September 29, 1958

MEMORANDUM

Submitted by
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SUBJECT: WHETHER RULES WHICH DISQUALIFY CERTAIN PERSONS AS WITNESSES ALSO DISQUALIFY HEARSAY DECLARANTS

(Rule 62(7))

5. The Dead Man Statute (C.C.P. § 1879 (3)).

In this study we do not consider the rule requiring a witness to possess direct knowledge (C.C.P. § 1845) or the Opinion Rule. Hence we do not discuss whether (for example) a party's admission must be based on first hand knowledge, whether a declaration against the interest of a declarant must be so based, whether a dying declaration stating declarant's "conclusion" is inadmissible, etc. The bearing of the Knowledge and Opinion rules upon various hearsay exceptions has been treated in memoranda dealing with those exceptions and will not be considered herein. Our concern at this point is rather with the applicability to hearsay declarants of the five rules stated above.

The Problem in General

There is no overall categorical answer to the question under investigation because, as McCormick tells us (McCormick, p. 505):

> "The application of the standards of competency of witnesses to declarants whose statements are offered in evidence under the various hearsay exceptions has never been worked out comprehensively by the courts . . ."

We can perhaps best summarize what little law there is by considering the problem seriatim with reference to each of the several exceptions to the hearsay rule which are indicated by the ensuing titles.

Dying Declarations

Insanity and Infancy. Wigmore (§ 1445) states that "In general, for testimonial qualifications, the rules to be applied [to dying declarants] are no more and no less than the ordinary

ones . . . for the qualifications of other witnesses." Therefore "if the declarant would have been disqualified to take the stand, by reason of infancy [or] insanity . . . his extrajudicial [dying declaration] must also be inadmissible" . Dicta in two California cases are in accord (People v. Sanchez, 24 C. 17 at 26 (1864); People v. Dallen, 21 C.A. 770 at 781 (1913)).

Dead Man Statute. Since dying declarations are admissible only in homicide cases and since the Dead Man Statute applies only in certain civil cases, we do not have any question of the applicability of the Dead Man Statute to declarants of dying declarations.

Spouse Rule. P.C. § 1322 provides in part as follows: "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one [is party], except with the consent of both or in case of criminal actions or proceedings for a crime committed by one against the person . . . of the other . . ." Dying declarations are admissible only in homicide cases and, furthermore, only the victim's declarations are covered by the exception. It follows that we have the question of applying the Spouse Rule to the declarant of a dying declaration only when one spouse is charged with homicide of the other and the other's dying declaration is offered. Such case is a "criminal action" for "a crime committed by one against the person of the other" (quotes from P.C. § 1322). Had the crime been attempted murder and had the attacked spouse survived he or she would have been a competent witness under the exception in § 1322. It would seem therefore that where the charge is homicide this should be regarded as a case where the declarant,

if alive, would have been a competent witness and the dying declaration should be received either for or against defendant insofar as the controlling factor is the notion that the rules for witnesses apply to declarants.

Depositions and Former Testimony

The problem of witness-competency rules as applicable to deponents and former witnesses can best be brought out by a series of hypothetical cases.

Case 1. Action of People v. D. At the preliminary W testifies for the prosecution. W is then sane. Prior to the trial W becomes insane and remains so during the trial. At the trial the People offer a transcript of W's testimony at the preliminary. D's objection overruled.

COMMENT: In general competency rules apply to former witnesses and deponents (Wigmore § 479). In general the competency of the former witness or deponent is judged as of the time that the former testimony was given or the deposition was taken (Wigmore § 483 (3)). In our case W, being sane at the time the former testimony was given, the transcript thereof is admissible. 43 C.A. 2d 238. Undoubtedly the same result would follow in case of a deponent who was sane at the time his deposition was taken but who is insane at the time the deposition is

offered, though, as explained in the appended footnote, C.C.P. § 2016 (e) is confusingly phrased.*

Case 2: Action of P. v. D. P takes W's deposition. W is then insane. Prior to the trial W recovers sanity but leaves the State. At the trial P offers the deposition. D objects on the ground of W's insanity at the time of the deposition. Sustained.

COMMENT: Again competency rules in general apply to deponents (Wigmore § 479) and again competency is usually judged as of the time of the deposition (Wigmore § 483 (3)). Again, however, C.C.P. § 2016 (e) is confusingly phrased, as explained in the appended footnote.**

Case 3: Action of People v. D upon a charge of forgery. The People call D's wife. She testifies without objection. D also testifies. Now D is charged with having committed perjury in the first case. In the perjury trial the People call D's wife. D's objection on the ground of P.C. § 1322 is sustained. The People then offer the transcript of the wife's testimony in the forgery case. No objection by D; transcript admissible. If, however, D had objected to

the transcript on the ground of P.C. § 1322 the transcript would probably have been inadmissible.

