Vanderbilt Law Review

Volume 5
Issue 3 *Issue 3 - April 1952*

Article 9

4-1952

Declarations Against Interest

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DECLARATIONS AGAINST INTEREST*

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"Declarations of a person, whether verbal or written, as to facts relevant to the matter of inquiry, are admissible in evidence, even as between third parties, where it appears: (1) That the declarant is dead; (2) that the declaration was against his pecuniary or proprietary interest; (3) that he had competent knowledge of the fact declared; (4) that he had no probable motive to falsify the fact declared." This, Mr. Justice Walker of North Carolina in 1906 stated to be the established rule.[1] What is its origin; for what reason is the evidence held to be admissible; to what extent is the reason controlling in the judicial decisions?

I. In England

1. *Declarations Against Pecuniary Interest*

(1) *Origin and Evolution.—Searle v. Lord Barrington*[2] has been said to be "the fountain from which all other authorities on this question flow in one uninterrupted channel."[3] In that case plaintiff sued in debt on a bond dated June 24, 1697. Defendant relied upon the presumption of payment from the lapse of more than twenty years. To rebut this presumption, plaintiff offered in evidence two indorsements on the bond in the handwriting of the obligee, dated respectively December 7, 1699, and March 25, 1707, each reciting the receipt of interest to date. Pratt, C.J., sustained defendant's objection and plaintiff suffered a nonsuit.[4] Thereafter he brought another action, at the trial of which Lord Raymond, presiding, received the indorsements in evidence. On writ of error to the Exchequer Chamber from a judgment for the plain-

*The most thorough consideration of the authorities and most thoughtful examination of the rational basis of this exception to the hearsay rule is the article by Mr. Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, in 58 Harv. L. Rev. 1 (1944). It is much more thought-provoking than Wigmore's treatment of the subject. No one dealing with this subject can afford to overlook or disregard it. Although I disagree with some of Mr. Jefferson's conclusions, I acknowledge great indebtedness to him.

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1. Smith v. Moore, 142 N.C. 277, 55 S.E. 275, 278, 7 L.R.A. (N.S.) 684 (1906).

2. 2 Str. 826, 93 Eng. Rep. 875 (K.B. 1725), *aff'd*, 3 B.P.C. 593, 1 Eng. Rep. 1518 (H.L. 1730). Other reports of the case are to be found in 2 Ld. Raym. 1370, 92 Eng. Rep. 392 (K.B. 1724) and 8 Mod. 278, 88 Eng. Rep. 198 (K.B. 1725).

3. Gleadow v. Atkin, 1 Cr. & M. 410, 425, 149 Eng. Rep. 459, 465 (Ex. 1833).

4. On hearing a motion to take off the nonsuit, the majority of the judges were of opinion that the evidence should have been admitted, but they held that the plaintiff had put himself out of court by taking the nonsuit. It was later the settled practice to remove the nonsuit and grant a new trial when the nonsuit was taken because of a mistake of law by the judge. 2 Str. at 827.

tiff, the case was twice argued before the judges of the Common Pleas and of the Exchequer, and the judgment was affirmed. A writ of error was brought in Parliament, where after consideration of the arguments of counsel for the parties and of the opinions of the judges delivered seriatim, the judgment was affirmed in February 1730. Three judges were absent; of those present, all but Baron Comyns were for affirmance.[5] Unfortunately there is no report which sets forth either the opinions of the judges or the reasons which induced Parliament to affirm. In none of the reports is any ground for the decisions of the lower courts stated nor is the argument of counsel given. The argument for plaintiff in Parliament stressed the protection afforded the obligor by indorsements upon the bond itself as furnishing him evidence of payments which in most instances he would not be able to prove otherwise, and urged that if the indorsements were made on the dates specified in them, their being written by the obligee could furnish no ground of objection, "because it was impossible that he could have any bias upon him, or be in any manner influenced to make them, for they were evidence against him, and he could derive no advantage from them, as he had no occasion to take off the presumption of payment, there not being a lapse of 20 years, from the day of payment to the date of the indorsements."[6] When judicial disapproval of this decision was asserted by counsel in *Gleadow v. Atkin*,[7] Bayley, B., replied that the only objection he had heard was that there was no extrinsic evidence of the time when the indorsements were made and that although the reports made no mention of it, he had by independent research discovered that such evidence was in fact given.

In *Manning v. Lechmere*,[8] Lord Chancellor Hardwicke in discussing evidence to prove title in a lessor pointed out that receipts for rent are not sufficient evidence, especially where the person signing the receipt is alive, for he ought to be examined in the cause, but he added: "Where there are old rentals, and bailiffs have admitted money received by them, these rentals are evidence of the payment, because no other can be had."[9]

Three years later, in 1740, in *Warren v. Greenville*[10] in the King's Bench the issue was whether a client of Mr. Edwards, an attorney, had suffered a recovery. The defendant offered in evidence an entry in a book of Edwards of charges for suffering the recovery, for drawing the surrender and for engrossing two parts of it, with a notation that the charges were paid. The

5. See 3 B.P.C. at 595n, 1 Eng. Rep. at 1520n. Baron Vaughan in Gleadow v. Atkin, 1 Cr. & M. 410, 149 Eng. Rep. 459 (Ex. 1833), says the argument was before eight judges "three of whom were thought to be dissentient." *Id.* at 426.

6. 3 B.P.C. at 595, 1 Eng. Rep. at 1519.

7. 1 Cr. & M. 410, 421, 425, 149 Eng. Rep. 459, 463, 465 (Ex. 1833).

8. 1 Atk. 453, 26 Eng. Rep. 288 (Ch. 1737).

9. *Id.* at 453.

10. 2 Str. 1129, 93 Eng. Rep. 1079 (K.B. 1740).

court said in effect that there was no circumstance of suspicion, that if Edwards were living he might have been examined and that "this was now the next best evidence."

The authority of this case was challenged by counsel in *Higham v. Ridgway*,[11] where the issue was the date of birth of Fowden Jr. As evidence that he was born on April 22, 1768, and not on April 2, entries in the books of a man-midwife, who was shown to have attended Mrs. Fowden, were received. The entry in his daybook, wherein it was shown he made entries of all matters relating to his business immediately upon his return home, was under date of April 22, 1768, and recorded the birth to Mrs. Fowden of a son, followed by a figure referring to a ledger page on which was an entry of a charge for attendance on April 22 and for medicine on April 26, with the notation "Pd. 25th. OcXtr, 1768." Lord Ellenborough insisted that *Warren v. Greenville* was solid authority for admitting the entry and that the ruling therein was made after thorough consideration. He said the entries in the man-midwife's book were properly admitted

> "upon the broad principle on which receivers' books have been admitted; namely, that the entry was made in prejudice of the party making it. In the case of the receiver, he charges himself to account for so much to his employer. In this case the party repelled by his entry a claim which he would otherwise have had upon the other for work performed, and medicines furnished to the wife. . . . If this entry had been produced when the party was making a claim for his attendance, it would have been evidence against him, that his claim was satisfied. It is idle to say that the word paid only shall be admitted in evidence without the context, which explains to what it refers: we must therefore look to the rest of the entry, to see what the demand was, which he thereby admitted to be discharged."[12]

Grose, J., and LeBlanc, J., agreed that *Warren v. Greenville* was controlling. The latter remarked that "the entries were made by a person who, so far from having any interest to make them, had an interest the other way; and such entries against the interest of the party making them are clearly evidence of the fact stated, on the authority of the case of *Warren v. Greenville* and all of those cases where the books of receivers have been admitted."[13] Bayley, J., is reported as having concluded his opinion thus: "But the principle to be drawn from all the cases, beginning with *Warren v. Greenville* down to *Roe v. Rawlings*, is that if a person have peculiar means of knowing a fact, and make a declaration of that fact, which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his lifetime. And that principle has been constantly acted upon in the case of receivers' accounts."[14]

11. 10 East 109, 103 Eng. Rep. 717 (K.B. 1808).
12. *Id.* at 117.
13. *Id.* at 121.
14. *Id.* at 122-23.

In *Gleadow v. Atkin*[15] the bond upon which the action was brought bore an indorsement by the obligee, Gleadow, that the principal sum was not his own proper money, but trust money under the will of the late Cuthbert Thew. If this was true, a payment of interest to Mrs. Thew had the same legal effect as if it had been made to the obligee. Evidence was received that such a payment had been made to Mrs. Thew after the period had elapsed when a presumption of payment would have arisen, and the case turned on the admissibility of the indorsement. Pollock and Creswell took the position that in *Higham v. Ridgway* and similar cases, as well as those of receivers' accounts, the declarant, if alive, would have been a competent witness in the case, but that here Gleadow would have been clearly incompetent. They relied upon the statement of Bayley, J., quoted above. The court unanimously repudiated the limitation and put all the cases beginning with the *Searle* case in the same class and rested them upon the ground that the declarant had peculiar knowledge of the fact stated and had no motive to misrepresent, and that the declaration was against his interest.

