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Recent Decisions: Evidence: Admission of Third Party's Declaration Against Penal Interest-

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dence of that conversation would also be admitted. In reaching this decision, the Court never discussed the sixth amendment implications.

Considering the *Lopez* fact situation, it would appear that when the agent returned to record the petitioner's statements, the investigation was no longer a general inquiry and the petitioner was actually, although not formally, the "accused," thus rendering the recording inadmissible under the *Massiah-Escobedo* rule. *Lopez* was not mentioned in *Massiah* or *Escobedo,* although on its face, the reasoning behind the *Massiah-Escobedo* rule impliedly overrules *Lopez,* unless the Court makes the distinction between a statement which admits a past crime and a statement which is made during the commission of a crime. A possible reason for such a distinction is that the Court would feel that a person might be forced or tricked into admitting a past crime, whereas no coercion would be involved in merely recording the statements made while the criminal act is taking place.

Many questions are yet unanswered. Has an investigation "focused" on the accused as soon as he is picked up for questioning? Must he be advised of his right to counsel? Must counsel be appointed during interrogation if the accused is indigent? In time, the answers will be provided by the Court on a case-by-case basis.

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Evidence: Admission of Third Party's Declaration Against Penal Interest—The defendant was arrested and convicted of possessing heroin in violation of California law. The lower court refused to permit a police officer called by the state to testify on cross-examination that the defendant's companion had admitted to the officer that heroin which the defendant was charged with possessing actually belonged to her. Upon appeal, the defendant argued that the police officer should have been allowed to answer the question, contending that the hearsay rule does not preclude admission of a declaration against penal interest. The state's argument was that the traditional rule only admits those declarations which are against the pecuniary or proprietary interests of the declarant. Further, the state contended that there was no showing that the declarant was unavailable to testify as to the matters involved. The Supreme Court of California, in *People v. Spriggs,*[1] held in favor of the defendant and ordered a new trial.

The English *Sussex Peerage* case,[2] decided in 1844, constitutes the first expression of the rule that a declaration of a third party against his penal interest is not admissible. Wigmore calls this case a "backward step and an arbitrary limit put upon the [hearsay] rule."[3]

[1] 36 Cal. Rptr. 841, 389 P. 2d 377 (1964).
[2] 11 Cl. & F. 109 (1844), where the declarations of a clergyman that he had performed a marriage which would subject him to a prosecution were rejected.
[3] WIGMORE, EVIDENCE §1476 (3d ed. 1940).

The hearsay rule basically signifies "a rule rejecting assertions offered testimonially which have not been in some way subjected to the test of cross-examination."[4] However, there have developed certain exceptions to this rule; to wit: (1) to show state of mind of the declarant, both at the time of and before the declaration; (2) to establish future conduct of the declarant; (3) to show past knowledge of the declarant; (4) to show spontaneous or excited utterances regardless of their contemporaneousness with a "transaction in issue" (*i.e.*, as part of the res gestae); (5) to show pain or suffering.[5] A further exception to the hearsay rule allows the admission of declarations of third parties which are against their interest. This exception is based upon the principle that one will not assert a fact directly against one's interest which is deliberately false or incorrect and hence that such statement is worthy of belief although there has been no oath or cross-examination.[6] However, this exception is almost unanimously limited to declarations which are against proprietary or pecuniary interests of the declarant and does not include declarations against penal or social interests.

In the *Spriggs* case, the California court adopted the minority rule and the position of Mr. Justice Holmes' dissent in the case of *Donnelly v. United States*.[7] Jones, in his work on evidence stated that "in criminal actions most courts have consistently adhered to the rule excluding confessions of others which tend to exculpate another person who is charged with the offense and the rule is generally applied in civil actions."[8]

The decision in *Spriggs* is not wholly without support, however, and "there is substantial recent authority for admitting in evidence confessions and declarations which are shown to have been against the penal

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[4] *Id.* §1362.

[5] People v. Spriggs, *supra* note 1, at 844, 389 P. 2d at 380.

