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Evidence--Confession of a Third Party as Admissible Evidence in a Criminal Case

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plete harmony in the denial of third party confessions. The case of *Shelton* v. *Commonwealth*[22] of Harrison Circuit Court is entirely without precedent not only in Kentucky, but throughout the remaining Anglo-American jurisdictions. It does not fulfill the factual requirement of the most liberal American case nor does it have present the elements of dying declaration and statements against interest to lend credibility to it.

The decision of the Harrison Circuit Court is difficult to justify. It is said that it is in response to the demand that better ninety-nine guilty men go free than one innocent man be punished. But even in the face of this policy, there must be about the statement some factor upon which the court can rely for its credibility. If there must be a change in our rules of evidence in this respect, there must be some safeguard for the truth and validity of such statements. The Hines Case, the Brennan Case, and the Blocker Case each required such a safeguard and it is suggested that the confession by a third party be admitted only when there are facts in evidence connecting the declarant with the crime to which he has confessed.

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EVIDENCE—CONFESSION OF A THIRD PARTY AS ADMISSIBLE EVIDENCE IN A CRIMINAL CASE.*

In the trial of Andy Shelton for murder in the Harrison County Circuit Court in 1940, the defendant offered to introduce in evidence the confession of Jack Davis that he, Davis, had committed the crime, and that Andy Shelton had nothing to do with it. The evidence against Shelton was entirely circumstantial, but there was no evidence introduced by the defendant connecting the declarant with the crime. The confession was made under oath and in writing about an hour before Davis was electrocuted for another murder. The affidavit was admitted and the defendant acquitted.

This question has arisen many times and the overwhelming weight of authority is against admitting such a confession on the ground that it is hearsay.[1] However, a few jurisdictions have

100, 12 S. W. (2d) 329 (1928); Thomas v. Com., 257 Ky. 605, 78 S. W. (2d) 777 (1934).

[22] *Supra* n. 15.

* Ed. Note—This is a companion note to the one immediately preceeding. These notes discuss the problem argued by four seniors before the Ky. Court of Appeals, April, 1941.

[1] Donnelly v. United States, 228 U. S. 243, 57 L.Ed. 820, 33 S.Ct. 449 (1912); Wells v. State, 21 Ala. App. 217, 107 So. 31 (1926); Moya v. People, 79 Colo. 104, 244 Pac. 69 (1926); Thomas v. Commonwealth, 257 Ky. 605, 78 S.W. (2d) 777, 779-780 (1934); Davis v. Commonwealth, 95 Ky. 19, 23 S.W. 585 (1893); Brown v. State, 99 Miss. 719, 55 So. 961 (1911); State v. English, 201 N.C. 295, 159 S.E. 318 (1931); State v. May, 15 N.C. 328 (1833); Newton v. States, 61 Okla. Crim. Rep. 237, 71 P. (2d) 122 (1937); State v. Fletcher, 24

admitted such a confession under special circumstances.[2] There is even some dictum to the effect that Kentucky decisions are in conflict on this point,[3] but as a matter of fact they are readily distinguishable and are in accord with the majority.[4]

The argument that is most often given by courts in favor of admission is that it is a declaration against interest and so is an exception to the "hearsay rule."[5] While declarations against interest are admissible as an exception to the "hearsay rule," they are confined to statements against the pecuniary or proprietary interest of the declarant, and they do not extend to cases where the declaration is against the penal interest of the declarant.[6] Mr. Justice Holmes thought a declaration against penal interest even more likely to be true than a statement against the pecuniary interest.[7] This is not necessarily true. Here the declaration is not against any interest of Jack Davis. A man can be executed only once, no matter how many people he kills. There is no additional punishment to be inflicted upon Davis for killing the deceased. Since he will die under the odium of being a condemned murderer, he has no good reputation to be injured. This view is well set out in *Brown* v. *State*:[8]

Ore. 295, 33 Pac. 575 (1893); Sussex Peerage Case, 11 Cl. & F. 109, 8 Eng. Rep. 1034 (1844); Pappendick v. Bridgwater, 5 E. & B. 166, 119 Eng. Rep. 443 (1855). For additional cases see 35 A.L.R. 441; 22 C.J.S. section 749 (Criminal Law).

