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Evidence: Declarations against Interest in Montana

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these cases don't support the holding in the *Kirkup* case, where the services were being performed for the corporation itself and had not been paid for in any other way.

It is hoped that if the Montana Supreme Court is ever again called on to determine the validity of a contract for issue of stock in return for services to be performed before the date of issue, it will overrule *Kirkup v. Anaconda Amusement Co.* and follow what seems to be the weight of authority—that such a contract is valid.¹⁸

—Arthur C. Mertz.

EVIDENCE: DECLARATIONS AGAINST INTEREST IN MONTANA

Much confusion still exists regarding the distinction between a declaration against interest and an admission in the Law of Evidence.¹ Under common law rules, it has long been settled that as an exception to the hearsay rule, declarations of persons

¹⁸There is a further ground on which the holding of the *Kirkup* case might be questioned: Even assuming that the contract involved is one looking to the issuance of stock before the services are to be performed, does it necessarily follow that the contract is utterly *void*? The wording of the constitutional provision does not lead to such a conclusion. Indeed, the fact that it refers to "all fictitious increase of stock or indebtedness" as "void", whereas in its prohibition against issuance of stock except for "labor done, services performed," it does not use the word "void", implies that a violation of this latter prohibition is not to be treated as an utterly *void* transaction. A more reasonable interpretation, and one which would better serve the interests of all the parties involved, would be a holding by which the third person (plaintiff here) would be bound as a stockholder and made to pay to the corporation the difference, if any, between the par value of the stock and value of the services performed. This approach has been followed by many courts in cases involving the so-called "trust fund doctrine" or the "fraud or holding-out theory". See *Kelly v. Clark* (1898) 21 Mont. 291, 53 P. 959, 69 Am. St. Rep. 668, 42 L. R. A. 621; *King v. Pony Gold Mining Co.* (1903) 28 Mont. 74, 72 P. 309; *John W. Cooney Co. v. Arlington Hotel Co.* (1917) 11 Del. Ch. 286, 101 A. 879; *Meyer v. Ruby-Trust Mining and Milling Co.* (1905) 192 Mo. 162, 90 S. W. 821; *Corrington v. Crosby* (1926) 54 N. D. 614, 210 N. W. 342, 48 A. L. R. 660; *Mitchell v. Bowles* (Tex. Civ. App., 1923) 248 S. W. 459; *Murphy v. Pantan* (1917) 96 Wash. 637, 165 P. 1074. It is true that in those cases suit was by creditors of insolvent corporations to force holders of unpaid stock to pay up to par value, but the question involved was the same—namely, what effect should be given to an issue of stock for a consideration less in value than the par value of the stock.

¹THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898), p. 520. MORGAN, THE LAW OF EVIDENCE, SOME PROPOSALS FOR ITS REFORM (1927) pp. 37-49. 10 CAL. JURIS., *Evidence*, §329, p. 1097; JONES ON EVIDENCE, (4th ed. 1938) §323, p. 600.

since deceased are admissible in evidence, provided the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it and if the statement was opposed to his pecuniary or proprietary interest.³

Thus, in a leading English case,⁴ the time of a child's birth was proved by the production of the ledger of the man-midwife in which his charge for attendance was marked as paid, there being also evidence adduced that the work was done. One authority has pointed out: "The courts recognize that it is a fair presumption that men will neither falsify accounts nor make false statements if falsehood or mistake is prejudicial to their own pecuniary interests. This consideration, together with the facts that the declaration is not admissible during the lifetime of the author, that any fraudulent motive for making the statement may be shown, and that such declarations are frequently the only available mode of proof, are deemed to be of sufficient force to justify the admission of such declarations, although the sanction of an oath and the test of cross-examination are wanting."⁵

The statement must be against the pecuniary or proprietary interests of the party making it, at the time he makes it.⁶ If the party who made the declaration is alive, though out of the jurisdiction so that he cannot be called, the declaration is generally held to be inadmissible,⁶ though Professor Wigmore and other

³Middleton v. Melton (1829) 10 Barn. & Creswell (Eng.) 317; Short v. Lee (1820) 2 Jac. & Walk. (Eng.) 489; Matter of Woodward (1902) 68 App. Div. 327, 74 N. Y. S. 18. For cases interpreting statutes see: Welch v. All Persons (1929) 85 Mont. 144, 278 P. 110; Rulofson v. Billings (1903) 140 Cal. 452, 74 P. 35; Harp v. Harp (1902) 136 Cal. 421, 69 P. 28; Ross v. Brusie (1883) 64 Cal. 245, 30 P. 811; Kerner v. Peacock (1933) 129 Cal. App. 686, 19 P. (2d) 283.