[6] WIGMORE, *op. cit. supra* note 3, §1457.

[7] 228 U.S. 243 (1913). The opinion of Mr. Justice Holmes is as follows: "The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make anyone outside of a court of justice believe that Donnelly did not commit the crime. I say this, of course, on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick. The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man . . . ; and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at greater length." *Id.* at 277-78.

[8] JONES, EVIDENCE §296 (5th ed. 1958).

interest of the declarant."[9] The case of *Hines v. Commonwealth*[10] is one of the first in which the court departed from the traditional rule. In that case, Hines was ultimately found guilty of the murder of a police officer, but the appellate court did rule that the subsequent confession of a third party declarant that he, the third party, committed the murder should be admitted. The court in *Hines* was careful, however, to limit its decision to the particular case where there were other facts of motive and conduct of the third party which were material circumstances supporting the confession. This decision was followed by *Newberry v. Commonwealth.*[11]

Other states recognizing third party declarations against penal interest include: Missouri, where in *Sutter v. Easterly*[12] an affidavit that declarant had engaged in fraudulent, shameful, and criminal conspiracy culminating in perjury was admissible; Maryland, where in a bastardy case in which the third party, who had associated with prosecutrix, before committing suicide admitted that he was the father of the child, the court in light of the surrounding circumstances allowed the letters of admission to be introduced;[13] and Illinois, where the court allowed a third party declaration of the commission of the crime for which the defendant was tried, when the defendant had been convicted solely on the basis of a confession, the voluntariness of which was seriously questioned.[14] Minnesota, in a note to *In re Forsythe's Estate,*[15] pointed favorably to the modern tendency to hold that the interest element need not be proprietary or pecuniary.

The majority opinion in the *Donnelly* case[16] presents the present view of the federal courts, although in the case of *United States v. Annunziato*[17] the position was referred to as a "rather indefensible limitation."[18] Dictum in *Truelsch v. Northwestern Mut. Life Ins. Co.*[19] indicates that Wisconsin would follow the majority rule, although the particular case did not involve a declaration against penal interest, but rather a declaration against pecuniary or proprietary interest.

Justice Traynor points out in the *Spriggs* case that a declaration against penal interest is no less trustworthy than a declaration against pecuniary or proprietary interest. This is also the view advanced by

[9] *Ibid.*
[10] 136 Va. 728, 117 S.E. 843 (1923).
[11] 191 Va. 445, 61 S.E. 2d 318 (1952).
[12] 354 Mo. 282, 189 S.W. 2d 284 (1945).
[13] Brennan v. State, 151 Md. 118, 134 Atl. 148 (1926).
[14] People v. Lettrich, 413 Ill. 172, 108 N.E. 2d 488 (1952).
[15] 221 Minn. 303, 22 N.W. 2d 19 (1946).
[16] Donnelly v. United States, *supra* note 7.
[17] 293 F. 2d 373 (2d Cir.), *cert. denied,* 368 U.S. 373 (1961).
[18] *Id.,* 293 F. 2d at 378.
[19] 186 Wis. 239, 248, 202 N.W. 352, 356 (1925): "Mr. Wigmore vigorously argues that the exception should be so extended as to include confessions of crime or other statements of facts against penal interest. . . . But, as he concedes, this view has not been generally accepted."

McCormick.[20] Wigmore states that the only plausible policy reason that has been advanced for this limitation is the possibility of procuring fabricated testimony to such an admission if oral.[21] As the cases and authorities have maintained, however, if the surrounding circumstances support the declaration, there is no reason to consider a declaration against penal interest less trustworthy than a declaration against pecuniary or proprietary interest.