(2) *Meaning of "Against Interest."*—In these precedents we have the origin of the rule in so far as it deals with declarations involving a pecuniary interest. While in some of the opinions there is an intimation that only an absence of a motive to falsify should be required, certainly the later decisions have insisted on more than that. But the language in which the requirement is phrased is ambiguous. The declaration must be against the declarant's interest. It is too obvious for comment that the courts do not mean that the mere utterance of itself, whether oral or written, creates a disadvantageous legal relation between the declarant and another. And Wigmore's assurance, that "the question whether the *statement* of the fact could create a liability is beside the mark,"[16] is not worth discussion. But his preceding sentences assert that the fact stated must be against interest, and that it is for this reason that declarant's "open and deliberate mention of it is likely to be true." Why "open and deliberate"? If it is likely to be true, it is because he believes it to be true. Would his belief not be the same if his statement was not open and deliberate, but was contained in a secret document? Is the underlying idea that a man will not concede even to himself the existence of a fact which would create an unconditional obligation to do something to his financial disadvantage unless he believes that it does exist, or is it that he will not make a statement which he realizes can later be used as evidence against him, unless he believes it to be true? Wigmore's text has usually been interpreted as finding his "guaranty of trustworthiness" in the disserving quality of the fact stated rather than in the disadvantage to the declarant which the making of the statement creates. If this interpretation

15. 1 Cr. & M. 410, 149 Eng. Rep. 459 (Ex. 1833).
16. 5 WIGMORE, EVIDENCE § 1462 (3d ed. 1940) (italics in original).

is correct, the inference which is to be drawn from the utterance to the declarant's state of mind is based on the content of his utterance and not on the circumstances in which it is made. If the proper interpretation requires in addition that the utterance be open and deliberate, his state of mind, to be inferred, must include something more than his belief in the existence of the fact stated—namely, his realization that the statement may be used against him.

It will be observed that Lord Hardwicke's justification for the reception of "old rentals" by bailiffs as evidence of payment was necessity, "because no other can be had."[17] The King's Bench in *Warren v. Greenville* noted that the entry by Edwards could not be suspected to be done for the purpose of use in an inquiry as to the reasonableness of the surrender, and was evidence next best to that of testimony of Edwards, but Lord Ellenborough later put the reception of this entry on the ground that it was made in prejudice of the entrant. In *Searle v. Lord Barrington,* counsel's emphasis was upon the use of the entry as evidence and the lack of motive to make it at the time it was made. And in *Barry v. Bebbington,*[18] where the steward's entries were in his private book, Ashhurst, J., took pains to say that the lord, if he had brought action against the steward, "might have given him notice to produce the books in which these entries were made." In various other cases it is pointed out that the entry or declaration could have been used as evidence against the party making it. In the *Sussex Peerage Case*[19] one of Lord Lyndhurst's reasons for holding the testimony inadmissible was that the offered declarations were made to declarant's own son, "and in so making them, it cannot be presumed that he would have exposed himself to prosecution, or that he made them under any belief that he should do so."[20] In *Massey v. Allen,*[21] Vice Chancellor Hall interpreted Lord Blackburn's pronouncement[22] as imposing the requirement that the entry be one "which under no circumstances could operate for the advantage or benefit of the party who made it."[23] He rejected an entry in a broker's book on the ground that it might, depending on the turn of the market, prove to be to the advantage of the broker. And Lord Moulton in *Tucker v. Oldbury Urban Council*[24] said that the proponent must show that the statement was, to the knowledge of the declarant, contrary to his interest.

17. Manning v. Lechmere, 1 Atk. 453, 26 Eng. Rep. 288 (Ch. 1737).
18. 4 T.R. 514, 516, 100 Eng. Rep. 1149, 1150 (K.B. 1792).
19. 11 Cl. & Fin. 85, 8 Eng. Rep. 1034 (H.L. 1844).
20. *Id.* at 110.
21. 13 Ch. D. 558 (1879).
22. In Smith v. Blakey, L.R. 2 Q.B. 326 (1867).
23. 13 Ch. D. 558 at 563.
24. [1912] 2 K.B. 317, 321 (C.A.).

These precedents furnish ample ground for a conclusion that the English courts placed primary emphasis upon the creation of available evidence against the declarant rather than upon the disserving quality of the matter declared. On the other hand, North, J., in *Newbould v. Smith*[25] seems to have considered the rule applicable to an entry in a private diary. And in *Ward v. H. S. Pitts Co.*[26] the Court of Appeal reviewed all the cases and laid down the following requisites of admissibility: (1) Declarant made a statement of a fact of the truth of which he had peculiar knowledge. (2) The fact was to declarant's immediate prejudice; that is, against his interest at the time he stated it. (3) Declarant knew the fact to be against his interest when he made the statement; "it is on the guarantee of truth based on a man's conscious statement of a fact, 'even though it be to his own hindrance' that the whole theory of admissibility depends." (4) The interest to which the statement is adverse must be pecuniary or proprietary.

(3) *The Stimulus to Truth-Telling.*—In these first three requisites, this authoritative resumé of the English cases makes it reasonably clear that so far as admissibility is concerned, declarant's consciousness that the fact stated is against his interest is controlling, and there is no necessity that he realize that the statement may be used as evidence against him in the future. And this seems plain common sense. No one can doubt that when a person acknowledges that he must account to another for a sum of money whether because he has collected it for the other or because he owes it to the other for some other reason, he believes in the truth of the acknowledgement whether he communicates it to another or not. Obviously if after a dispute has arisen, he then made acknowledgment openly and deliberately, he would ordinarily have been aware that he was furnishing evidence against himself. Where the statement is written upon a document or in a book which the writer must have known would be used by another in determining the existence or extent of obligation between them, it is reasonable to infer that the writer realized that he was furnishing the other with information upon which the other would rely, and this would make the writer careful not to concede anything detrimental to his financial interest. Thus, in the *Searle* and *Gleadow* cases the indorsement upon the document and in rentals cases where the entries were in books kept by the bailiff or steward in the course of his employment as bailiff, the fact that the statement would be usable against the writer might well have been in his mind and have furnished a real stimulus to write only the truth. But except in such situations what must

25. 29 Ch. D. 882 (1885). He held the entry inadmissible as not against interest.

26. [1913] 2 K.B. 130, 137, 138 (C.A.). In this case the court approved the test laid down in Smith v. Blakey, L.R. 2 Q.B. 326 (1867), as opposed to that used by the distinguished Jessel, M.R., in Taylor v. Witham, 3 Ch. D. 605 (1876), "so far as there is any real difference between them. . . ."

be assumed as the state of mind of a person who is conscious that he is making evidence against himself when he says that he owes *X* a hundred dollars? Certainly he is conscious that the fact stated imposes an obligation to pay. But if he thinks of his statement as creating evidence against himself, must he also not be thinking of denying or repudiating the obligation, for there will never be any occasion to use the statement against him unless he does deny or repudiate it? And if he intends to do that, is it at all likely that he would make the statement, unless it be assumed that he fears his own dishonesty and wants to erect a bulwark against temptation? Except in most extraordinary circumstances the very fact that the declarant makes the statement renders it most unlikely that he is contemplating its use as evidence against himself.

Now consider the situations of which that in *Higham v. Ridgway* is typical. A person to whom a debt was due declares that it has been paid in full. He repels a claim which he otherwise would have had, as Lord Ellenborough put it. True, but does he believe that the fact stated is against his interest? Since when does a physician consider a charge on his books more advantageous than cash in hand? If a merchant collects an account from a delinquent debtor, does he believe the collection to be to his pecuniary damage? By what sort of legal legerdemain does what every creditor considers a benefit become so transformed as to be, to the knowledge of the creditor, against his pecuniary interest? Well, it prevents him from collecting it again. Consequently, by his acknowledgment of payment, he is making evidence against himself. But it is not the fact that the declaration may be used as evidence against him that furnishes the guaranty of truth; what is required is his realization that he is creating the damaging evidence. Again, how can he have any such thought unless he contemplates an attempt to collect twice? And if he were so unscrupulous as to contemplate such a course, what likelihood is there that he would have made the entry?

Whether a statement of a fact which destroys a previously existing valid claim is against interest depends upon the fact. If the fact destroys the claim without conferring a corresponding benefit upon the declarant, it is obviously contrary to his interest, as, for example, where his claim has been discharged by the bankruptcy of the obligor or has become barred by lapse of time. But when he exchanges the claim for a benefit which any reasonable man would consider more desirable than the claim, the exchange is in no sense disserving, and it is little short of nonsense to assume that he realized either that the exchange was contrary to his pecuniary interest or that there was any likelihood that his statement would be used or usable as evidence against him in the future. It must not be forgotten that the supposed guaranty against falsehood is his state of mind at the time of making the statement.