[2] Brennan v. State, 151 Md. 265, 134 Atl. 148 (1926); Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923); Blocker v. State, 55 Tex. Crim. Rep. 30, 114 S.W. 814 (1908).

[3] Harvey v. Commonwealth, 266 Ky. 789, 100 S.W. (2d) 829, 830 (1937) (Dictum).

[4] The two cases cited by the court in the Harvey case as holding that such a confession is admissable do not hold that. In those cases there is no confession or admission involved. There was only conduct before and during the crime that indicated that the third person committed the crime, and such evidence is always admissible, but it does not include confessions and admissions. The cases cited by the court to that effect were Etley v. Commonwealth, 130 Ky. 723, 113 S.W. 896 (1908) and Morgan v. Commonwealth, 14 Bush (77 Ky.) 106 (1878). However, in the following cases the court said that such extra-judicial confessions or admissions are inadmissible when made by third parties. Thomas v. Commonwealth, *supra,* n. 1; Minniard v. Commonwealth, 158 Ky. 210, 164 S.W. 804 (1914); Bacigalupi v. Commonwealth, 30 Ky. L.Rep. 1320, 101 S.W. 311 (1907); Selby v. Commonwealth, 25 Ky. L.Rep. 2209, 80 S.W. 221 (1904); Davis v. Commonwealth, *supra,* n.1; Cloud v. Commonwealth, 7 Ky. L.Rep. 818 (1886).

[5] Hines v. Commonwealth, *supra,* n. 2 at 847 (Reasoning).

[6] Donnelly v. United States, *supra* n. 1; United States v. Mulholland, 50 Fed. 413 (1892); Moya v. People, *supra,* n.1; Newton v. State, *supra,* n.1 at 126 (Quoting from the Donnally case).

[7] Donnelly v. United States, 228 U. S. 243, 278, 57 L. Ed. 820, 33 S.Ct. 449 (1912); Hines v. Commonwealth, *supra,* n. 5.

[8] *Supra,* n.1 at 962; Newton v. State, *supra,* n.1 at 127 (Quotes this approvingly from the Brown case).

> "The extreme case of a confession on the gallows by one claiming to be the true offender, employed by Wigmore to illustrate his view, affords no ground for the relaxation of the rule; for the experience assuring us that the last breath of men not wholly bad is sometimes employed in the asseveration of a falsehood justifies the rejection of the hearsay statements of a malefactor, who having no longer any concern as to his own fate, may wish to serve a pal, a kinsman, or a friend."

In the instant case it was contended that the confession of Davis should be admitted on grounds similar to those present in a dying declaration and, as such, an exception to the "hearsay rule." A dying man's statement is not admitted under the hearsay exception, unless the subject of the declaration is his own death.[9] This was not true in the principal case. However, it is argued that his confession was made under a sense of impending death and so would be as likely to be true as any dying declaration. Ordinarily, a man who makes a dying declaration is injured and feels his life slipping away. This is supposed to free him more or less from mortal entanglements and cause him to be anxious to tell only the truth, and so face his maker with a clear conscience, since he stands on that border between life and death. Here the declarant was not injured in any way. He was in full possession of all his faculties. He might have desired to protect loved ones by making them a secret gift of the bribe Andy Shelton might pay him to confess to a crime he never committed. Since he was not yet injured, it may be contended that he did not have that consciousness of being about to face his maker that a dying man is said to have.

