether the declaration arose in a criminal or civil case.

As a result the only possible explanation of the holding in the *Sutter* case is found in the nature of the facts in the case. Here was a judgment procured by fraud which could be proved only by the admission into evidence of the affidavit of the witness who committed the perjury. Therefore the court found a convenient way to overturn the judgment by adopting the view of a small minority. However, when the *Sutter* case was cited to this same court in a criminal case, the distinction was made that such declarations are not admissible in criminal prosecutions because of the general rule

²⁸ The other civil case is *Band Refuse Removal v. Fair Lawn*, 62 N.J. Super. 552, 163 A.2d 465 (App. div. 1960). There is also authority for stating that Arizona would admit such declarations in civil cases, although in the only case reported a declaration was not admitted because it was not truly a declaration against interest. *Deike v. Great A. & P. Tea Co.*, 3 Ariz. 430, 415 P.2d 145 (1966).

²⁹ See *Weber v. Chicago, R.I. & P. Ry.*, 175 Iowa 358, 151 N.W. 852 (1915), where a declaration that the declarant had unbolted the rail, thereby causing deraiment of the train, was held admissible.

³⁰ *Id.*

against the admissibility of extrajudicial confessions.³¹ It appears that this distinction arose as a rule of convenience and therefore would not necessarily be valid in other jurisdictions. In fact, when tested in the light of logic, if a situation exists where one is placing himself in a position to be criminally prosecuted because of remarks alluding to crimes he may have committed, it is ludicrous to assume that the trustworthiness of the statement is to be judged by the type of action in which the litigants are engaged. If it is trustworthy enough to merit introduction into evidence in civil cases, then it should be trustworthy enough for criminal cases.

To date California has been the only jurisdiction that has made a complete break with the majority in criminal cases. In *People v. Spiggs*,³² the defendant was charged with illegal possession of narcotics. At the time of his arrest a female companion stated that the narcotics were hers. When the arresting officer was asked about this statement on cross examination, the answer was excluded as hearsay. On appeal the California Supreme Court reversed the verdict of guilty, establishing the precedent that declarations against a penal interest are, per se, admissible.

In the short time since this case was handed down, it has become the leading case in the battle of the minority to become the majority. This can be attributed to the forceful opinion in which Chief Justice Traynor pointed out the fallacy of assuming that declarations against a penal interest are any less trustworthy than declarations against a proprietary or pecuniary interest: "A person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement made against that interest".³³ Hence, we have for the first time a recognition by a court of the

³¹ This same distinction has been made in New Jersey. *State v. Sejuelas*, 94 N.J. Super. 576, 229 A.2d 659 (App. div. 1967).

³² 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964).

³³ 389 P.2d at 381, 36 Cal. Rptr. at 845.

trustworthiness, per se, of a declaration against a penal interest.³⁴

The holding in the *Sprigg's* case is the first common sense approach to the problem to appear. Although it is late in arriving, it no doubt will be accepted in many other jurisdictions as the question arises. For this reason, the author would like to suggest the approach to be taken in Oklahoma should the question come before our courts. However, before this suggestion is made, we should look to the law in Oklahoma regarding declarations against interest.

The rule in Oklahoma is squarely aligned with the majority. In criminal cases as well as civil, a declaration against a penal interest is clearly inadmissible.³⁵ The reason for adopting the majority rule was well expressed by the Court of Criminal Appeals when it stated:

If evidence of this kind was admissible as original testimony for a defendant, it would be impossible to convict any thief, because he could always find witnesses who would testify that they heard some one who was absent confess to being guilty of the crime. To hold that such evidence was competent would put a premium on fraud, make perjury safe and place the state at the mercy of criminals. This would make a mockery of the law, and will not be permitted in the courts of Oklahoma.³⁶

³⁴The *Spriggs* case is also unique in that Justice Traynor also held that the availability of the witness was immaterial in determining the admissibility of a declaration against interest. This has the effect of eliminating the necessity factor and leaving the reliability factor as the only element to be considered in the determination of the admissibility of such evidence. To date this is the only case that has so held.

³⁵*Aetna Life Ins. Co. v. Strauch*, 179 Okla. 617, 67 P.2d 452 (1937); *In re Winger's Petition*, 337 P.2d 445 (Okla. Crim. 1959); *Newton v. State*, 61 Okla. Crim. 237, 71 P.2d 122 (1937); *Dykes v. State*, 11 Okla. Crim. 602 150 P. 84 (1914); *Davis v. State*, 8 Okla. Crim. 515, 128 P. 1097, (1913).

³⁶*Davis v. State*, 8 Okla. Crim. 515, 525-26, 128 P. 1097, 1099 (1913).

From this rather strong wording it is obvious that the majority rule of nonadmissibility of declarations against a penal interest is well entrenched in Oklahoma. Equally well entrenched is the rule that only declarations against a pecuniary or proprietary interest will be admitted. This rule evolved from the rather unique case of *Aetna Life Insurance Co. v. Strauch*,³⁷ a case which deserves some close scrutiny in the search for a logical rule in Oklahoma.