The bare fact that he has lost a valid claim, without more, is obviously against his interest. Consequently the statement that he has lost it coupled with the statement that he has gained an equal or greater benefit in return may be regarded as a statement of a combination of damaging and beneficial facts. If he had received the benefit at the same time that he suffered the loss but not in exchange for the loss, it would be clear that his statement of the loss would meet the requirement, for in making it the disserving fact would have been in his consciousness. And there would be no reason for excluding evidence of his statement as tending to prove the loss. Even if the benefit were in exchange for the loss, it might not be unreasonable to argue that he would have in mind the injurious effect of the loss as offsetting to some extent the benefit; and if the statement were to be received as evidence tending to prove the loss and nothing more, no great deviation from the theory on which the exception is said to be grounded would be involved. But except where what was received in exchange for cancellation of the claim was pecuniarily less desirable than the claim, the exchange either was beneficial or it created neither benefit nor loss; and there is no justification in the reason of the rule for receiving evidence of the claimant's statement as tending to prove anything other than the loss. Nor can there be any reasonable contention that the exchange or the statement concerning it was preponderatingly against the interest of the declarant.

If it be granted that the statement of payment in full of a conceded or proved claim has a sufficiently disserving quality to justify its classification as a declaration against interest, what of such a statement concerning a claim supported by no evidence extrinsic of the statement, as in *Warren v. Greenville?* The orthodox argument for that decision is that the acknowledgement of receipt of payment is by itself disserving, and that it carries with it the self-serving assertion of the facts creating the claim. But on this theory the acknowledgment can be disserving only on the assumption of the existence of the claim, which is the very fact the evidence is offered to prove. If this isn't question-begging, it comes perilously close to it.

It was probably for this reason that Mr. Justice Littledale in *Doe v. Vowles*[27] refused to receive evidence of an entry marked paid as tending to prove performance of the services charged in the entry. But in *Rex v. Inhabitants of Lower Heyford,*[28] Baron Parke in 1840 held the contrary. And in *Taylor v. Witham*[29] the distinguished Master of the Rolls, Sir George Jessel, said that he preferred to follow the view of Baron Parke. In that case Taylor, the residuary legatee of his brother, was claiming that the sum of

27. 1 Moo. & Rob. 261, 174 Eng. Rep. 89 (N.P. 1833).
28. 2 Smith L. C. 371 (1840) (8th Am. ed. 1885).
29. 3 Ch. D. 605 (1876).

£2000, which Witham had received from the testator in December 1871, was a loan; Witham was asserting that it was a gift by way of a marriage portion to Taylor's niece, whom Taylor had married shortly before. Witham had used the money to purchase a house in which Taylor afterward resided with Witham and his wife. To overcome Witham's evidence that the money was a gift and not a loan, Taylor offered in evidence entries in a private account book of Witham. The first, dated October 1, 1872, recited a payment of £20 interest by Witham. The others, on a separate page, began with the date, January 1872, and a recital that J. Witham acknowledged "lone" of £2000. This was followed by four entries, each of receipt of interest of £20, one of them obviously a repetition of the previously mentioned entry of October 1, 1872. A fifth entry under the same date as that of the last interest payment was "Paid off £20. Left £1980."

In two striking particulars these facts differ from those in the *Greenville* and *Heyford* cases. First, these entries asserted receipt of only partial payment of the claim. As a whole they are highly self-serving; and the evidence is offered to prove the existence and amount of the unpaid balance. In the previous cases the offered evidence was an assertion or set of assertions which as a whole was neither self-serving nor disserving. In an action by the entrant against the person charged to recover the amount of the claim, it would not have been relevant or admissible for the entrant but would have been receivable against him. Second, in the previous cases the parties were entire strangers to the entrant. In the *Taylor* case the plaintiff, as successor in interest to the entrant, stood in his shoes and was relying on his self-serving statements. Jessel held the entries admissible. He made no pretense that either the fact stated or the making of the statement was against the entrant's interest. If the entry by itself is prima facie against his interest, he said, it is admissible. All that is necessary is that "the natural meaning of the entry standing alone" be "against the interest of the man who made it."[30]

"Of course, if you can prove *aliunde* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether, but the question of admissibility is not a question of value."[31]

He did not mention *Smith v. Blakey*[32] or Lord Blackburn's pronouncement therein, which explained that the reason for admitting disserving entries is that they could never be made available for the entrant himself. Indeed, Jessel made the rule a mere rule of thumb, and thereby repudiated every reason that had been advanced for excepting such declarations from the

30. *Id.* at 607.
31. *Ibid.*
32. L.R. 2 Q.B. 326 (1867).

operation of the hearsay rule, for even the most liberal theories had required a lack of motive to misrepresent. But it has been approved by English text writers and has been accepted in some latter decisions.[33] It was disapproved by the Court of Appeal in the *Ward* case.

2. *Declarations Against Proprietary Interest*

The precedents dealing with declarations against proprietary interest are no more satisfactory than those concerning declarations against pecuniary interest. The earliest decisions admitting declarations of an occupier of land have nothing to say about the availability of the declarant or the disserving quality of his utterance. In *Holloway v. Rakes*[34] and *Doe v. Williams*[35] the declaration of a tenant that he was the tenant of a named person was received as tending to prove that person's title, though in the latter case the available declarant was not permitted to testify for his landlord. These cases were cited and followed in *Davies v. Pierce*[36] in 1787, where the declarant's statement was that he had paid rent to a specified person. Eight years later in *Walker v. Broadstock*[37] the proponent offered evidence that a tenant of a messuage had said that he had no right of common appurtenant to the messuage as tending to prove the truth of the fact stated. To an objection on the ground of hearsay, the court replied that it was not hearsay, but opinion of the tenant and the best evidence of opinion, and that declarations of occupiers are evidence against their own rights. In *Doe v. Rickarby*[38] a statement by an available witness that she was a tenant of defendant was held admissible, and nothing was said about its being against interest.

In 1808, the year in which *Higham v. Ridgway*[39] was decided, *Doe v. Jones*[40] and *Ivat v. Finch*[41] came before the courts. In the former, Lord Ellen-

33. See Ward v. H. S. Pitts Co., [1913] 2 K.B. 130 (C.A.). The Court of Appeal preferred the view of Lord Blackburn to that of Jessel, M.R., "so far as there is any real difference between them. . . ." *Id.* at 137. It is difficult to understand this qualification, for their views seem as far apart as the East is from the West. Notwithstanding the disapproval of this doctrine by the Court of Appeal in the Ward case, the Supreme Court of Nova Scotia in McDonald v. Young, 7 M.R.P. 602, 4 D.L.R. 172 (1934) held similar entries admissible, Ross, J., remarking that it seemed somewhat anomalous to admit entries that on the whole were self-serving and referring to Ganton v. Size, 22 U.C.Q.B. 473, 483 (1863), where the judge pointed out that the entry was "by mere pecuniary computation twenty-five times more in his favor than it is against him." See note 52, *infra,* and BAKER, THE HEARSAY RULE 71-72 (1950).

34. Decided in 1769, cited and applied in Davies v. Pierce, 2 T.R. 53, 100 Eng. Rep. 30 (K.B. 1787).

35. 2 Cowp. 621, 98 Eng. Rep. 1273 (K.B. 1777).

36. 2 T.R. 53, 100 Eng. Rep. 30 (K.B. 1787).

37. 1 Esp. 458, 170 Eng. Rep. 419 (N.P. 1795).

38. 5 Esp. 4, 170 Eng. Rep. 718 (C.P. 1803). The declarant was unavailable.

39. 10 East 109, 103 Eng. Rep. 717 (K.B. 1808), *supra,* note 11.

40. 1 Camp. 367, 170 Eng. Rep. 988 (N.P. 1808). (The statement was clearly a vicarious admission.)

41. 1 Taunt. 141, 127 Eng. Rep. 785 (C.P. 1808).

borough, who sat also in *Higham v. Ridgway,* held admissible a memorandum signed by one Byron, a former owner of a copyhold, that a garden was not part of the copyhold and that he had paid rent for it. He pointed out that Byron's interest was the other way and that he charged himself by this representation with payment of rent for which he would not have been liable if the garden had been part of the copyhold. In the latter a woman, since deceased, had said that she had retired from business and transferred all her property to another. Evidence of this statement was held admissible by Sir James Mansfield, who said that the "admission" was against the declarant's interest, that if the action had been against her the evidence would have been clearly admissible, and that it ought to have been received against the plaintiff since his right depended upon her title.