⁴Higham v. Ridgway, (1808) 10 East 109; 2 SMITH'S L. C. (12th ed.) 301; see also Smith v. State (1903) 44 Tex. Crim. 606, 73 S. W. 401.

⁵JONES ON EVIDENCE (4th ed. 1938) §323, p. 601. See also WIGMORE ON EVIDENCE (3rd ed. 1940) §1455, p. 259 *et seq.* In re Colbert's Estate (1915) 51 Mont. 455, 153 P. 1022; Donnelly v. United States (1913) 228 U. S. 243, 57 L. E. 820, 33 S. Ct. 449; Aldred v. Ray (1915) 54 Okla. 154, 153 P. 664, 7 A. L. R. 1; Carpenter v. Carpenter (1936) 153 Ore. 584, 56 P. (2d) 305, 57 P. (2d) 1098, 58 P. (2d) 507, 105 A. L. R. 386; Halverson v. Moon & K. Lumber Co (1902) 87 Minn. 18, 91 N. W. 28, 94 Am. St. Rep. 669; German Ins. Co. v. Bartlett (1900) 188 Ill. 165, 58 N. E. 1075, 80 Am. St. Rep. 172.

⁶Sussex Peerage Case (1843) 11 Clark & Fenn. 85, 8 Eng. Reprint 1034. See also: People v. Hall (1902) 94 Cal. 595, 30 P. 7; In re Baird's Estate (1924) 193 Cal. 225, 223 P. 974.

⁷In re Friedman's Estate (1918) 178 Cal. 27, 172 P. 140; In re Horgan's Estate (1928) 93 Cal. App. 36, 268 P. 1090; Hines v. Comm. (1923) 136 Va. 728, 117 S. E. 843, 35 A. L. R. 431; Currier v. Gale (1860) 14 Gray (Mass.) 504, 77 Am. Dec. 343; Hart v. Kendall (1837) 82 Ala. 144, 3 So. 41.

NOTE AND COMMENT

authorities' who early suggested a more liberal rule, have led some of the courts to extend the doctrine where convenience and proper administration of justice permit.⁹ Thus, absence from the jurisdiction, illness, and insanity have been held sufficient under the principle of necessity.⁹

In general, the entire declaration is admissible even though it includes statements of fact not in themselves against interest, and when admitted the whole declaration is evidence.¹⁰ The declaration may be written or oral,¹¹ and oral declarations are admitted apart from the *res gestae* exception to the hearsay rule.¹² The declaration is admissible notwithstanding the declarant is neither a party nor in privity with a party to the action.¹³ The declarations of parties identified in interest with those against whom they are offered are denominated admissions, and as such are treated as a different category of the Law of Evidence.¹⁴

The admission of one of the parties to a suit is primary evidence as against him, and this is so even where the oral admissions relate to the contents of a written instrument.¹⁵ An admission has been defined as: "A statement or act which amounts to the affirmance of some fact material to the issue,

⁹"The principle of necessity is broad enough to assimilate other causes, but the rulings upon causes other than death are few. They are ill-judged, so far as they do not recognize the general principle of unavailability." WIGMORE ON EVIDENCE (3rd ed. 1940), *Statement of Facts Against Interest*, §1456, p. 261 citing numerous cases. See also: JONES ON EVIDENCE (4th ed. 1938) pp. 602-3.

¹⁰Weber v. Chicago, R. I. & P. Ry. Co. (1918) 175 Iowa 358, 151 N. W. 852, L. R. A. 1918A 626; Griffith v. Salus (1890) 77 Tex. 630, 14 S. W. 230.