A third party confession is hearsay.[10] When such a confession is offered, it is impossible to search the confessor's motives and test his accuracy and veracity by cross-examination.[11] The jury does not have a fair opportunity to compare the evidence and give the proper weight to the testimony of the declarant.[12] These things open up an opportunity for too much fraud. Mr. Justice Holmes in his dissent in the case of *Donnally* v. *United States*[13] showed that he saw this difficulty by making a prerequisite to the admission of such a confession, the fact that there should be no connection shown between the accused and the declarant. As a practical matter, if there was such a

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[9] People v. Hall, 94 Cal. 595, 30 Pac. 7 (1892); Davis v. Commonwealth, *supra,* n. 4; Mitchell v. Commonwealth, 12 Ky. L. Rep. 458, 14 S.W. 489 (1890); Newton v. State, *supra,* n.1; Sussex Peerage Case, *supra* n. 1 at 1044 (1844) (Dictum); 22 C.J.S., Sec. 749 (Criminal Law).

[10] *Supra,* n1.

[11] Donally v. United States, 228 U.S. 243, 273, 57 L.Ed. 820, 33 S.Ct. 449 (1912) (Reasoning); Newton v. State, *supra,* n.1 at 126 (Reasoning).

[12] Donnally v. United States, *supra,* n.11; State v. English, *supra,* n.1 at 319 (Reasoning).

[13] Donnally v. United States, 228 U.S. 243, 277, 57 L.Ed. 820, 33 S.Ct. 449 (1912) (Dissent).

connection, it could be very rarely proven. This idea is best set forth in a quotation from *Davis* v. *State*:[14]

> "If evidence of this kind were 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 had heard someone 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."

There is only one authority that can be definitely said to favor the admission of such a confession as was offered in the *present case* and that is Wigmore.[15] The cases[16] that are cited for the admission of such a confession are distinguishable, because in all of these cases there were very strong supporting facts tending to show the commission of the crime by the declarant. He usually had an opportunity to commit the crime and ample motive. As a matter of fact the court in the case of *Brennan* v. *State*[17] expressly limited the admission to cases where there were very strong supporting facts. In the case under discussion there were no supporting facts. So these cases are no support for the admission of the confession in the principal case. Wigmore would probably admit the confession in this case, but the weakness of his position is shown by this quotation from the case of *Brown* v. *State*.:[18]

> "Wigmore in his learned work on Evidence, while admitting that the weight of authority sustains the rule as stated, condemns it as unsound and barbarous. 5 Wigmore, section 1476. In this he finds no support in the other text-writers on the subject, nor in the legal encyclopedists, who perhaps had greater deference for the opinions of those learned judges who, daily witnessing the application of the law, refused to sacrifice its wholesome principles to untried theory."

Another argument that should be borne in mind is that an extra-judicial confession by a third party cannot be used against a defendant.[19] If it could not be used against a defendant, there seems to be no reason why it should be used for him. The case of *State* v. *May*[20] goes even further when it says:

> "Even a judgment upon the plea of guilty could not be offered in evidence for or against another; much less a bare confession."

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[14] 8 Okla. Crim. Rep. 515, 128 Pac. 1097, 1099 (1913).
[15] 5 Wigmore, Evidence (3rd ed. 1940) section 1476.
[16] *Supra*, n.2.
[17] *Supra*, n.2.
[18] 99 Miss. 719, 55 So. 961, 962 (1911); Newton v. State, *supra*, n.1 at 127 (Quotes this approvingly from the Brown case).
[19] Davis v. Commonwealth, *supra*, n.4 at 586 (Dictum); Neighbors v. State, 121 Ohio 525, 169 N.E. 839 (1930).
[20] State v. May, *supra*, n.1 at 333; cited approvingly in State v. English, *supra*, n.1 at 320.

Therefore, in conclusion, an extra-judicial confession of a third person to the commission of the crime should not be admitted. The reasons are that it is hearsay and tends to promote fraud. It does not come under any exception to the "hearsay rule." However, if such a confession should be admitted, it should be confined to cases where there are very strong supporting facts. Since there are no strong supporting facts in the *Instant Case,* it is submitted that the lower court was wrong in admitting such a confession.

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