Possession of realty, so it is generally held, is prima facie evidence, or raises a presumption that the possessor is seised in fee simple. On this basis the court in *Peaceable v. Watson*[42] held that the declaration of a possessor that he was tenant of another made most strongly against his interest and was admissible in evidence in favor of the other as the real plaintiff in an action of ejectment against a defendant who was not claiming through the declarant. In none of the earlier cases is the disserving quality of the declaration so explained. In *Carne v. Nicoll,*[43] counsel argued that although any declaration by an occupier showing that he had less than a freehold was admissible as an admission or to rebut adverse possession, it could not be received to prove title in another. But Tindal, C.J., was not persuaded, and followed *Peaceable v. Watson. Baron de Bode's Case*[44] in 1845 and *Doe v. Langfeld*[45] in 1847 applied the same reasoning without enlightening comment. It remained for *Queen v. Overseers of Birmingham*[46] and *Queen v. Governors and Guardians of Exeter*[47] to disclose the full sweep of the rule. Each was a pauper settlement case. In the former, the issue was whether one Day, since deceased, shown to be the occupier of certain premises, had paid a sufficient amount of rent to establish a settlement in Kingswood. It was conceded that he had paid some rent; and it was agreed that the order of removal of the pauper should be quashed if evidence was admissible that Day had said that he was tenant at £20 a year. During the course of the argument, Blackburn, J., asked counsel why the statement might not have been self-serving, for the rent might have been £30. He did not reject the specious reply, that fraud is never presumed. The court held the evidence

42. 4 Taunt. 16, 128 Eng. Rep. 232 (C.P. 1811).
43. 1 Bing N.C. 430, 131 Eng. Rep. 1183 (C.P. 1835).
44. 8 Q.B. 208, 243, 115 Eng. Rep. 854, 868 (K.B. 1845).
45. 16 M. & W. 497, 153 Eng. Rep. 1285 (Ex. 1847).
46. 1 B. & S. 763, 121 Eng. Rep. 897 (Q.B. 1861).
47. L.R. 4 Q.B. 341 (1869).

admissible. Both Cockburn, C.J., and Blackburn reasoned that the declaration was against interest because of the presumption of seisin in fee. Once the evidence was admitted, the principle established in *Higham v. Ridgway* made it usable to prove the amount. They pointed out that in *Peaceable v. Watson* the admission of the declarant that he was a tenant was usable to prove him tenant to *AB*. In the *Exeter* case on the issue whether James McGuire had acquired a settlement in Welsford, all pertinent facts were conceded except his payment of rent. The case turned on the admissibility of (1) entries in his handwriting in a book reciting two payments of rent and (2) his oral statement to his daughter that he had rented the house from James Brook at £22 a year and had paid the rent. The objection made to the application of the former decisions was that they had received the evidence only as tending to show to whom the rent was paid and the amount. The court, however, interpreted the *Birmingham* case as making the doctrine of *Higham v. Ridgway* controlling as to declarations against proprietary interest, and said that "it would be most objectionable to lay any narrow restrictions upon the reception of declarations . . . against interest . . . by persons since deceased. . . ."[48] "It would be absurd to hold that a declaration was admissible, but to hold that it was no evidence as to one of the main facts which it imported."[49]

These two cases and *Ivat v. Finch*[50] were cited in the *Ward* case,[51] and the reason on which they were based was stated, apparantly with approval and certainly without disapproval by the Court of Appeal. What possible foundation in fact is there for the presumption that an occupant of a house realizes that in the absence of evidence to the contrary, the law regards him as owner in fee simple, or that when he asserts that he has a lease for a year, he is stating a fact against his proprietary interest? Even if this suggestion does not pass the boundary of the probable, what extraordinary combination of unusual conditions would be required to cause the ordinary renter to regard as a disadvantage to him the fact that he had paid his rent?

The climax of absurdity is reached in In re *Adams*.[52] Testatrix, who lived with her husband in a house owned by her, died in June 1919. She had made a will in 1907. Her executor found an empty envelope with an indorsement stating that it contained the will. The husband confessed that he had destroyed the will. It was conceded that without the will he had no interest in the realty and that under the will he took a life estate. He was in possession of the premises after his wife's death until his death in January 1920. In a

48. *Id.* at 345.
49. *Id.* at 344.
50. 1 Taunt. 141, 127 Eng. Rep. 785 (C.P. 1808).
51. [1913] 2 K.B. 130 (C.A.).
52. [1922] P. 240.

proceeding to establish the will, in which the heirs put the proponent to the proof, Horridge, J., held the declaration of the husband, then deceased, admissible. He did not pretend that the husband knew of his presumed ownership in fee simple or that he had any notion that a will which gave him a life estate operated against his proprietary interest. He interpreted the *Exeter* case as establishing the rule that "any statement which is prima facie against the interest of the speaker is admissible even if, when the facts are examined, it may not turn out to be detrimental."[53]

Can it be that in England a declaration which standing alone is prima facie against pecuniary interest is not admissible if it appears in truth to be neutral or self-serving, as the Court of Appeal said in the *Ward* case, but that a declaration prima facie against proprietary interest is always admissible? Is that the effect of the failure of the Court of Appeal to disapprove the *Exeter* case? Or are the text-writers and the judges who accept the doctrine of Baron Parke and Jessel, M.R., to be trusted rather than Blackburn, J., and the Court of Appeal?[54]

3. *Declarations Against Penal Interest*

Whatever the answer to these queries, nothing can make the English authorities have even a superficial appearance of rational consistency so long as the currently accepted interpretation of the *Sussex Peerage Case*[55] prevails; namely, that evidence of a declaration against penal interest is inadmissible in a situation where a similar declaration against pecuniary or proprietary interest is receivable. The law lords unanimously rejected the proffered evidence of a declaration of a clergyman that he had performed a marriage forbidden by statute; Lord Brougham, Lord Denman, and Lord Campbell agreed that the declaration, to be admissible, must be against pecuniary or proprietary interest. Lord Campbell added: "I think it would lead to the most inconvenient consequences, both to individuals and to the public, if we were to say that the apprehension of a criminal prosecution was an interest which ought to let in such declarations in evidence. . . ."[56] Lord Chancellor Lyndhurst thought that the circumstances in which the statement was made negatived any realization by the declarant that he was exposing himself to prosecution, and Lord Campbell, pointed out, apparently as a makeweight, that there was nothing to indicate the declarant's state of mind. It seems idle to argue that the opinion of the Lord Chancellor and this

53. *Id.* at 242. But here as in Taylor v. Witham, the result is sensible. The husband conceded that he had been guilty of very disgraceful, if not criminal, conduct.

54. See BAKER, THE HEARSAY RULE 71-72 (1950).

55. 11 Cl. & Fin. 85, 8 Eng. Rep. 1034 (H.L. 1844).

56. *Id.* at 113, 8 Eng. Rep. at 1045.

remark of Lord Campbell throw any appreciable doubt upon the interpretation of the decision that has been accepted for over a century. And Mr. Wigmore's optimistic statement, "In England the limitation would perhaps nowadays no longer be observed"[57] has precious little foundation. In the case which he cites,[58] the trial judge told defendant's counsel that he might put in anonymous letters containing confessions of crime, saying: "I quite agree that the letter is strictly inadmissible; but under all the circumstances it might be done."

The English decisions are hopelessly confusing. They purport to have a foundation in reason for creating an exception to the hearsay rule. In some situations that reason is a guide to decision. In others where the reason obviously exists, it has no operative effect. In still others where it does not exist, it is treated as if it were present and controlling.

II. IN THE UNITED STATES

1. *Declarations Against Pecuniary Interest*

The American cases also leave much to be desired. As to declarations against pecuniary interest, there seems never to have been any doubt that a declaration, acknowledging indebtedness to another or the recepit of money for which the declarant must account to another, falls within the rule. The early opinions rely heavily upon the English precedents beginning with *Searle v. Lord Barrington* and *Warren v. Greenville*. The text-writers agree that the doctrine of the latter case as expounded and applied in *Higham v. Ridgway* is generally accepted.[59] And the decisions support them where the proponent of the evidence is one other than the entrant or his successor in interest. Thus in *Knapp v. St. Louis Transit Co.*,[60] evidence of entries in the account book of a deceased physician of charges, marked paid, against a patient for attending her for a specified ailment was received as tending to prove the nature of the disease for which he treated her. And in *Massee-Felton Lumber Co. v. Sirmans*,[61] the return of a sheriff of a sale of certain real estate, reciting his receipt of the purchase price, was received in evidence as tending to prove the truth of his statements therein as to his authorization to make the sale.

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57. 5 WIGMORE, EVIDENCE § 1476 and note 10 thereto (3d ed. 1940).

58. William Gardiner's Trial (1902), Notable British Trial Series 145, 208 (1934). The case is discussed in 5 WIGMORE, EVIDENCE 288, n.10.

59. 5 WIGMORE, EVIDENCE § 1465 (3d ed. 1940); 4 CHAMBERLAYNE, MODERN LAW OF EVIDENCE § 2788 (1913); 3 JONES, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES § 1169 (2d ed. 1926).

60. 199 Mo. 640, 98 S.W. 70 (1906).

61. 122 Ga. 297, 50 S.E. 92 (1905).