COMMENT: Authority for the suggested rulings is the opinion of the Supreme Court denying a hearing in People v. Chadwick, 4 C.A. 63, 75 (1906). In that case D did not object to his wife's testimony at the first trial or to the transcript of such testimony at the second trial (he did, however, object to the proposed testimony of the wife at the second trial). In affirming D's conviction the District Court of Appeal did not use the rationale of waiver of objection to the transcript by failure to object. Rather the Court stated and apparently rested its decision upon the following broad generalization:

> "The provisions of the code (Code Civ. Proc., sec. 1881 [1]; Pen. Code, sec. 1322) prohibiting a husband or a wife from being examined as a witness for or against the other, except with the consent of both, does not preclude the people, in a criminal proceeding against either of the spouses, from proving the statements or declarations of the other (if otherwise admissible) by the testimony of a witness who heard them. The code merely makes either spouse incompetent as a witness in an action or proceeding against the other, but does not render their statements elsewhere given privileged against being shown by competent testimony."

This generalization is in marked contrast to Wigmore's proposition to the effect that "it would seem that hearsay declarations by the wife or husband, such as would ordinarily be receivable under some exception to the Hearsay Rule, should be excluded when offered against the other spouse (Wigmore § 2233). Furthermore the generalization seems to be disapproved by the following statement of the Supreme Court in the opinion of that Court denying a hearing:

> "If the decision of the district court of appeal was intended to declare, as the defendant insists that it does, that when, upon the trial of a case, the wife of the defendant has testified against him without objection by him, her testimony then given may, in all cases, be read against him, over his objection, upon another trial of that or any other charge against him, we do not approve of that portion of it. No such question was necessarily involved in the case. The affirmance of the judgment, so far as the reading of such testimony is concerned, was justified by the fact that upon the trial of the forgery charge the defendant made no objection to the testimony of Norinee Schneider against him, and that upon the trial of the perjury case, resulting in the judgment appealed from, he did not object to the reading of the testimony given by her upon the other trial."

Nevertheless at least one commentator (Hines, Privileged Testimony of Husband and Wife in California, 19 Calif. L.Rev. 390, 394 (1931)) and two subsequent California cases

seemingly overlook the Supreme Court's opinion and suggest that the DCA generalization is the law of this State (First National Bank v. De Moulin, 56 C.A. 313, 323 (1922); People v. Peak, 66 C.A. 2d 894, 906 (1944). If this view is accepted the spouse rule is inapplicable to former testimony, to excited utterances (res gestae) etc. We shall therefore have occasion to make further reference to this view and to the opposing Wigmore view as the study proceeds.

It is perhaps worth noting that under the Wigmore view that the Spouse Rule does apply to hearsay declarations, the time as of which the disqualification is operative or inoperative is the time when the hearsay declaration is offered, not the time when made (Wigmore § 2237 (3) and footnote 6 thereto). It follows that under this view a man could suppress the hearsay declaration of a woman (otherwise admissible against him) by marrying the woman (unless, of course, the case is one of the exceptional cases stated in C.C.P. § 1881 (1) or P.C. § 1322).

Finally it is perhaps worth noting that in the case of former testimony most objections which could have been made when the testimony was first given may be withheld at that point and be successfully advanced for the first time when evidence of the testimony is offered at the second trial (McCormick § 236). Under the Supreme Court's opinion in Chadwick this, of course, is true of the P.C. § 1322 objection.

Case 4: A sues B for money judgment for goods and services allegedly supplied by A to B. A testifies in support of his claim and is cross-examined by B. Mistrial. Before the action is reached for re-trial A dies and his administrator is substituted as party plaintiff; B also dies and his administrator is substituted as party defendant. Upon the re-trial plaintiff offers a transcript of A's testimony. D objects on the ground of the Dead Man Statute (C.C.P. § 1879 (3)). Query as to the ruling.

COMMENT: This problem has arisen in other jurisdictions and the decisions are in conflict (Wigmore § 1409, footnotes 2 - 4). No

apposite California case has been found. The better view, it would seem, is that the transcript is admissible. At the time A testified B was alive. Therefore the dangers against which the Dead Man Statute is supposed to be the safeguard (temptation to perjury because of death of B) were simply non-existent. If B had been dead at the time A testified the situation would be entirely different. In other words the disqualification of the Dead Man Statute probably applies to deponents and former witnesses but probably the disqualification is judged as of the time the deposition or former testimony is given. Compare Case 3 in this regard.

