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Evidence - Admissibility of a Declaration against Penal Interest - Sufficiency of Trustworthiness

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the court utilized the actual use doctrine in finding that the lien had not been filed in time to meet the statutory requirement.

Jurisdictions adjacent to North Dakota have adopted varying viewpoints as to which doctrine to apply That Montana takes a stricter view as to use is demonstrated by the fact that Montana by statute[22] and through case interpretation[23] places the burden of proof on the lien claimant, and he must show actual use or no lien attaches. South Dakota courts state that the requirement of actual use is the better rule and further state that it is incumbent on the contractor to see that his goods are actually used.[24] Minnesota has one of the most generous courts in allowing mechanics' liens[25] and consequently adopts the more liberal presumptive use doctrine under which delivering or furnishing of goods is sufficient for a lien to attach unless the owner rebuts the presumption.

Although the North Dakota statute requires use,[26] our courts have adopted a liberal viewpoint[27] and follow the presumptive use doctrine. This interpretation relieves the materialman of the burden of watching his material until it is put into the structure or consumed in the process and places the burden of proof on the owner who is in a better position to prove non-use than is the materialman to prove actual use. Notably North Dakota's statute goes further than some others as it allows the mechanics' lien to attach the land on which the structure is located as well as the structure itself.[28] North Dakota also allows the mechanics' lien priority over all other attachments if filed within the statutory period, however, failure to file within the statutory period will not bar the lien, but the priority will then be determined by the order in which they are filed.[29]

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EVIDENCE—ADMISSIBILITY OF A DECLARATION AGAINST PENAL INTEREST—SUFFICIENCY OF TRUSTWORTHINESS—Plaintiff sued decedent's estate for the return of stolen money An accomplice, while

22. MONT. REV. CODE § 45-502 (1947).
23. Rogers-Templeton Lumber Co. v. Welch, 56 Mont. 321, 184 Pac. 838 (1919).
24. Pittsburgh Plate Glass Co. v. Leary, 25 S.D. 256, 126 N.W 271 (1910).
25. See, generally, 39 A.L.R.2d 406.
26. N.D. CENT. CODE § 35-27-01 (1961).
27. McCauli-Webster Elevator Co. v. Adams, 39 N.D. 259, 167 N.W 330 (1918).
28. N.D. CENT. CODE § 35-27-19 (1961).
29. N.D. CENT. CODE § 35-27-22 (1961). It should also be noted that the Uniform Commercial Code which is now effective in North Dakota has no effect on statutory liens such as the mechanics' liens. This is stated in 41-09-04.

in the custody of Chicago police, stated that he, deceased and another had stolen the money in question. This was the only evidence that linked deceased to the theft. The Court of Appeals of Arizona *held*, the statement was admissible as a declaration against a penal interest, but felt that the statement did not fulfill the requirement of trustworthiness since declarant was incarcerated for murder, thus this statement could not be against his interest—pecuniary, proprietary or penal. *Dieke v Great Atlantic & Pacific Tea Company*, 415 P.2d 145 (Ariz. 1966)

This case is in holding with a trend of decisions that have recognized the admissibility of a declaration against a penal interest, contrary to the majority rule which allows only those declarations which are against the pecuniary or proprietary interest of the declarant.[1] Perhaps the instigation of this trend was brought about as far back as 1913 when Justice Holmes, in a vigorous dissent, pointed out that a declaration against a penal interest was likely to be the most convincing of any type of statement.[2] The majority rule was again attacked in 1923 when the Virginia Court intimated that under the proper circumstances it would hold such a statement admissible.[3] In 1964 California unequivocally overruled the majority rule and held a declaration against penal interest to be admissible.[4] The court seemed to have little reluctance in arriving at this decision since it had previously intimated that a declaration against a penal interest should be admissible.[5] The courts in other states have adopted the minority view although some limit its application to the particular facts involved.[6] This trend is supported by the Uniform Rules of Evidence.[7] The adoption of these uniform rules, however, has not been widespread.[8]

Hearsay is an out of court statement offered to prove the truth of the matter asserted therein,[9] and such statement is generally