¹¹South Omaha v. Wrzensinski (1903) 66 Nebr. 790, 92 N. W. 1045; Syracuse Engineering Co. v. Haight (C. C. A. 2d, 1938) 97 F. (2d) 573 where L. Hand, J., says: "The attempted defence of its introduction is that it was a declaration against . . . interest, but Brown was alive, and death, or at least inaccessibility, is a condition upon this exception to the hearsay rule." Mahaska Co. v. Ingalls (1864) 16 Iowa 81.

¹²Smith v. Moore (1906) 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684; Doe v. Thynne (1810) 10 East. 206, 103 Eng. Reprint 753, ANNOTATION: 11 Eng. Rul. Cas. 276; see *infra*, also R. C. M. 1935, §10515.

¹³Lay v. Neville (1864) 25 Cal. 546; Miller v. Wood (1872) 44 Vt. 378.

¹⁴Freda v. Tischbein (1913) 174 Mich. 391, 140 N. W. 502, 49 L. R. A. (N. S.) 700.

¹⁵Smith v. Hanson (1908) 34 Utah 171, 96 P. 1087; Turner v. Turner (1905) 123 Ga. 5, 50 S. E. 969, 107 Am. St. Rep. 76; Tompkins v. Fonda Glove Co. (1907) 188 N. Y. 261, 80 N. E. 933; JONES ON EVIDENCE (4th ed. 1938) §323, pp. 600 *et seq.*

¹⁶JONES ON EVIDENCE (4th ed. 1938) §235 *et seq.* p. 449; WIGMORE ON EVIDENCE (3rd ed. 1940) vol. 5, §1459, p. 265.

¹⁷Moriarty v. London Ry. (1880) L. R. 5 Q. B. 314; 39 L. J. Q. B. 109; Behrenfeld v. Breedlove (1915) 27 Cal. App. 419, 150 P. 71; Doyle v. Doyle (1913) 257 Ill. 229, 100 N. E. 950; Seevers v. Cleveland Coal Co. (1912) 153 Iowa 574, 138 N. W. 793.

where such affirmance operates, at the time of trial against the interest of the party responsible for it.¹⁶ The admissions may be either direct statements as to the facts in issue, or they may be statements of other facts or conduct from which the facts in issue may be so inferred. The admissions of a third party are admissible when the interest of such person is identified with that of a party to the suit.¹⁷ Thus, a former owner of land is considered so identified in interest with a subsequent owner holding under the same title, that his admissions respecting the title, made while he is in possession and vested with title, are receivable in evidence.¹⁸ The principle on which an admission against interest is received differs from that of a declaration against interest. It is never required as a preliminary to using an opponent's statement that he be dead or otherwise unavailable, and moreover, an opponent's admission is always receivable even though the fact as stated by him was not against his interest at the time of the statement.¹⁹ An admission is receivable when it is made by a party to a law suit or someone in privacy with him.²⁰

An important question arises whether the Montana Statutes²¹ have retained the common law rules relating to declarations against interest or whether the adoption of the code provisions changed the previously settled doctrines. The recent case of *Wilson v. Davis*²² decided by the Montana Supreme Court answers this question.

In that case plaintiff sued certain defendants in an action based on alleged loss of property because of the conspiracy and wrongful acts of the defendants in withholding from plaintiff deeds to certain real property and assignments of some personal property executed by deceased in her lifetime in favor of plaintiff and delivered by deceased to one of the defendants. To prove the execution and delivery of the deeds and of the assignments of the stocks and bonds, plaintiff testified to statements alleged to have been made to her and to others by the declarant in her lifetime. Plaintiff produced witnesses who testified that the declarant had said that she intended to provide for the plaintiff and her husband and had left them certain property.

¹⁶McKELVEY, EVIDENCE (4th ed. 1932) §72, p. 123.

¹⁷Sybray v. White (1809) 1 Mees. & W. 425.

¹⁸Freeman v. Brewster (1894) 93 Ga. 648, 21 S. E. 165.