SUMMARY: (1) Infancy-insanity disqualification applies to deponent's and former witnesses, qualification being judged as of time deposition is taken or former testimony is given.

(2) Spouse Rule probably applies, qualification being judged as of time deposition or former testimony is offered.

(3) Dead Man Rule probably applies and, if so, (hopefully) qualification is judged as of time deposition is taken or former testimony is given.

Declarations Against Interest

We find no case or other authority discussing our problem in connection with this exception. The elements of the exception themselves probably embrace at least maturity-sanity competency requisites. That is, a child too young to testify is too young to speak consciously against his interest. So, too, of a loon too daft to testify. Thus the proponent of a declaration against interest probably must show that his declarant possessed minimal maturity-sanity competence to testify in order to show that the declaration was against interest. What is said above under Cases 3 and 4 is germane to the question of Spouse Rule and Dead Man Statute disqualification of declarants of declarations against interest, assuming the problem could conceivably arise - a doubtful assumption, it seems.

Excited Utterances (Res Gestae)

Infancy. Wigmore's position is that the disqualification for infancy does not and should not exclude a child's excited utterance otherwise admissible. His reasoning is that the principle of the excited utterance exception "obviates the usual sources of untrustworthiness in children's testimony" and "furthermore the orthodox rules for children's testimony are not in themselves meritorious" (Wigmore § 175 (11)). McCormick concedes

that "it is held that evidence of spontaneous declarations of infants is admissible despite the incompetency of the child as a witness" (McCormick p. 582). However, he doubts the wisdom of so holding because, he says, "as to the qualification of mental capacity as applied to young children . . . in its modern form of a mere requirement that the witness must only possess such minimum capacity to observe, remember and narrate the facts as will enable him to give some aid to the trier, it would seem sensible to apply that standard to the out-of-court declarant . . . ." (McCormick p. 505). Neither author cites any California case on the point and none has been found.

Insanity. Wigmore thinks that the "disqualification of insanity should probably be treated for the present purpose like that of infancy" (Wigmore § 1751 (4), citing a Texas case for this view). McCormick cites the same Texas case as indicating the current rule which he, however, questions on the same basis (stated above) on which he questions the infancy rule (McCormick p. 582 and p. 505).

Spouse Rule. Wigmore's position is: "it would seem that hearsay declarations by the wife or husband, such as would ordinarily be receivable under some exception to the Hearsay Rule, should be excluded when offered against the other spouse" (Wigmore § 2233), the qualification of the declarant spouse being judged as of the time the declaration is offered in evidence rather than as of the time the declaration was made (Wigmore § 2237 (3)).

McCormick states the rule to be that an excited declaration is admissible even when "made by the husband or wife of the accused in a criminal case" (p. 582). He cites, however, only one Texas case and makes no reference to Wigmore's view or to the authorities cited by Wigmore supporting that view.

As indicated above under Case 3, a broad generalization in the California Chadwick case is opposed to the Wigmore view but is of doubtful validity.

Dead Man Statute. Suppose P sues X's administrator for damages for alleged injuries allegedly inflicted upon P by X's alleged negligence. P offers evidence of P's excited utterance made right after the accident. D objects on the basis of the Dead Man Statute. Query as to the ruling. In view of the rationale of the Dead Man Statute (fear of perjury motivated by interest) it seems that D's objection should be overruled on the basis that P's excitement and the resulting spontaneity of his statement override the interest-factor. (See by analogy Wigmore § 1751 (3) and Case 4 supra.)

Admissions

Infancy and Insanity. Wigmore's position is as follows (§ 1053):

> "A primary use and effect of an admission is to discredit a party's claim by exhibiting his inconsistent other utterances . . . It is therefore immaterial whether these other utterances would have been independently receivable as the testimony of a qualified witness. It is their inconsistency with the party's present claim that gives them logical force. . . .

"On the same principle, the admissions of an infant party would be receivable. Theoretically, the admissions of a lunatic party would stand upon the same footing, although the weight to be given them might be 'nil'."

McCormick's position is as follows (§ 240):

"In so far as outmoded testimonial restrictions still survive, such as disqualification for conviction of crime, marital disqualification, and the test of ability to understand the obligation of an oath as applied to small children, it seems that these requirements should not in general be extended to hearsay declarants nor in particular to admissions. But as to the qualification of mental capacity as applied to young children and insane persons, in its modern form of a mere requirement that the witness must only possess such minimum capacity to observe, remember and narrate the facts as will enable him to give some aid to the trier, it would seem sensible to apply that standard to the out-of-court declarant and the party making admissions. If it does not appear that this minimum capacity was wanting, then the immaturity or insanity of the declarant would only affect the credibility of the admission or other declaration. And so of intoxication, hysteria and similar temporary derangements. If the party making the admission, or other declarant, was not shown to be incapable of making any rational statement, his intoxication or other derangement would be considered only as affecting the credibility of the statement."

