

Declarations Against Interest In California And Federal Courts

I. INTRODUCTION

The exception to the hearsay rule for declarations against interest can be a tool of great usefulness to the practicing attorney. First developed in England in the early eighteenth century, it has been considerably expanded in the United States. This article will define and compare the declarations against interest exception to the hearsay rule as codified in California Evidence Code section 1230¹ and federal rule of evidence 804(b)(3).²

A brief survey of the historical development of the exception will be followed by a more detailed discussion of its requirements under the California Evidence Code and the Federal Rules of Evidence, as well as the underlying rationale. The three areas where a distinction exists between the systems will be explained and suggestions given on how to best take advantage of the differences. Particular emphasis will be placed on those problems facing the practitioner in using or preventing the use of the exception, such as determining whether the statement really is against the declarant's interest, assessing the effect of a motive to falsify, and testing for the declarant's realization that the statement is against his interest.

II. HISTORY OF THE EXCEPTION

Wigmore dated the existence of some form of declarations against interest exception to the hearsay rule from the early eighteenth century.³ It appears to have arisen chiefly in two separate lines of cases: first, those admitting the account entries of a deceased person, such as an overseer or steward, charging himself with the receipt of money;⁴ and, second, those admitting evidence of declarations,

¹CAL. EVID. CODE § 1230 (West 1968). For the full text of this section, see text accompanying note 23.

²FED. R. EVID. 804(b)(3). The Federal Rules of Evidence are set out at 28 U.S.C. FED. R. EVID. 101 *et seq.* (1975).

³5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1455 (Chadbourn rev. 1974) [hereinafter cited as 5 WIGMORE].

⁴Manning v. Lechmere, 1 Atk. 453, 26 Eng. Rep. 288 (Ch. 1737) (rental roll

usually oral, in disparagement of one's proprietary title.⁵ These two series of holdings proceeded independently until the early nineteenth century when a common underlying principle was recognized. All statements concerning matters prejudicial to the declarant's self-interest were considered relatively trustworthy and were therefore treated as forming an exception to the hearsay rule.⁶ This principle developed slowly until the 1830's, when courts commonly held that all declarations of facts against interest made by deceased persons were to be admitted. There was no apparent limitation on the type of interest involved.⁷

In 1844, however, in the *Sussex Peerage* case,⁸ "a backward step was taken and an arbitrary limit put upon the rule."⁹ The exception was held to exclude the statement of a fact subjecting the declarant to criminal liability; it was interpreted to admit only those statements of facts against either pecuniary or proprietary interest.¹⁰ Although this case was contrary to precedent, it has since been accepted as a valid statement of the exception in England.¹¹

The English cases have adhered to strict definitions of "pecuniary" and "proprietary" interests, confining them to the narrow areas of debt and property. American courts, on the other hand, have extended these interests to include the declarant's acknowledgment of facts which would give rise to his liability for damages in tort or for breach of contract, and similarly, to embrace statements of facts by the declarant which would give another person a defense to the declarant's claim for damages.¹²

Although England's rejection of declarations against penal interest was not a part of the common law when the United States Constitution was written, it has been accepted by most American courts.¹³ Today, however, declarations against penal interest are admissible in

receipts by bailiff); *Barry v. Bebbington*, 4 Term R. 514, 100 Eng. Rep. 1149 (K.B. 1792) (steward's receipts); *Stead v. Heaton*, 4 Term R. 669, 100 Eng. Rep. 1235 (K.B. 1792) (town account books), cited in 5 WIGMORE, *supra* note 3, § 1476, at 350 n.1.

⁵ *Davies v. Pierce*, 2 T.R. 53, 100 Eng. Rep. 30 (K.B. 1787) (declarations of tenancy by lessees); *Doe v. Jones*, 1 Camp. 367, 170 Eng. Rep. 988 (K.B. 1808) (charging oneself with rent due), cited in 5 WIGMORE, *supra* note 3, § 1476, at 350 n.3. An analogous practice of receiving entries in vicars' titlebooks and indorsements of payments on notes and bonds also existed at this time. See 5 WIGMORE, *supra* note 3, § 1460.

⁶ 5 WIGMORE, *supra* note 3, § 1476.

⁷ See *id.* for a more detailed discussion of the state of the exception at that time.

⁸ 11 Cl. & F. 85, 8 Eng. Rep. 1034 (H.L. 1844), cited in 5 WIGMORE, *id.*

⁹ 5 WIGMORE, *supra* note 3, § 1476, at 351.

¹⁰ *Id.*

¹¹ *Id.*

¹² E. CLEARY *et al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 277 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)].

¹³ *Id.*, § 278.