¹⁹Caswell v. Maplewood Garage (1930) 84 N. H. 241, 149 A. 746; JONES ON EVIDENCE (4th ed. 1938) §236, p. 452.

²⁰Boston Ry. Co. v. O'Reilly (1895) 158 U. S. 334, 39 L. Ed. 1006, 15 S. Ct. 830; Riley v. Martinelli (1893) 7 Cal. 575, 32 P. 579; 32 P. 579; Manning v. Foster (1908) 49 Wash. 541, 96 P. 233.

²¹R. C. M. 1935, §10506 *et seq. infra*.

²²Wilson v. Davis (1940) 110 Mont. 356, 103 P. (2d) 149.

All of the declarations insofar as they related to the gift of property to the plaintiff were allegedly made subsequent to the alleged execution of the deed and assignments in question. The majority of the court held such declarations were incompetent to establish the actual transfers, saying that the declarant's statements were inadmissible under Montana statutory provisions both because they were not against her interest when made and because the defendants were not the declarant's successors in interest.²³

The court based its reasoning on certain sections of the REVISED CODES OF MONTANA 1935, namely, Sections 10506 to 10515 inclusive.²⁴ The court quoted Section 10509 which provides: "The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore proceedings against one cannot affect another." The court said that all of these statutes taken together provided but three exceptions to the hearsay rule, as follows: 1. Declarations of predecessor in title; 2. Declarations of decedent against his pecuniary interest; 3. Res Gestae.

The majority's conclusion was that under these sections a declaration in respect to an interest in real property was only admissible if the party attempting to introduce the declaration was a successor in interest of the declarant. The court said further, that even if the parties were in privity the declaration was inadmissible where the declarant had parted with title to

²³The court argues that accepting the plaintiff's theory of the case, the declaration would be inadmissible since the declarant had parted with title before she made the statements.

²⁴These statutes are as follows: §10506 "A witness can testify to those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions inferences, or the declarations of others are admissible." §10507 "A witness can be heard only upon oath. . . ." §10508 "A witness is presumed to speak the truth. . . ." §10509 "The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them. . . ." §10510 "Where, however, one derives title to real property from another, the declaration, act or omission of the latter, while holding the title, in relation to the property, is evidence against the former." §10511 "Where also, the declaration, act or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction." §10514 "The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest." §10515. "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. . . ." (Sections 10512 and 10513 are not in point here.) §10531 (subdivision 4) is quoted *supra*.

the property, but was still in possession, on the ground that the declarant had no *interest* even though the purpose of introducing the declaration was to show that the declarant had in fact parted with title. As far as the personal property was concerned, the court held that since the declaration concerning the real property was inadmissible, there was no need to discuss the statements alleged to have been made concerning the personality. There was a strong dissent in the case on all these propositions, Mr. Justice Erickson holding that the declarations were admissible since the sections of the Montana Code on this subject were not intended to abridge the distinction between declarations and admissions.²⁵

The case then, squarely held that the common law rule relative to declarations against interest was not the law in Montana. There is serious doubt whether such a construction of the statutes is advisable or necessary, at least in regard to declarations about real property. It is highly probable that the Montana statutes were intended to retain the common law rules.²⁶ The California Court in its interpretation of the same code provisions has not so limited its statutes, but has adhered to the common law doctrine, and has held on facts identical with those in the *Wilson* case that the declaration is admissible.²⁷

²⁵110 Mont. 371, 103 P. (2d) 157.

²⁶R. C. M. 1935, §10703 provides: "In this state there is no common law in any case where the law is declared by the code or the statute; but where not so declared, if the same is applicable and of a general nature, and not in conflict with the code or other statutes, the common law shall be the law and rule of decision." Even in view of this statute it would seem that the common law rules are applicable, since they are not in conflict with the statutes.