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1. See, *e.g.*, Donnelly v. United States, 228 U.S. 243 (1915) *In re* Andrews' Estate, Iowa 819, 64 N.W.2d 261 (1954) Brown v. Warner, 78 S.D. 647, 107 N.W.2d 1 (1961).
2. Donnelly v. United States, *supra* note 1.
3. See Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923).
4. People v. Spriggs, 60 Cal.2d 868, 389 P.2d 377 (1964).
5. See People v. One 1948 Chevrolet Convertible Coupe, 45 Cal.2d 613, 290 P.2d 538 (1955)
6. *E.g.*, Sutter v. Easterly 345 Mo. 282, 189 S.W.2d 284 (1945) (third person's affidavit making statements against penal interest admitted although he refused to testify claiming right against self-incrimination) Blocker v. State, 55 Tex. Crim. 30, 114 S.W 814 (1908) (hearsay declaration admissible if prosecution's evidence is solely circumcircumstantial, and it is shown that declarant might have committed the crime) People v. Lettrich, 413 Ill. 172, 108 N.E.2d 488 (1952) (third person's confession admissible where prosecution's sole evidence was defendant's repudiated confession) Brennan v. State, 151 Md. 265, 134 Atl. 148 (Ct. App. 1926) (hearsay declaration of paternity admitted in behalf of defendant prosecuted for bastardy) McClain v. Anderson Free Press, 232 S.C. 448, 102 S.E.2d 750 (1958) (approved rule admitting declarations against penal interest, but holding evidence inadmissible under facts of case).
7. UNIFORM RULES OF EVIDENCE 63 (10).
8. See KAN. STAT. ANN. ch 60 § 460(j) (1963).

not admissible in evidence because it does not have the sanction of oath and cross-examination.[10] The courts have arrived at various exceptions to the rule, one of which is a declaration against interest, based on the probability of such a statement being trustworthy.[11] Other requirements for this exception are that the declarant must be unavailable[12] and that he have particular knowledge of the facts relative to the issue.[13] As to unavailability, the courts are not in complete harmony Some courts allow only declarations of deceased persons[14] while others feel that if declarant is unavailable for any practical reason, he should be considered unavailable.[15] Although unavailability takes away the sanctions of the oath and cross-examination, it seems the courts rest assured that by human nature one does not deliberately jeopardize his interests.[16]

The admissibility of a declaration against interest has been recognized in England since the 17th Century,[17] the English Courts originally holding such statements admissible regardless of the interest affected thereby [18] But in 1844 the House of Lords held, in *The Sussex Peerage* case, that only a declaration against a pecuniary or proprietary interest would be admissible.[19] This was definitely a backward step from previous decisions and was probably a misinterpretation. The case relied on by the House of Lords involved proving the date of birth of a child and the records of a mid-man were held admissible to show that he had been paid for his services on a certain day [20] Perhaps recognizing that it was against the mid-man's pecuniary interest to mark the account paid, the court in the *Sussex* case held that only a declaration against a pecuniary or proprietary interest would be admissible. Although this was not the rule established by the prior decisions, the House of Lords interpreted the extensive arguments of that case to mean that the rule should not be carried too far The House of Lords apparently felt that by allowing a declaration against a pecuniary interest, the exception was extended to its maximum. This became the rule