In this case one Claude Oliver plotted with a friend to find an eligible girl, marry her, take out a life insurance policy on her life, then murder her and subsequently split the proceeds with his confederate, who would help with the murder. Oliver and his friend carried out this plan and the result was not money but the electric chair for both. However, before Oliver took out the policy on his new bride's life, he confided to another the nefarious scheme into which he was about to enter. As a result, when the heirs of Mrs. Oliver sued the insurance company for the proceeds of the policy, an attempt was made by Aetna Life to put into evidence this statement by Oliver in order to prove that the policy was obtained by fraud, thereby relieving the company of any liability. In reversing the judgment for the plaintiff, the Oklahoma Supreme Court held that the statement should have been admitted as a declaration against interest. In so ruling the court established a guideline as to the admissibility of such statements. In essence this guideline provides that:

1. the declarant must be unavailable as a witness, usually by reason of death;
2. it must appear that the declaration or statement related a fact against the apparent or prima facie pecuniary or proprietary interest of the declarant at the time it was made;

³⁷ 179 Okla. 617, 67 P.2d 452 (1937).

³⁸ *Id.*

3. the declaration must have concerned a fact personally cognizable by the declarant; and
4. the circumstances must render it improbable that a motive to falsify existed.³⁸

In applying these standards the court found that the statement was a declaration against a pecuniary interest because Oliver could have lost the \$5,000.00 proceeds of the policy had the statement been made known to the insurance company. Therefore, reasoned the court, the statement should have been admitted. It is interesting to note the court's failure to allow the statement into evidence because of its penal quality. Certainly the fact that Oliver could have been electrocuted for his part in the crime would make the statement just as trustworthy as the fact that he stood to lose \$5,000.00. However, the court admitted the statement into evidence only for its pecuniary quality and failed to consider its penal quality at all.

The standards as announced in the *Strauch* case still stand as the law in Oklahoma today. There has been, however, an indication from one of the Justices of the Oklahoma Court of Criminal Appeals, that the majority rule does not meet with favor from all who sit on the bench. In the case of *In Re Winger's Petition*³⁹ a sharply worded dissent to the decision upholding the rule as expressed in *Strauch* was filed. Because this dissent is both well written and expresses an inescapable logic, it deserves examination.

In this case the court at first reversed Winger's conviction on the grounds that a confession by another should be admissible. However, this ruling was overturned when it was pointed out on rehearing that Oklahoma has long followed the rule of excluding such statements. It was to this ruling rehearing that the dissent pointed out the fallacy of including declarations against a pecuniary or proprietary on

³⁹ 337 P.2d 445 (Okla. Crim. 1959.)

the one hand and excluding declarations against a penal interest on the other. In commenting on this fallacy it was stated:

. . . How could it be said that one involved in crime could possibly attach more importance to his monetary assets than he would to his liberty or pursuit of happiness. . . . It is going far afield to say that, whereas mankind holds property on such high regard that a statement to the detriment of his title and interest therein will be taken as true and a statement which could forever deprive him of his liberty is false, . . . [T]his is especially unjustifiable in the light of common knowledge that the individual, instead of having a higher regard for property than for life and liberty, will, when accused of crime, exhaust his entire material wealth to secure liberty, life, and vindication.⁴⁰

The erroneous assumption that one's liberty is not dear enough to him to protect it at all costs forms the basis for the conclusion that the majority rule excluding declarations against a penal interest is without merit. This is a conclusion which has been reached by one of the three judges who make up the Court of Criminal Appeals. One can only hope that it will not be much longer before at least one more sees the wisdom of what was said in the dissent.

These observations illustrate the absurdity of failing to put declarations against a penal interest on parity with declarations against a pecuniary or proprietary interest. It is illogical to exclude these declarations because of an alleged lack of trustworthiness. Obviously, the very nature of the statement is so harmful to the declarant that a presumption of truthfulness is the only determination that can flow from its utterance. Furthermore, the danger of perjury complained of by the majority is no more real than in any other exception to the hearsay rule. In addition, the danger that the witness relating the statement will commit

⁴⁰ *Id.* at 454.

perjury is no greater here than in any other trial situation.

For the foregoing reasons the author recommends that Oklahoma abandon the rule that declarations against a penal interest are inadmissible and replace it with the rule that declarations against a penal interest are, per se, admissible. It would be self-defeating to adopt anything else. To adopt a rule whereby such declarations are admissible only under special circumstances would in effect refute the assumption of trustworthiness. If there are circumstances which shadow a statement's credibility, they should go to weight rather than admissibility. If the situation exists where the declarant has nothing to lose by confessing to the crime, then this fact can be pointed out to the jury. This method is surely more desirable than foreclosing the possibility of allowing into evidence such declarations in all but a few limiting cases. Furthermore, our system of justice with its inherent safeguards for the individual is at odds with a rule of evidence that prevents a defendant from clearing himself of criminal charges when perfectly trustworthy evidence is available for that purpose. It is obviously more desirable to allow into evidence such statements and permit the jury to weigh their significance in the light of the surrounding circumstances, than to summarily exclude them from evidence because of an alleged lack of trustworthiness.

It is with these thoughts in mind that the author urges the courts of Oklahoma to admit into evidence declarations against a penal interest and thereby place Oklahoma in the forefront of jurisdictions that have abandoned the untenable position of the majority rule.

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