DECLARATIONS AGAINST INTEREST

W. H. PUTNAM

The Model Code of Evidence proposed by the American Law Institute provides as follows with respect to the exception to the hearsay rule known as "Declarations Against Interest":

> "(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.
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> "(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."

Rules 506, 507, and 508 define admissions and the grounds upon which the various varieties will be received into evidence. Although there are important differences between "admissions" and "declarations against interest,"[1] such differences are often not practically material in the particular case and the courts have tended to treat them as synonymous terms. In volume 20 of American Jurisprudence, (section 542) at page 459, it is said:

> "Although, as hereinafter stated, (Section 543) a distinction between admissions and declarations is sometimes recognized, the courts have been inclined to use the terms interchangeably, particularly in reference to statements against interest. Obviously, account must be taken of the tendency of the courts to treat the terms as synonymous in discussing the principles asserted by them relative to the admissibility of admissions and declarations in evidence."

Professor E. M. Morgan in his article entitled *Declarations Against Interest* has made the same observation.[2] This tendency is

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[1] See 20 C.J. 232.

[2] Morgan, *Declarations Against Interest* (1932) 10 TEX. L. REV. 399, 406-406.

apparent in the decisions of our own high court wherein the merging phrase, "admission against interest," appears frequently.[3]

The bulk of the cases in Wisconsin involving this exception to the hearsay rule present situations where the contested evidence consists of an admission rather than a strict declaration against interest. It is usually a prior oral statement of a party to the action which is inconsistent with his present position in the litigation. No particular difficulty is experienced in this type of situation since the essential inquiry is whether the former statement was in fact made and, if so, whether it is inconsistent with the admitter's present position. If both phases of the inquiry are affirmatively answered in the court's estimation, the matter is admitted for whatever probative value it may have, and usually not as a mere "admission" but as an "admission against interest".[4] The utility of an admission is not only that of affirmative evidence but general impeachment by virtue of its quality as a prior statement of the adversary party inconsistent with his present claim. It is not necessary that the subject of an admission be limited to facts against the party opponent's interest at the time of making it. Wigmore[5] explains:

> "No doubt the weight of credit to be given to such statements is increased when the fact stated is against the person's interest at the time; but that circumstance has no bearing upon their admissibility."

This is true of admissions under the Model Code of Evidence as evidenced by Rules 507 and 508 covering the admission into evidence of adopted and vicarious admissions which need not be against interest.

An analysis of the leading Wisconsin cases reveals the empirical development of certain criteria in determining the admissibility of declarations against interest and certain interesting and seemingly inconsistent results in the application of such criteria in individual cases. As pointed out above, the practical similarities between admissions and declarations against interest are to be kept in mind in reviewing the decisions of our court. If the statement is an admission by a party to the litigation rather than a declaration against interest

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[3] See Markgraf v. Columbia Bank of Lodi, 203 Wis. 429, 233 N.W. 782 (1931); Olk v. Marquardt, 203 Wis. 479, 234 N.W. 723 (1931); Estate of Ryerson, 239 Wis. 120, 300 N.W. 782 (1941); Hoffman v. Labutzke, 238 Wis. 164, 298 N.W. 583 (1941); and Estate of Pardee, 240 Wis. 19, 1 N.W. (2d) 803 (1942).

[4] See Worthington Pump & M. Corp. v. Cudahy, 205 Wis. 227, 237 N.W. 140 (1931).

[5] 5 WIGMORE, EVIDENCE (3rd ed. 1940) §1048(3).

its admissibility is enhanced considerably.[6] But declarations against (1931).
interest need not have been made by a party to the litigation.

The cases show, generally speaking, that the declaration to be admissible must be an affirmative statement of fact against interest rather than a legal conclusion or an indefinite equivocal observation or friendly expression based on second-hand information.[7] However, the limitation with respect to the necessary factual aspect of the statement was not applied in *Estate of Pardee,*[8] *supra,* and in three decisions which really involved admissions rather than declarations.[9] Some *obiter dicta* were interjected into the subject of admissions and declarations in *Estate of Ryerson,*[10] *supra.* In that case the court was called upon to determine, among other things, whether assessment rolls are competent evidence to establish value in cases other than those where they are given that effect by express provision of the statutes. The court held that they were not competent evidence, stating ". . . but that statements made to the assessor or the board of review with respect to the description and value of his property, whether written or oral, may be received in evidence against him as an admission against interest, . . ." and then added the qualifying observation ". . . it being within the power of the assessor and the board of review to require the taxpayer to submit to an examination, *Tuckwood v. Hanthorn,*[11] *supra.*" As a matter of law, an admission to be admissible into evidence need not have been given under oath or under circumstances permitting the elicitation of sworn information from the admitter. The formality and potentially sworn character of the statement was not mentioned or depended upon as a passport of admissibility in the *Hanthorn* case.[12] The plaintiff's statements to the assessor in that case were received in evidence merely ". . . because they were his admissions, tending to prove a fact in issue."[13] (pages 336 and 337)

A more accurate statement of the law with respect to admissions

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[6] Worthington Pump & M. Corp. v. Cudahy, 205 Wis. 227, 237 N.W. 140
[7] Hilton v. Hayes, 154 Wis. 27, 141 N.W. 1015 (1913); Hanson v. Engebretson, 237 Wis. 126, 294 N.W. 817 (1941).
[8] 240 Wis. 19, 1 N.W. (2d) 803 (1942).
[9] Chapman v. Chicago & N.W. Ry Co., 26 Wis. 295, 7 Am.Dec. 81 (1870); Olk v. Marquardt, 203 Wis. 479, 234 N.W. 723 (1931); Markgraf v. Columbia Bank of Lodi, 203 Wis. 429, 233 N.W. 782 (1931).
[10] 239 Wis. 120, 300 N.W. 782 (1941).
[11] 67 Wis. 326, 30 N.W. 705 (1886).
[12] 67 Wis. 326, 30 N.W. 705 (1886).
[13] 67 Wis. 326, 336, 30 N.W. 705 (1886).