²⁷The Montana statutes are similar to the California code sections, (1856 through 1870, C. C. P.). The statutes were not taken from the N. Y. Field Code. In general, the California court has made no effort to decide the cases strictly according to the statutes, and in many cases the court has failed to distinguish between admissions and declarations against interest. *Bell v. Staacke* (1911) 159 Cal. 193, 115 P. 221; *Keith v. Electrical Engineering Co.* (1902) 136 Cal. 178, 68 P. 598; *Bias v. Reed* (1914) 169 Cal. 33, 145 P. 516; *Lauricella v. Lauricella*, (1911) 161 Cal. 62; 118 P. 430; *Williams v. Harter* (1898) 121 Cal. 47, 53 P. 405; 10 CAL. JURIS., EVIDENCE 306, 312, and 319, pp. 1055-1100. In *James v. James* (1926) 80 Cal. App. 185, 251 P. 666, the California Court said: "The next objection which seems necessary to consider is that in relation to excluding testimony as to statements made by the grantor of the plaintiff just before and after the execution and delivery of the conveyance by him to her. It is well-settled that all such statements which would indicate that the grantor named in the instrument had divested himself of title are admissible as against interest. . . ." citing *Williams v. Kidd* (1915) 170 Cal. 631, 151 P. 1, ANN. CAS. 1916E, 703. In this case the court pointed out: "It is, of course, well-settled that acts and declarations of a grantor made after he has parted with title to property and in disparagement of it are inadmissible when made in the absence of the

In the Montana case of *Laundreville v. Mero*²³ the Court held contra to the later *Wilson* case. There, defendant's theory, as in the *Wilson* case, was that the declarant was the owner of the property in question; the plaintiff's that the declarant had deeded it to him. The court said: "Contention is also made that the evidence given by Conley to the effect that decedent, after the making of the deeds told him that he had deeded all his land away, and that the forty acres in question belonged to Laundreville, was inadmissible as hearsay. This evidence was admissible by reason of subdivision 4, section 10531, Revised Codes 1921, which makes admissible 'the act or declaration of a deceased person done or made against his interest in respect to his real property'."²⁴

This decision is important because it allows the declaration to be admitted even though the declaration was made *after* the decedent had allegedly parted with title to his real property. The Montana Court in the *Wilson* case was unwilling to allow such a declaration to be admitted. However, such a declaration is clearly against the proprietary interest of the declarant when the declaration is made, even though the declarant merely has possession and not title when he makes the declaration,²⁵ and in Montana, under Section 10531, subdivision 4, a declaration of a deceased person concerning his real property should be admissible regardless of whether the declarant at the time of making the statement had *title* or not, and regardless of whether the party against whom the statement is admitted was in privity with the declarant, or whether the declarant was a party to the action or in privity with one of the parties. This interpretation of the Montana statute is in harmony with the common law decisions and has been enunciated by the California Court in con-

grantee. But here the very question was whether Williams had ever parted with title to the property. This was the main issue in the case; the claim of respondents being that there had been no delivery of the deed. . . . Such declarations were properly admissible as bearing on the question of whether there had been a delivery of the deed." Thus we see that the California Court has limited the rule neither on the basis of privity nor on the basis of title in interpreting the same statute.

²³*Laundreville v. Mero* (1929) 86 Mont. 43, 281 P. 749, 69 A. L. R. 416.

²⁴See also *Osnes Livestock Co. v. Warren* (1936) 103 Mont. 284, 62 P. (2d) 206; *Washoe Copper Co. v. Junila* (1911) 43 Mont. 178, 115 P. 917. Both of these cases are distinguishable as the dissenting opinion in the *Wilson* case points out. *Wilson v. Davis* (1940) 110 Mont. 373, 103 P. (2d) 149.

²⁵*Laundreville v. Mero* (1929) 86 Mont. 43, 281 P. 749, 69 A. L. R. 416. *Scott v. Crouch* (1902) 24 Utah 377, 67 P. 1068. The court in the *Wilson* case failed to overrule this *Laundreville* case. Also see note 31, *infra*.

struing the same statutes."¹¹ It is therefore submitted that the Montana Court in the *Wilson* case erred, at least with regard to the declaration in respect to the real property, when it said that the declaration was not admissible because it was not against interest and because defendants were not in privity with the declarant.