9. See Gurganus v. Guaranty Bank & Trust Co., 246 N.C. 655, 100 S.E.2d 81 (1957).
10. See Hines v. Commonwealth, *supra* note 3 at 847.
11. *E.g.*, Lane v. Pacific Greyhound Lines, 26 Cal. 575, 160 P.2d 21 (1945).
12. See People v. Spriggs, *supra* note 4 at 381.
13. See Weber v. Chicago, R. I. & P Ry. Co., 175 Iowa 358, 151 N.W 852 (1915).
14. *E.g.*, Beebe v. Kleidon, 242 Minn. 521, 65 N.W.2d 614 (1954).
15. *E.g.*, Weber v. Chicago, R. I. & P Ry. Co., *supra* note 13 at 861 (insanity) Johnson v. Sleizer, 268 Minn. 421. 129 N.W.2d 761 (1964) (outside of jurisdiction) Sutter v. Easterly 345 Mo. 282, 189 S.W.2d 284 (1945) (claim of privilege against self incrimination).
16. See Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923).
17. See Warren v. Greenville, 2 Stra. 1129, 93 Eng. Rep. 1079 (1740). See, generally, 5 WIGMORE, EVIDENCE §§ 1476, 1477 (1940, Supp. 1964).
18. See Middleton v. Melton, 10 B. & C. 317, 109 Eng. Rep. 467 (1829).
19. 11 Clark & Fin. 85, 8 Eng. Rep. 1034 (1844).
20. See Higham v. Ridgway, 10 East 109, 103 Eng. Rep. 717 (1808).

passed on to America as part of the English Common Law and adopted by a majority of jurisdictions.[21]

As stated before, the basis of admitting hearsay into evidence, if admitted at all, is due to its high probability of trustworthiness.[22] There does not appear to be a clearly enunciated reason why a declaration against a penal interest should not be included in this category, other than that it is not trustworthy. It will be conceded that the veracity of a criminal may not be as reliable as that of a model citizen, but it is submitted that this should go to the weight of the statement rather than to its admissibility. Since this type of evidence may be important in achieving justice, one would think that the element of self-interest in itself would afford a substitute for the oath and cross-examination. Moreover, there is little doubt but that a conviction of crime involves economic loss,[23] thus, some support may be extracted from the majority rule by demonstrating that this is a pecuniary loss. Some merit may also be found in the fact that under the existing conditions of our economic status, one may be willing to tell "a little white lie" if it only involves money, but may be very reluctant to make a statement which would subject him to punishment for a crime. The situation becomes extremely absurd when an accused person cannot use such a statement to exonerate himself.[24] Thus, the guilty party could sit in a jail which is not within the jurisdiction of the court in which a defendant is being tried and could make all kinds of statements, sign confessions and plead guilty to the same crime, yet under the majority rule, this defendant could not avail himself of these statements. If this approach was followed, both persons could be accused of a crime committed by only one.

The North Dakota Court has recognized the Hearsay Rule on a few occasions in the past 20 years but has rendered no decision on the admissibility of a declaration against interest. The court seems to be quite conservative towards allowing exceptions to the rule, as is illustrated by the case in which an engineer testified to the loss sustained by the insured resulting from a fire. Although the engineer did not refer to the report he had submitted to the insurance adjuster, he did explain it fully in his testimony. The court held the report inadmissible as hearsay since the engineer did not use it to refresh his memory.[25] It would seem that since the person

21. *E.g.*, Donnelly v. United States, 228 U.S. 243 (1915), *In re* Andrews' Estate, 245 Iowa 819, 64 N.W.2d 261 (1954), Brown v. Warner, 78 S.D. 647, 107 N.W.2d 1 (1961).
22. See Lane v. Pacific Greyhound Lines, 26 Cal. 575, 160 P.2d 21 (1945).
23. See People v. Spriggs, 60 Cal.2d 868, 389 P.2d 377 (1964).
24. See People v. Lettrich, 413 Ill. 172, 108 N.E.2d 488 (1952).
25. Grand Forks Building & Development Co. V Implement Dealers Mut. Fire Ins. Co., 75 N.D. 618, 31 N.W.2d 495 (1948).

who had made the report was on the stand, had taken the oath and was subject to cross-examination, a more liberal court would have accepted the report.[26]

Should this conservative attitude still prevail in our court, there may be little chance of the adoption of the rule admitting declarations against a penal interest. Yet, since there is no precedent to bind the court as to the admissibility of a declaration against penal interest, it is submitted that the court should, in a proper circumstance, adopt the minority view The court must use its discretion to determine trustworthiness and unavailability, but by adopting the minority view, after finding these requirements fulfilled, the court will have an avenue conducive to its basic goal: "the search for truth."

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26. *Cf.* City and County of Honolulu v. Bishop Trust Co., 404 P.2d 373 (Hawaii 1965).