But no case has been found which goes so far as to hold that an entry acknowledging part payment of a contested claim is receivable in evidence as a declaration against the entrant's interest when offered by him or his successor in interest as tending to prove the truth of the facts asserted as the basis of the claim. And none has been found which accepts Jessel's notion that the test of admissibility is not whether the statement when made was actually disserving but whether, taking it at face value, standing alone, and without regard to the circumstances in which it was made, its natural meaning was against interest.

Wigmore disapproves the English doctrine which holds inadmissible a statement that the declarant is a promisor in an executory bilateral contract.[62] He says "The incurring of a contract liability of any sort is on principle a fact against interest."[63] It should go without saying that a man will not ordinarily enter into a contract which he believes to be to his pecuniary disadvantage. Consequently it seems difficult to support Wigmore's thesis, particularly since he suggests that the test should be "that the interest injured or the burden imposed by the fact stated should be one so palpable and positive that it would naturally have been present in the declarant's mind."[64] The cases which he cites to support his position are not in point. For example, *White & Elder v. Chouteau*[65] concerned a declaration of receipt of money accompanied with a statement indicating its source and the terms on which it was received; and its admissibility was justified by citation of *Higham v. Ridgway*. And *Hosford v. Hosford*[66] held admissible a declaration of revocation of a contract which the declarant had obviously considered to his pecuniary or proprietary advantage. Mr. Jefferson thinks Wigmore cannot properly consider a statement of the existence of an executory contract to be against interest when by its terms it is obviously beneficial to the declarant, so long as Wigmore stands on the proposition that the fact stated must be against interest. But he believes that the American authorities accept Wigmore's view without any attempt to explain it. The decisions upon which he relies, however, as he concedes, though using the language of declarations against interest, may be explained as dealing only with

62. Queen v. Worth, 4 Q.B. 132, 114 Eng. Rep. 847 (Q.B. 1843). The proponent argued that by the entry by the promisor in his private book, the declarant was making evidence against himself.

63. 5 WIGMORE, EVIDENCE § 1461, p. 269 (3d ed. 1940).

64. *Id.* at 267.

65. 10 Barb. 202, 209 (N.Y. 1850). Tully, since deceased, said he had got the money and accepted defendant's offer on plaintiff's guaranteeing the sale. The issue was whether plaintiffs, who were brokers for Tully, had guaranteed the sale so as to make it proper for them to sue the buyer in their own names.

66. 41 Minn. 245, 42 N.W. 1018 (1889). The elderly declarant husband's statement was that he had destroyed an antenuptial agreement which limited his much younger wife's interest in his estate to one-seventh and that he wanted her to have the greater part of his property.

vicarious admissions of a predecessor in interest.[67] Indeed, on any other theory, some of them are obviously wrong, for the evidence received included declarations that could not possibly have been considered disserving and would doubtless have been rejected if offered by declarant's successor in interest and not against him. In other cases the alleged contract had been partially or fully performed, and most of these also obviously involved vicarious admissions.[68] In such situations neither court nor counsel is compelled to distinguish between admissions and declarations against interest; the confusing phrase "admission against interest" is used, and cases dealing with vicarious admissions and declarations against proprietary interest are cited without discrimination.[69] Since the pertinent opinions do not declare that the legal relation created by a wholly executory bilateral contract is a fact against interest within the rule, and the decisions are readily explainable either on the ground that the statement received was a vicarious admission or in the circumstances was of a fact against interest because of partial or complete performance by the promisee, it can hardly be said that the American cases agree with Wigmore. Obviously cases admitting evidence of statements conceding a breach of contract by the declarant do not support him. If a stray case may be found here and there unqualifiedly applying his dictum, it is out of harmony with the usual attitude of the courts.

What of an assertion of a fact which would create a valid claim against declarant for damages in tort or would prevent the creation of such a claim in his favor? An admission of embezzlement of money or of the conversion of a chattel would clearly constitute a declaration against pecuniary or proprietary interest. In some other situations the fact stated is such that any reasonable person must realize its pecuniarily disserving quality. For example, where the declarant drives an automobile into collision with another's person or property and concedes that he was to blame because he did not have the car under control or his attention was diverted from his driving

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67. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule,* 58 HARV. L. REV. 1, 28, n.59 (1944).

68. See, *e.g.,* Steinberger v. Young, 175 Cal. 81, 165 Pac. 432 (1917); Jackson v. Johnson, 126 Miss. 26, 88 So. 410 (1921); Lowell v. Wheeler's Estate, 95 Vt. 113, 112 Atl. 361 (1921); Lackey v. Price, 142 Va. 789, 128 S.E. 268 (1925).

69. There is much confusion of thought and language in the authorities dealing with admissions, both personal and vicarious, and Wigmore has done little to clarify either, if indeed he has not created greater perplexity. On personal admissions, see Morgan, *Admissions as an Exception to the Hearsay Rule,* 30 YALE L.J. 355 (1921); *cf.* 4 WIGMORE, EVIDENCE, §§ 1048, 1049 (3d ed. 1940) (contrast first and second editions, third edition same as second). On vicarious admissions, see Morgan, *The Rationale of Vicarious Admissions,* 42 HARV. L. REV. 461 (1929); *cf.* 4 WIGMORE, EVIDENCE §§ 1062a-87, particularly 1080a, refuting 42 HARV. L. REV. 461 *et seq.* See 5 WIGMORE, EVIDENCE § 1459, distinguishing an admission by a predecessor in title from a declaration against interest: "Here [declaration of predecessor] the main requirements are that the admitter must have had title at the time, and that the admission shall be used only against himself or his successors; but the admitter need not be deceased before the statement can be used. Here, too, no hearsay exception is involved."

by conversation with a passenger, he would be extraordinarily naive or stupid if he did not realize that he would be called upon to pay for such damage as he had caused the other and would have no claim for any loss he might have suffered. It is likely that in so clear a case most American courts would admit evidence of such a statement as a declaration against pecuniary interest. Indeed, in a growing number of instances they are receiving such evidence where the content of the statement and the circumstance in which it was uttered make it very unlikely that the declarant was at the time conscious either that the fact stated harmed his pecuniary interest or that in stating it, he was creating evidence that might be used to his pecuniary disadvantage.[70] The test of admissibility should be his state of mind. If he realizes the pecuniary disadvantage which is created by the fact stated, it should make no difference that its amount is unliquidated or that the legal consequences of it are to be given effect in an action of tort rather than of contract. This, of course, is not to say that his knowledge of the availability or unavailability of a means to make the fact hurt him pecuniarily is immaterial. If he knows that he is so situated that neither the fact stated nor his making of the statement can do him pecuniary harm, it would be fatuous to suppose that he was consciously influenced one way or the other by financial considerations. Thus if a convict, without assets and condemned to death, should confess that he either purposely or negligently injured another or even that he owed another a large sum of money, it might well be urged that he would have no motive to falsify or that he would not be likely to make such a statement of fault or delinquency if untrue, but it would approach the ridiculous to argue that he would have in mind any actual or potential financial harm to himself.[71]

On the other hand, assume that the declarant realizes that although he cannot be personally harmed by the fact stated, it necessarily will result in harm to his family as his successors in interest or that it creates a claim enforceable against his estate or prevents the creation of a claim in favor of his dependents who will survive him. If in a dying declaration a man declares that the injury to his person was due solely to his own fault, or that a claim appearing on his books as due and unpaid has been paid in full, does his statement fall within the rule? Certainly his motive for protecting his family or his dependents from financial harm would ordinarily be quite as strong as that for protecting himself. In most instances the evidence would be offered against his successor in interest and would be receivable as a

70. See, *e.g.*, Weber v. Chicago, R.I. & P. Ry., 175 Iowa 358, 378, 151 N.W. 852 (1915); Windorski v. Doyle, 219 Minn. 402, 18 N.W.2d 142 (1945); Aetna Life Ins. Co. v. Straunch, 179 Okla. 617, 67 P.2d 452 (1937); Dillenberg v. Carroll, 49 N.W.2d 444 (Wis. 1951); Pennsylvania R.R. v. Rochinski, 158 F.2d 325 (D.C. Cir. 1946). But see 4 CHAMBERLAYNE, MODERN LAW OF EVIDENCE § 2780 (1913), and cases cited.