There is a question, however, whether under the Montana statutes a declaration against a party's interest in regard to his personal property may be admitted. The statute referred to, Section 10531 (4), refers only to real property. In the *Wilson* case, where there was both realty and personalty, Mr. Justice Erickson suggested that the declarations concerning the personal property could be received in evidence as part of the declaration concerning real property. This would seem to be a correct analysis, because the guarantees of truthfulness sufficient to accept the declaration about real property would hold good for the personal property.¹² Since there is no specific Montana statutory enactment on declarations relating to personal property, we may inquire whether the intent of the legislature was to exclude such declarations, although that would violate the common law rule.¹³ An analogy is the parol evidence rule stated in Section 10517, which gives the Montana statutory rule for the reception of oral evidence, but which has been interpreted to be merely declaratory of the common law rule.¹⁴ It is submitted that this approach should be adopted concerning declarations

¹¹As pointed out in note 27, *supra*, the California Court on similar facts has interpreted the statutes in the light of the common law rules. "When the issue is whether a party had divested himself of title, his declarations and acts after the signing of the instrument, in form a deed to the property in dispute, and tending to show a delivery thereof are admissible as declarations against interest." *Rice v. Carey* (1915) 170 Cal. 748, 151 P. 135; *Donahue v. Sweeney* (1915) 171 Cal. 388, 153 P. 708. The excellent annotation on this subject in ANN. CAS. 1916E, p. 713 cites this rule with approval saying: "In some cases, evidence of declarations by a grantor after the conveyance as to the delivery of the deed has been admitted without any question being raised as to its admissibility", citing cases. And, further, "In these cases, the fact that the declaration is made while the declarant is still in possession of the property makes the declaration be against his proprietary interest, and thus satisfies the interest requirement."

¹²*cf.* note 10, *supra*.

¹³*cf.* note 26, *supra*. R. C. M. 1935, §17 does not repeal any law or rule except in cases provided for by the code. The *Wilson* case holds such declarations inadmissible relying generally on R. C. M. 1935, §10509.

¹⁴§10517 provides: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms. . . ." That this section is merely declaratory of the common law is held in: *Gaffney Mercantile Co. v. Hopkins* (1898) 21 Mont. 13, 52 P. 561; *Riddell v. Peck-Williamson* (1902) 27 Mont. 44, 69 P. 241.

against interest regarding personal property, and that even where the declaration relates solely to personal property, the better view would be to allow the declaration to be admitted.

Professor Wigmore in speaking of the general statutory enactments dealing with statements against interest has remarked: "They are for the most part obstructive or confusing rather than helpful; for they either restate merely, in a form too concise to be useful, the established common law rule, or they mingle in inextricable confusion certain fragments of this and other exceptions."⁵⁵ This criticism is surely trenchant for Montana. Section 10510 concerning declarations of a predecessor in title clearly refers to an *admission*. Section 10514 making admissible declarations of decedents against their pecuniary interest, is in harmony with common law rules, but this particular statute is made incomprehensible by the addition of the words "against his successor in interest" which makes it possible to construe the statute as providing that declarations against interest are admissible only against successors or privies, which clearly was not the common law rule. Section 10531 (4), permitting the admission of declarations against interest, in terms applies only to real property, and if construed as so limiting the law it engrafts another condition in Montana which was not contemplated by the common law. These three statutes, either because of poor original draftsmanship or failure by the framers to understand the common law, have resulted in confusion.

A decision like that in the *Wilson* case, which clearly confused declarations against interest with admissions, does not come as a surprise under such statutes. However, it is the opinion of the author of this comment that the declaration sought to be introduced in the *Wilson* case was clearly against the declarant's interest when made and so should have been admitted even though the parties were not in privity. Further, it is suggested that the Montana Court in the future should receive declarations against interest in regard to personal property as well as realty, and recognize the clear cut, common law distinction between admissions and declarations against interest.

—Walter Paul Coombs.

⁵⁵ WIGMORE ON EVIDENCE (3rd ed., 1940) §1455, p. 260. Re Wilfred B. Keenan (1934) 287 Mass. 577, 192 N. E. 65, gives a detailed discussion of the Massachusetts statutes, while 96 A. L. R. 679 contains an excellent annotation on the statutory enactments of several other states.