is to be found in *Worthington Pump & M. Corp. v. Cudahy*,[14] to the following effect:

> "The contention is made that the court erred in admitting in evidence plaintiff's 1927 income tax return and the 1928 report of the president to the stockholders of the plaintiff. It is unnecessary to discuss the defendant's contention that these are admissible to form the basis of an estoppel. We think they are at least competent as admissions, in that they tend to show that plaintiff prior to the litigation, had taken a position with respect to the issue of fact involved here, inconsistent with that which it contended for at the trial."

In passing it may be noted that, far from requiring any sworn aspect to the statement, our court has held that the admission need not even be of facts within the knowledge of the party making it and the statement may have been made upon information derived from others.[15]

There is a series of cases in this state which ostensibly refer to the admissibility of declarations against interest made by individuals (former voters at a contested election) who are not parties to the action or present at the trial. Their statements outside of court are admitted and are termed declarations against interest but analysis of the cases reveals that actually the quality of admissibility derives from the theory that ". . . a person who has voted at an election is always considered a party when the result of the election is in controversy, and on that ground his declarations voluntarily made are admissible."[16] Consequently, such statements are really considered and admitted in evidence as prior admissions of an adversary party in the litigation. These cases are *State ex rel Hopkins v. Olin*,[17] *State ex rel Leonard v. Rosenthal*,[18] *State ex rel Hallam v. Lally*,[19] and *State ex rel Alford v. Thorson*.[20]

Probably the most cited case in Wisconsin on declarations against interest is *Truelsch v. Miller*.[21] The court laid down the following as the tests for determining the admissibility of declarations against interest (pages 246 and 248):

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[14] 205 Wis. 227, 231, 237 N.W. 140 (1931).
[15] See Chapman v. Chicago N.W. Ry. Co., 26 Wis. 295, 7 Am.Dec. 81 (1870).
[16] See State *ex rel.* Alford v. Thorson, 202 Wis. 31, 37, 231 N.W. 155 (1930).
[17] 23 Wis. 309 (1868).
[18] 123 Wis. 442, 102 N.W. 49 (1905).
[19] 134 Wis. 253, 114 N.W. 447 (1908).
[20] 202 Wis. 31, 231 N.W. 155 (1930).
[21] 186 Wis. 239, 202 N.W. 352 (1925).

> "The exception is that the declarations of persons, since deceased, are admissible in evidence provided the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it, and if it was opposed to his pecuniary or proprietary interest. Such declarations are not received as admissions, nor as entries made in the ordinary course of business, nor on the ground that any privity exists between the declarant and the person against whom they are offered."

The above statement as to the essentials necessary to an admissible declaration against interest has never been overruled and represents the most complete and thorough exposition of the law in this state on this subject. A comprehensive treatment of the law in other jurisdictions on declarations is to be found in a recent article by Bernard Jefferson.[21a]

The real problem under the present law and Rule 509 is to determine in the individual case whether the given declaration is actually against the declarant's interest. That determination is for the judge rather than the jury under Rule 11. It is not enough that the statement, *prima facie,* be against interest. It must actually be against interest at the time of utterance.[22] If the declaration is both for and against interest, the latter aspect must clearly predominate in the opinion of the trial judge. This is a question of fact, and its determination depends upon the circumstances in each case.

It is the writer's opinion that adoption of Rule 509 of the Model Code of Evidence would work no far-reaching changes in the established law in this state on declarations against interest except with respect to clarification of the necessary degree of unavailability of the declarant. Death is the only grounds of unavailability laid down in the *Truelsch Case* whereas under Rule 509 the declarant need not be unavailable as a witness. Under Rule 503 a hearsay declaration is admissible if the judge finds that the declarant is unavailable as a witness, or is present and subject to cross examination. An exception for declarations against interest, therefore, is necessary only if the declarant is available but not present and subject to cross examination. The broad grounds of unavailability set out in Rule 1 (15) of the Code importantly limit the number of instances where it will be necessary to resort to the exception for declarations against interest even under the law of Wisconsin as it is. The relative degree of

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[21a] Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, (1944) 58 HARV. L. REV. 1.

[22] See 5 WIGMORE, EVIDENCE (3rd ed. 1940) §§1462, 1463. Also, Estate of Pardee, 240 Wis. 19, 1 N.W.(2d) 803 (1942).

unavailability or the various reasons therefor, such as insanity, sickness, incarceration, have never been the principal issues litigated in our high court, and it might well be that death would not be the only grounds if the question were squarely presented to our court. There is language to this effect in *State ex rel Alford v. Thorson*,[23] but the import is subject to the qualifying "admission" feature of the case as discussed above.

Adoption of Rule 509 would clarify and settle—and correctly in the writer's opinion—the question whether the declaration must be against the declarant's pecuniary or proprietary interest. So far as this bars declarations which are against penal interest, it is an anachronism and should be definitely discarded. The emphasis in Rule 509 on the predominance of the judge in determining the admissibility of a particular declaration probably would have no effect on the present law or trial practice in this state.[24]

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[23] 202 Wis. 31, 231 N.W. 155 (1930).
[24] See also Rogers, *The Best Evidence Rule* 1945 WIS. L. REV.