71. See Newton v. State, 61 Okla. Cr. 237, 71 P.2d 122 (1937).

vicarious admission, so that the applicability of the present exception would be moot. In most of the actions for wrongful death, even under a statute like Lord Campbell's Act, the courts find sufficient privity between the decedent and the surviving beneficiaries to designate them his successors in interest. In a few jurisdictions, the wrongful death act is said to give the survivor a totally new action and to prevent the applicability of the vicarious admission doctrine. In these there is a conflict as to whether a declaration of fault by the decedent is admissible as a declaration against interest.[72]

2. *Declarations Against Proprietary Interest*

As to declarations against proprietary interest, Wigmore says:

> "A statement predicating of oneself a *limited interest instead of a complete title to property* asserts a fact decidedly against one's interest, and has always been so regarded. In particular, assertions that one's estate is a leasehold, not a freehold, or that one's possession is merely as agent or as trustee for another, are admissible. [Quotation from *R. v. Birmingham*[73] omitted.] Such statements may be used in so far as they tend to prove the matter against interest, for example, that some other person is the owner of the higher estate. But they could not be received to prove the matter as to which they were not against interest—for example, the ownership of the limited estate asserted."[74]

It may be significant that while he quotes from the *Birmingham* case, he does not even cite the *Exeter* case[75] or the *Adams* case,[76] in both of which the evidence was offered for a highly self-serving purpose; namely, to prove in the former the payment of the rent and in the latter the existence of a will creating a life estate in the declarant. It is true that the evidence in each case was not offered in favor of the declarant, for neither he nor anyone claiming through him was a party to the action. But the sole ground of admissibility was the disserving quality of the declaration. Perhaps the quotation means that any part of the statement bearing upon the matter against interest, including amount and payment of rent, may be received, but nothing tending to prove the fact or extent of the declarant's interest. Wigmore also finds a "unique application of the principle" in *Allegheny v. Nelson*,[77] where the proponent offered in evidence the application of his predecessor in interest for a grant of certain premises as an island. The court pointed out that it was against the interest of the applicant to expend his time and money in taking a title to the land as an island if it were not an

72. Carr v. Duncan, 90 Cal. App.2d 282, 202 P.2d 855 (1949) reviews the authorities. Cases are collected in Note, 114 A.L.R. 921 (1938).

73. 1 B. & S. 763, 121 Eng. Rep. 897 (Q.B. 1861).

74. 5 WIGMORE, EVIDENCE § 1458 (3d ed. 1940).

75. L.R. 4 Q.B. 341 (1869).

76. [1922] P. 240.

77. 25 Pa. 332, 334 (1855).

island. It therefore admitted the application as evidence that the land was an island. It is too plain for argument that the statement when made was highly self-serving, the fact stated was the very foundation of the applicant's right and the evidence was received for the truth of the matter stated. The decision seems in truth to be a unique misapplication of the principle.

But Wigmore's text, it is believed, does fairly state the result of the American cases, although they cite the English decisions with apparent approval. In few, if any, of them has the declaration been received to prove the asserted ownership of the lesser estate; in most of them it has been admitted only as evidence of the disserving fact or a neutral fact closely connected with it, and in some of these it was obviously an admission by a predecessor in interest. There is no doubt that here as elsewhere, the opinions, encyclopedias and digests badly confuse declarations against interest and vicarious admissions. On the whole the courts use the same approach to declarations against proprietary interest as to declarations against pecuniary interests. They do not indulge in fantastic deductions from the mere fact of possession or other apparent interest in property. They seem to feel free to inquire into the conditions under which the offered statement was made, for what seems on its face to be against interest may in fact appear to the declarant to be favorable to him and thus destroy his motive to tell the truth. *Roe v. Journegan*[78] is one of the few cases where the opinion goes into detail. There a recorded deed, in which declarant's father was grantor, purported to convey a life estate in a parcel of land to declarant with remainder to declarant's children. Decision of the issue depended upon whether declarant had accepted the deed. To overcome the presumption of acceptance, proponent offered evidence of a statement, made several years after the date of the recording, that he had no land and that his father had offered to give him a place, but he wouldn't accept it. The court held this inadmissible because the conditions under which the statement was made indicated that declarant believed acceptance of the deed to be to his disadvantage. *Yentis v. Mills*[79] presents a similar situation. A statement by *O*, the record owner, that the realty in question was owned by *A* was obviously against his proprietary interest; but *A* had made a contract in the name and as agent of *O* to convey the property to *P* and had received a cash payment for *O* for which *O* would be liable to *P* if the conveyance were not made. The court considered that this liability prevented the statement from having the necessary disserving quality.

78. 175 N.C. 261, 95 S.E. 495 (1918) (contains full discussion of the theory of declarations against interests). Of course unless the declarant knew of the recorded deed, he could not have been conscious of the disserving quality of his declaration.

79. 299 Pa. 25, 148 Atl. 909 (1930). See also Hollis v. Sales, 103 Ga. 75, 29 S.E. 482 (1897). It will be noticed that this decision is in effect contrary to that in the *Exeter* case, note 47, *supra*.

In neither of these cases did the statement itself have any self-serving quality. Had there been no evidence of the circumstances which overcame the apparent stimulus to truth-telling, it would have been clearly admissible. In each case the court based the rejection on the ground that declarant had a motive to falsify. And the absence of a motive to falsify is in a number of opinions said to be a necessary element of admissibility. Wigmore insists that this is not a separate or additional requisite.[80] Mr. Jefferson disagrees.[81] If we accept the theory that the exception is grounded on the assumption either that a person will not concede even to himself the existence of a fact which is against his interest or that he will not create evidence of the existence of such a fact, it is difficult to see why Wigmore is not right. The controlling element is the state of mind of the declarant. As a Minnesota trial judge put it: "I cannot avoid the conclusion that the question must be settled by the motives which would be presumed to actuate a declarant at the time the statements were made."[82] If the declarant had a motive to falsify, it might or might not neutralize or destroy the influence of the disserving fact as a stimulus to truth telling, depending upon the strength of the motive.

3. *Declarations with Disserving and Self-serving Aspects*

Where extrinsic circumstances disclose a motive to falsify, the controlling considerations should be no different from those which operate where the disclosure is contained in the statement itself. Courts are constantly confronted with evidence of declarations which contain an assertion, express or implicit, which standing by itself is so obviously against interest as to be unquestionably admissible, and one which by itself would be rejected as self-serving or otherwise objectionable as hearsay. The self-serving or otherwise objectionable matter, while a material part of the statement, may or may not be clearly separable. As already noted, where a declarant acknowledges full or partial payment of an unproved claim, as for goods sold, his statement incorporates the assertion of the sale, so that as a whole it is either neutral or self-serving. Where he states that he has received payment of a proved claim for services rendered, described in detail, the identity of the claim, so far as proved, is an inseparable part of the disserving statement; but, so far as not proved, may be easily separated. Thus in the *Knapp* case, the extrinsic evidence may have shown that the physician attended

80. 5 WIGMORE, EVIDENCE § 1464 (3d ed. 1940).

81. Jefferson, *Declarations Against Interest*, 58 HARV. L. REV. 1, 52-57, citing cases.

82. Paine v. Crane, 112 Minn. 439, 128 N.W. 574, 575 (1910). In an action to determine adverse claims defendant was claiming through his brother, he offered a declaration by him that he had a deed from plaintiff but on plaintiff's advice had not recorded it, for if it were put on record a judgment of $500 against declarant would be collected out of the land. The trial judge excluded the declaration and the supreme court affirmed his ruling.

the patient but would not have shown the nature of her illness, and the assertion of that was clearly separable and was unnecessary to identify the claim. Where the creditor declares that he has received part payment of a proved claim, his statement of receipt cannot be separated, but it has both a self-serving and a disserving aspect. Insofar as it destroys his claim, it is disserving; insofar as it opens a new period of limitations, it is self-serving. In any event the statement has a guaranty of trustworthiness only insofar as the truth-telling stimulus of the declarant is operative. It would be entirely unprofitable to seek a rational basis in the English decisions dealing with such a situation so long as *Taylor v. Witham*[83] is recognized as an authority. Wigmore asserts and some American decisions agree that the whole statement should be examined to determine whether the matter against interest outweighs that which favors the declarant. If so, evidence of the statement is to be received as tending to prove its truth; otherwise, it is to be rejected. If the statement is preponderatingly self-serving, it has nothing to give credibility to its self-serving or neutral portions, and the credibility which would normally be accorded its disserving portion is vitiated by the motive of the declarant to falsify. If the statement is neutral and the evidence is offered to prove either its self-serving or its neutral portion, there is nothing to bring it within the reason for the exception, but if offered to prove only the disserving portion, it may have as much inherent credibility as if that portion stood alone. For example, if a taxpayer's return states his income at an amount which subjects him to any tax, the statement may be true or false; he has a motive to put the amount at as small a figure as possible, but he has no motive to put it at any amount in excess of his actual receipts. Why should not evidence of the return be received as tending to show that his income was at least as large as the amount stated?[84]

If the statement is preponderatingly disserving, and the evidence is offered to prove the disserving matter, there is obviously no argument for its rejection; if offered to prove the neutral matter, if any, it should fall within the exception unless that matter is so connected with or affected by the self-serving portion as to be an integral part of it. But what if offered to prove the self-serving portion? Wigmore's proposition seems to consider the statement as a unit: it is either admissible as a whole or not at all.[85] The cases which admit acknowledgment of payment in full of a claim for goods sold, money lent or services rendered as evidence of the sale, loan or

83. 3 Ch. D. 605 (1876).