In our opinion McCormick's position is preferable to Wigmore's. An admission is substantive evidence, whether made in or out of court. If the admitter when making his out of court statement is so young or so insane that he could not have been heard in court at that time, we think that his out of court statement should be excluded. This seems to be the rule when the admission is in the form of a confession by defendant in a criminal case (People v. Isby, 30 C.2d 879). It should, we submit, be the rule with reference to all admissions.

Spouse Rule. Usually a third person's out-of-court statement is hearsay as to a party and is not, of course, admissible against the party as his admission. If the party is a husband and the out-of-court declarant is his wife what has just been said is equally applicable. It follows that the situations are very few in which the wife's out-of-court statement could be regarded as the husband's admission and there is little occasion therefore to consider whether the wife-against-husband disqualification applies to out-of-court declarations constituting admissions (Wigmore § 2232). A few such situations, however, do arise under C.C.P. § 1870, subdivisions (5) and (6) which provide as follows:

> "5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence [is admissible]. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party;
>
> 6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy [is admissible];"

What if the declarant in such cases is wife of the party? It would seem that the § 1870 rules should override the Spouse Rule (Wigmore § 2232 (1)). Under our decisions it seems clear that this is so insofar as the joint interest principle of § 1870 (5) is concerned. (Wilcox v. Berry, 32 C.2d 189). Possibly it is not so insofar as the agency principle of that section is concerned (Ayres v. Wright, 103 C.A. 610).

A superficially similar problem is presented by C.C.P. § 1870 (3) which is as follows:

"3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto; [is admissible]"

What if the "another" referred to is the wife of the party? Here, it is clear enough that the evidence is admissible (People v. Leary, 28 C.2d 740) because, as Wigmore says:

". . . the statements are receivable, as would be those of any other person; for they are not offered as hers, but as his by assent and adoption;"

Dead Man Statute. An admission is a party's statement offered against the party. If plaintiff sues an administrator plaintiff could not use his own out-of-court statement because of the Hearsay Rule. If defendant offers the statement there is, of course, no objection under the Dead Man Statute. It seems, therefore, that the problem of disqualification of a party-declarant under the Dead Man Statute does not arise.

Declarations of Physical and Mental Condition

Presumably maturity-sanity requisites are applicable here. Query as to Spouse and Dead Man Rule. See discussion supra under Cases 3 and 4.

Pedigree Declarations

Presumably maturity-sanity requisites apply. Query as to others. See discussion supra under Cases 3 and 4.

U.R.E.

The U.R.E. preserve maturity-sanity requirements in the following terms:

"Rule 17. A person is disqualified to be a witness if the judge finds that (a) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth. An interpreter is subject to all the provisions of these rules relating to witnesses."

Both the Dead Man Statute and the Spouse Rule are abolished by Rule 7 (the privilege for spousal confidential communications is, however, retained by Rule 28).

Recommendation

It would seem that the minimal requisites to qualify a witness under Rule 17 should be imposed also to qualify hearsay declarants. This could be accomplished by amending 63 (4), (5), (6), (7), (8), (10), (12), (23), (24) and (25) so that each would contain the substance of the following restriction:

"if the judge finds that at the time of making the statement the declarant possessed the capacities requisite to qualify a witness under Rule 17."

Respectfully submitted,

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FOOTNOTES

*Under C.C.P. § 2016 (d)(3)(iii) the inability of deponent to testify at the trial because of "sickness" or "infirmity" is one of the occasions wherein use of his deposition at the trial is authorized.

However, under § 2016 (e) "objection may be made at the trial . . . to receiving in evidence any deposition . . . for any reason which would require the exclusion of the evidence if the witness were then present and testifying." This cannot mean what it literally states, for taken literally it would mean that the deposition could not be used in the case suggested in the text. Literally our deponent's present [i.e. at the trial] insanity would be a "reason which would require the exclusion of the evidence if the witness were then [i.e. at the trial] present and testifying." Surely, this is not the intent of § 2016 (e) and it is most unlikely that it would be literally construed to bring about this absurd result.

**If C.C.P. § 2016 (e), quoted above in footnote *, be taken literally, D's objection must be overruled. Since W is now sane, no reason "would require the exclusion of the evidence if the witness were then [i.e. at the trial] present and testifying."

Again literal construction producing this absurd result is most unlikely.