> If a charge involving the life or liberty of a citizen, and depending solely upon circumstantial evidence, cannot stand the test of allowing the jury to determine from the testimony whether a third party has in fact confessed guilt, and if so whether such confession was true, a conviction ought not to follow.[22]

The second issue in the *Spriggs* case involved the availability of the declarant to testify. From the record, Justice Traynor states that there was no showing whether or not she was available. The court felt that had Mrs. Roland, the declarant, taken the witness stand and denied possession of narcotics, her out-of-court declaration against interest would have been admissible to prove the truth of the matter stated,[23] as well as to impeach her by a prior inconsistent statement.

A witness is considered unavailable if he is dead, insane, or outside the jurisdiction of the court. It has also been held that one who has refused to testify because his testimony might incriminate him is considered unavailable as a witness, just as though he were beyond the reaches of the court or had since died.[24] Hence, had Mrs. Roland been unavailable, Justice Traynor states, there would have been a necessity for her declaration, thus affording another basis for its admissibility in addition to the trustworthy character of the evidence.

The decision in *Spriggs* seems to be a step forward in the abandonment of an illogical rule of evidence. The admissibility of the declaration against penal interest should be determined in light of the principle that "the purpose of all rules of evidence is to aid in arriving at the truth, and if it should appear that any rule tends rather to hinder than facilitate this result . . . it should be abrogated without hesitation."[25] However, the courts have been and should remain cautious in allowing only those declarations against penal interest to be admitted which

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[20] McCormick, Evidence §255 (1954).
[21] Wigmore, *op. cit. supra* note 3, §1477
[22] Hines v. Commonwealth, *supra* note 10, 117 S.E. at 846.
[23] Wigmore, *op. cit. supra* note 3, §1792, states: "Statements offered as self-contradictions are admitted not as assertions to be credited, but merely as constituting an inconsistency which indicates the witness to be in error in one or the other statement; their use as hearsay assertions is uniformly prohibited by the Courts." The cases cited by the California court point to their position here as a minority view which is further supported by McCormick and Uniform Rule of Evidence 63 (10).
[24] Newberry v. Commonwealth, *supra* note 11, 61 S.E. 2d at 326.
[25] Williams v. Kidd, 170 Cal. 631, 649, 151 Pac. 1, 8 (1915).

are supported by corroborating circumstances, in order that the opportunity to perpetrate fraud upon the courts shall not be presented.

COLLEEN A. ROACH

Partnership: The Concept of the "Continuing Partnership"—The recent Wisconsin case of *Adams v. Jarvis*[1] involved a three-man medical partnership at will, governed by a formal and detailed partnership agreement. Under the rather unique contract, the partnership was not to terminate at the withdrawal or death of a partner. Instead, until a full settlement was made in accordance with the agreement, the withdrawing partner or the deceased partner's estate would continue to participate in partnership profits and losses, but not in the management of the clinic. A retiring partner would receive any balance standing to his credit on the books of the partnership, the amount of his capital account, and that proportion of profits to which he was entitled pursuant to the agreement. It was specifically agreed that on the withdrawal of any partner the accounts receivable were to remain the property of the clinic. The books of the firm were not to close until the end of the fiscal year.

On May 8, 1961, the plaintiff submitted a letter to the partnership giving notice of withdrawal, declaring the partnership dissolved, and requesting an accounting. The plaintiff terminated his association with the firm on June 1. The remaining partners carried on the business of the firm and refused, by virtue of the agreement, to pay any portion of the accounts receivable to the plaintiff. The plaintiff brought an action for a declaratory judgment in the county court, urging that the partnership was dissolved upon his withdrawal and that partnership property, including accounts receivable, be divided equally among the three partners. The plaintiff reasoned that if the partnership dissolved upon withdrawal, the retiring partner's rights should be determined pursuant to section 123.37[2] of the Wisconsin statutes, and the partnership affairs

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[1] 23 Wis. 2d 453, 127 N.W. 2d 400 (1964). Relevant portions of the partnership contract were quoted by the court.

[2] "*Rights of retiring or deceased partner.* When any partner retires or dies, and the business is continued under any of the conditions set forth in [section] 123.36(1), (2), (3), (5) and (6) or [section] 123.33(2)(b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by [section] 123.36(8)."