84. In Veach's Adm'r v. Louisville & I. Ry., 190 Ky. 678, 228 S.W. 35 (1921), 30 YALE L.J. 854 (1921), the court entirely overlooked the fact that the statement in the tax return in question was offered solely to prove the disserving fact, and there was no extrinsic evidence tending to show a motive to falsify.

85. 5 WIGMORE, EVIDENCE § 1464 (3d ed. 1940); BAKER, THE HEARSAY RULE 71-72 (1950).

rendition of services upon an issue between strangers to the transaction support this theory. And in one situation it has been unqualifiedly applied in the earliest and most modern cases. Evidence of a statement of receipt of part payment of a proved or admitted debt, offered by the declarant's successor in interest to prove the commencement of a new period of limitations, has been received if made within the original period and excluded if made thereafter.[86] But as already observed, evidence of a declaration by a possessor of property of a limited interest therein is not admitted in favor of declarant's successor to prove ownership of the interest. And, speaking generally, where the evidence is offered by declarant's successor in interest to prove the self-serving matter, the American courts are inclined to reject it. It is in such situations that they are especially likely to confuse vicarious admissions and declarations against interest, and to point out that the evidence would be admissible against the proponent but because of its self-serving features, is inadmissible in his favor.[87] This is particularly true where the self-serving matter is separable.

Perhaps it would not be unfair to say that *Allen v. Dillard*[88] illustrates the usual attitude of the courts. In that case the action was for specific performance of a promise by Dr. Johnson to leave all her property by will to plaintiff in consideration of a promise by Dr. True to leave one half of his property to Dr. Johnson and one half to plaintiff. It was conceded that both alleged promisors had executed on the same day wills drawn by the same attorney and witnessed by the same witnesses, leaving their respective properties as in the alleged promises provided; that Dr. True did not change his will and that the plaintiff and Dr. Johnson received property as provided in his will. Dr. Johnson about five years after Dr. True's death revoked her will and executed another. The issue was whether the original wills were executed pursuant to contract formed by the alleged promises. Plaintiff offered to have Oliver True testify that Dr. True had told him (a) that he and Dr. Johnson had agreed to leave their property as provided in the original wills, of which he gave Oliver copies, and (b) that he wanted Oliver to see that the terms of those wills were carried out according to the agreement. The trial judge rejected this evidence, and the supreme court affirmed. The opinion first questions Wigmore's view that the incurring of any

86. Searle v. Lord Barrington, 2 Str. 826, 93 Eng. Rep. 875 (K.B. 1725) *supra*, note 2; Turner v. Crisp, 2 Str. 827, 93 Eng. Rep. 876 (K.B. 1740); cases collected in Note, 59 A.L.R. 903 (1929). The statements received in the reported cases all seem to have been made a reasonable time before the statutory period expired, so that the motive to extend the period must have had but slight influence, if any.

87. I have been able to find no case which analyzed the situation as one in which the whole statement was deemed preponderatingly against interest and an offered assertion deemed highly self-serving was admitted.

88. 15 Wash.2d 35, 129 P.2d 813 (1942). But see Dillenberg v. Carroll, 49 N.W.2d 444 (Wis. 1951), where the court cites loose generalizations without analysis.

contractual liability is a fact against interest. Then it asserts that it might be argued that a contract to make a will does not limit the pecuniary or proprietary interest of the promisor. Next it confuses the exception for declarations against interest with that for vicarious admissions. It then suggests that extrinsic circumstances may make self-serving a statement which is prima facie disserving, and it finally declares that a statement against interest coupled with one that is self-serving is inadmissible if offered to prove the facts beneficial to the declarant. Its citation of *Cryer v. McGuire*[89] and its interpretation of *Hollis v. Sales*[90] clearly indicate that it treats the self-serving portion of the declaration, when evidence of it is offered by the declarant's successor in interest, as it would treat a vicarious admission. At any rate, it uses reasoning applicable to such an admission.

The truth is that the decisions dealing with declarations which commingle self-serving and disserving assertions are in no less confusion, and are no less inconsistent, than those dealing with other aspects of the exception.[91]

4. *Declarations Against Penal Interest*

The doctrine of the *Sussex Peerage Case*[92] seems to have been accepted without question by the Ameriean courts until the early 1900's. The first famous judicial challenge to its validity was in the dissenting opinion of Mr. Justice Holmes in *Donnelly v. United States:*[93] "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." The Court of Criminal Appeal of Texas, which was apparently not handicapped by knowledge of the *Sussex Peerage Case,* had anticipated Mr. Justice Holmes by more than a decade,

89. 148 Ky. 100, 146 S.W. 402 (1912).

90. 103 Ga. 75, 29 S.E. 482 (1897).

91. A recent extreme example of this confusion is found in Atlantic Coast Line R.R. v. Bowen, 192 Va. 162, 63 S.E.2d 804 (1951). After discussing the requisites of declarations against interest with reference to the statements of the unavailable driver of the automobile in which plaintiff was riding when it collided with defendant's train, the court concluded: "Whether mere absence from the jurisdiction be treated as the necessary degree of unavailability or not, (which we need not and do not decide), and though it be conceded that the statements were against Sheffield's pecuniary interest, he was not a party to the cause, and they were not admissible against defendant in error to exonerate the company." 63 S.E.2d at 810.

But rarely does a judge exhibit the utter confusion found in Maletis v. United States, 97 F. Supp. 562 (D. Ore. 1951), in which testimony by plaintiffs as to their mental condition was spoken of as self-serving declarations but admissible because "admissions against interest."

92. 11 Cl. & Fin. 85, 8 Eng. Rep. 1034 (H.L. 1844).

93. 228 U.S. 243, 277, 33 Sup. Ct. 449, 57 L. Ed. 820 (1913).

in *Blocker v. State*.[94] But when the case was reprinted in American State Reports, the editor, in ignorance of a series of then recent Texas precedents, interpreted the decision as modifying the orthodox rule only where the evidence against the defendant was purely circumstantial. And the Texas court later preferred to follow this unenlightened commentator rather than its own wiser predecessors.[95] In 1926 the Virginia court adopted the view of Mr. Justice Holmes with some reservations,[96] but it has recently come out four-square for the admission of declarations against penal interest.[97] The Maryland court has been somewhat more cautious.[98] Minnesota seems also to favor the unorthodox rule,[99] and Missouri has recently clearly and definitely adopted it.[100]

The Oklahoma Court of Appeals in *Newton v. State*[101] preferred to adhere to the orthodox doctrine and refused to consider a statement admitting a bank robbery as a declaration against pecuniary interest. It discussed only the declarant's dying declaration that he had robbed a bank. Obviously one who believes himself dying has no fear of being punished criminally so that no fault can be found with the rejection of this statement as one against penal interest. The declarant's financial condition was probably such that he could hardly be regarded as having been influenced by the pecuniary aspect of the situation. But the case also involved a statement made earlier by the declarant, who, when questioned about money in his possession, said that he had secured it by robbing the bank, the name of which was on the bands binding the banknotes. The court treated this declaration as involving no different questions. But in *Aetna Life Ins. Co. v. Strauch*[102] the Oklahoma Supreme Court had before it a confession by the beneficiary of a life insurance policy that he had procured the insurance for the assured with the intent to murder her and that he had murdered her. This statement he made while he was charged with her murder. The court refused to admit it as a declaration against penal interest but held it receivable as a declaration against declarant's pecuniary interest in the policy. And in *Weber v. Chicago R.I. & P.Ry.*,[103] the Iowa court, while declining to rule on the admissibility of

94. 55 Tex. Cr. 30, 114 S.W. 814, 131 Am. St. Rep. 772 (1908).

95. See Morgan, *Declarations Against Interest in Texas*, 10 TEX. L. REV. 399, 409-16 (1932).

96. Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843, 35 A.L.R. 431 (1923).

97. Newberry v. Commonwealth, 191 Va. 445, 61 S.E.2d 318 (1950).

98. Brennan v. State, 151 Md. 265, 134 Atl. 148, 48 A.L.R. 342 (1926); Thomas v. State, 186 Md. 446, 47 A.2d 43, 167 A.L.R. 390 (1946).

99. See State v. Voges, 197 Minn. 85, 266 N.W. 265 (1936), 21 MINN. L. REV. 181; *In re* Forsythe's Estate, 221 Minn. 303, 22 N.W.2d 19, n.3 (1946).

100. Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284, 162 A.L.R. 437 (1945).

101. 61 Okla. Cr. 237, 71 P.2d 122 (1937).

102. 179 Okla. 617, 67 P.2d 452 (1937).

103. 175 Iowa 358, 151 N.W. 852, L.R.A. 1918A 626 (1915).

declarations against penal interest, held admissible as a declaration against pecuniary interest a confession by declarant that he had purposely wrecked a railway train. If this sort of reasoning were applied to all statements against penal interest, the orthodox rule could do little harm, for almost every crime against the person or property of another creates a liability in tort. Of course it is more than doubtful that the person confessing the commission of a crime has in mind, or is appreciably influenced by, considerations of liability for damages. But the existence of the liability in tort furnishes a plausible ground of escape from the results of a settled foolish rule. Since in a criminal prosecution a defendant need raise only a reasonable doubt and such a statement by an unavailable witness may be easily fabricated, it may well be wise to require, as a condition of its admissibility, that there be some other evidence tending to show declarant's guilt.

No case has been found which even intimates that a declaration of a fact which would subject the declarant to hatred, ridicule, contempt or social ostracism falls within the exception. But it requires no argument to convince that the realization of such a consequence is generally a much more powerful influence upon conduct than the realization of legal responsibility for a sum of money.

III. Unavailability of Declarant

Evidence of a declaration against interest is inadmissible unless the declarant is unavailable. Theoretically the cause of unavaliability should be immaterial, and there is a strong argument for not requiring unavailability, for a declaration carrying the guaranty of a really disserving statement is quite as likely to be true as testimony given after controversy has arisen, and if the declarant is available, he may be brought in for cross-examination. But the English courts have been especially strict and have refused to recognize any cause except death of the declarant.[104] The American cases put insanity in the same category as death but are generally hesitant about going further.[105] There are, however, some modern decisions showing a more liberal and rational attitude.[106] This is particularly true where a declaration against penal interest is admissible. In *Harrison v. State*[107] and *Thomas v. State*[108] the declarant was present and testified. In *Sutter v. Easterly*[109] the

104. See Baker, The Hearsay Rule 70 (1950).

105. See Weber v. Chicago, R.I. & P. Ry., 175 Iowa 358, 151 N.W. 852 (1915); Tom Love Co. v. Maryland Casualty Co., 166 Tenn. 275, 61 S.W.2d 672 (1933).

106. See Pennsylvania R.R. v. Rochinski, 158 F.2d 325 (D.C. Cir. 1946).

107. 47 Tex. Cr. 393, 83 S.W. 699 (1904).

108. 186 Md. 446, 47 A.2d 430, 167 A.L.R. 390 (1946). Compare the statement of Mr. Justice Holmes as to a declaration by a predecessor in interest in Fourth National Bank v. Albaugh, 188 U.S. 734, 736, 23 Sup. Ct. 450, 47 L. Ed. 673 (1903): "If ever a declaration not made under oath is to be admitted against any other than the person

declarant was present but claimed his privilege against self-incrimination. It is to be hoped that these cases indicate a general trend toward treating as sufficient any actual impossibility of securing declarant's personal presence which is not caused by the neglect or wrongdoing of the proponent.[110]

IV. NEED FOR LEGISLATION

The reason upon which this exception to the hearsay rule is said to rest has a strong appeal. Men do not concede the existence of facts which will cause them substantial harm unless they believe that those facts do exist. But rarely in the application of a rule of law can be found such a conglomeration of inconsistencies, such flat contradictions in the facts of the very basis of the rule declared to be applied. It is utterly useless to attempt to harmonize the decisions or even to understand the intellectual processes of the writers of many of the opinions. The need for intelligent legislation is clearly indicated. What of the proposal of the American Law Institute?

Rule 509 of the Model Code of Evidence provides:

> "(1) A declaration is against the interest of a declarant if the judge finds that the fact asserted in the declaration was at the time of the declaration so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the declaration unless he believed it to be true.
>
> "(2) Subject to Rule 505, evidence of so much of a hearsay declaration is admissible as consists of a declaration against interest and such additional parts thereof, including matter incorporated by reference, as the judge finds to be so closely connected with the declaration against interest as to be equally trustworthy."[111]

1. The theory on which the rule rests is that a person will not concede even to himself the existence of a fact which will cause him substantial harm, unless he believes that the fact does exist. Whether he realized that in making the statement he was creating evidence against himself is immaterial upon the question of admissibility, however pertinent it may be in determining the persuasive value of the declaration.

2. The disserving quality of the fact must be so apparent and important that a reasonable man in the position of the declarant would not have made the declaration unless he believed it to be true. The state of mind of the

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making it, it should be admitted in this case. The declaration was obviously against interest. It was the only evidence in the nature of things that could be had, when Martindale haltingly denied the fact on the stand."

109. 354 Mo. 282, 189 S.W.2d 284, 162 A.L.R. 437 (1945).

110. See Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 5-8; 5 WIGMORE, EVIDENCE § 1456 (3d ed. 1940).

111. MODEL CODE OF EVIDENCE, Rule 509 (1942). (Rule 505 deals with confessions.)

declarant, his belief in the truth of the statement, is decisive. That state of mind is determined by an objective standard, that of a reasonable man in the position of the declarant. In the absence of unusual circumstances, the only reasonable inference is that the declarant's mental condition with reference to the subject of the declaration was that of a normal person. Evidence of an unusual situation, as in *Roe v. Journegan*[112] and *Paine v. Crane*,[113] is to be used to show not an unreasonable belief, but a belief reasonable in the peculiar circumstances.

a. It is possible that a case may arise where a declarant honestly but unreasonably believed the fact stated to be strongly against his interest when in truth it was highly advantageous. On theory, the declaration should be received; under the rule it would be rejected; and practical considerations seem to furnish a sufficient justification for this result.

b. It is also possible that a declarant may be shown to have considered the fact stated, which was obviously against interest under the rule, to be to his advantage, even though the circumstances were such that the belief was totally unreasonable. On theory the declaration should be rejected; under the rule it would be received. Here, again, the situation is so unlikely to occur that for all practical purposes it may be disregarded. But if the hearsay rule is to be preserved and declarations against interest are to be put on a rational basis, the test should be the actual state of mind of the declarant and paragraph (1) of the rule might well have concluded "that the declarant would not have made the declaration unless he believed it to be true." Even so, it would be futile to argue that the statement of a self-serving fact should under this exception be received merely because the declarant honestly believed the fact to be against his interest.

3. The rule makes clear that the facts having the necessary disserving quality include (1) those which subject the declarant to (a) civil liability (b) criminal liability (c) serious social disapproval, and (2) those which render invalid a claim by declarant against another.

It does not, however, define pecuniary or proprietary interest. This is perhaps unfortunate, for it apparently accepts the confused and confusing interpretations that the courts have given to these terms in situations other than those specified in the rule. It may be that the confusion would be mitigated by the requirement that the declaration be such that a reasonable man would not have made it unless he believed it to be true. It is suggested, however, that any proposed legislation should confine this exception to statements that really carry the theoretical guaranty; and that other provision

112. 175 N.C. 261, 95 S.E. 495 (1918).
113. 112 Minn. 439, 128 N.W. 574 (1910), *supra*, note 82.

be made for the reception of other entries and declarations which reasonable men treat as trustworthy.

4. The rule attempts to furnish a rational test for the reception of neutral or self-serving matter which forms a part of a declaration against interest. Obviously such parts of the statement as are found by the judge to have characteristics of credit equal to those of the strictly disserving part should be received. The circumstance that the matter was physically incorporated in the statement should not be controlling.

5. The rule does not require the declarant to be unavailable.

On the whole the proposed rule would greatly improve the existing law. If an act dealing only with this exception is to be drawn, it should make more precise definitions of the terms pecuniary and proprietary interest.[114]

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114. The Tennessee cases are generally in accord with the orthodox rule.

(1) Overton v. Hardin, 46 Tenn. 375 (1869) dealt with statements made by a predecessor in interest (a) while he had the interest and (b) after he had transferred it to his successor. The court noted the distinction and held (a) admissible as a vicarious admission and (b) admissible as a declaration against pecuniary interest. The fact against interest in the maker's declaration that an indorser was an accommodation indorser was the liability of the maker for costs to the indorser if he were sued and lost after reasonably contesting liability. It is extremely doubtful that the maker realized the disserving quality of his statement.

(2) In Tom Love Co. v. Maryland Casualty Co., 166 Tenn. 275, 61 S.W.2d 672 (1933), the trial judge was reversed for admitting a confession by a burglar, who had become incompetent by conviction of the burglary, that he had burglarized plaintiff's store. The question considered was whether the unavailability of the declarant on account of infamy was sufficient to satisfy the requirement of necessity. The court said that only death or insanity would suffice. It stated the usual rule limiting the interest to pecuniary or proprietary interest.

(3) Adcock v. Simon, 2 Tenn. App. 617 (M.S. 1926), talks of the admitted statement as being disserving, but it was admissible as a vicarious admission. The court cited Overton v. Hardin.

(4) Nichol v. Ridley, 13 Tenn. 63, 26 Am. Dec. 254 (1833) admitted an oral statement acknowledging receipt of payment by a judgment creditor.