California¹⁴ and the federal courts.¹⁵

III. COMPARISON OF CALIFORNIA AND FEDERAL LAW

A. DEVELOPMENT

Until recently, the position of both California and the federal courts toward the declarations against interest exception was essentially that of the common law; such declarations were admissible if the declarant was dead and the statements were against the declarant's pecuniary or proprietary interest.¹⁶

In 1964, California diverged significantly from the common law position by the judicial expansion of the exception to include statements against penal interest. In *People v. Spriggs*,¹⁷ Spriggs was on trial for possession of heroin. He alleged error in the trial court's refusal to allow the arresting officer to testify that Mrs. Roland, the defendant's companion, had stated that the narcotics were hers. In an opinion by Justice Traynor, the California Supreme Court held that a person's interest in not being criminally implicated gave reasonable assurance of the truthfulness of a statement made against that interest.¹⁸ The court also held that the evidence should have been admitted irrespective of Mrs. Roland's availability or unavailability.¹⁹

In 1965, a California court of appeal further broadened the declarations against interest exception. In *People v. Parriera*,²⁰ defendant Frank Parriera appealed a conviction for the attempted murder of his wife. He alleged error in the trial court's refusal to admit testimony by two witnesses who had heard Mrs. Parriera's statement that she had shot herself. The court held that such a statement was not a declaration against penal interest because suicide was not a crime under California law. However, the court found sufficient guarantees of trustworthiness in the fact that the declarations

¹⁴CAL. EVID. CODE, § 1230 (West 1968).

¹⁵FED. R. EVID. 804(b)(3).

¹⁶See text accompanying note 12 *supra*. There was no federal statute. In California, the common law exception had been partially codified in Code of Civil Procedure sections 1946, 1853, and 1870(4). Section 1946 covered written entries against pecuniary interest. CAL. CODE CIV. P. § 1946 (1872) (repealed Stats. 1965, c. 299, p. 1362, § 103). Section 1853 covered both oral and written statements against interest, but only against the successor in interest of the declarant. CAL. CODE CIV. P. § 1853 (1872) (repealed Stats. 1965, c. 299, p. 1360, § 50). Section 1870(4) covered both oral and written statements against the declarant's interest but only so far as they concerned real property. CAL. CODE CIV. P. § 1870(4) (1872) (repealed Stats. 1965, c. 299, p. 1360, § 58). In all three instances, the declarant was required to be dead.

¹⁷60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964).

¹⁸*Id.* at 874, 389 P.2d at 381, 36 Cal. Rptr. at 845.

¹⁹*Id.* at 875, 389 P.2d at 382, 36 Cal. Rptr. at 846.

²⁰237 Cal. App. 2d 275, 46 Cal. Rptr. 835 (5th Dist. 1965).

“... might lead to a sanity hearing and confinement in a mental institution, or ... would subject her to odium ...”²¹ Thus, the court recognized the existence of a truth-compelling social interest and held evidence of Mrs. Parriera’s statement admissible. As in *Spriggs*, the availability or unavailability of the declarant was immaterial.

The exception in the federal system revealed no comparable development during this time period and remained essentially unchanged until the adoption of the Federal Rules of Evidence in 1975.

B. CALIFORNIA EVIDENCE CODE SECTION 1230 AND FEDERAL RULE OF EVIDENCE 804(b)(3): A COMPARISON

The California Evidence Code became effective in 1967.²² Section 1230 states the declarations against interest exception to the hearsay rule:

Evidence of a statement made by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and if the statement, when made, was so far contrary to the declarant’s pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community that a reasonable man in his position would not have made the statement unless he believed it to be true.²³

²¹*Id.* at 285, 46 Cal. Rptr. at 842.

²²The California Evidence Code was adopted after study by the California Law Revision Commission, which used the 1953 version of the Uniform Rules of Evidence as a basis for the new evidence code. 6 CAL. LAW REV. COMM’N, REPORTS, RECOMMENDATIONS, AND STUDIES 323 (1964). Rule 63(10) served as the model for the California declarations against interest exception. It states that a declaration against interest is:

a statement which the judge finds was at the time of the assertion 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 statement unless he believed it to be true.

UNIFORM RULE OF EVIDENCE 63(10) (1953 version, superseded 1974).

²³CAL. EVID. CODE § 1230 (West 1968). Section 1230 incorporates the requirement of former California Code of Civil Procedure section 1853 that the declarant have “sufficient knowledge of the subject.” It changes the “social interest” statement of Uniform Rule 63(10) by requiring “disgrace” instead of “disapproval,” and expands the pecuniary interest requirement by stating that the declaration need only “tend to render” rather than “render” invalid a claim by the declarant against another. It is considerably broader than the common law exception, as it includes both declarations against penal and social interest, and the broader conceptions of pecuniary interest. But section 1230 requires unavailability of the declarant despite the *Spriggs* and *Parriera* decisions, which held that unavailability of the declarant is immaterial to admissibility

In 1975, the Federal Rules of Evidence were signed into law.²⁴ The exception for declarations against interest is found in rule 804(b)(3):

(b) Hearsay exceptions: The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (3) Statement against interest— A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.²⁵

A comparison of these two sections indicates that they share five common elements: the declarant must have personal knowledge;²⁶ the declarant must be unavailable; the statement must be against interest; the interest must be one of three or four specific types; and the statement must have been one which a reasonable man in declarant's position would not have made unless he believed it to be true.

The texts of the statutes reveal two substantive differences. First, section 1230 recognizes declarations against social interest; the

and also despite the Model Code of Evidence, which does not require unavailability. MODEL CODE OF EVIDENCE rule 509 (1942). Uniform Rule of Evidence 804(b)(3), adopted in 1974, parallels the Federal Rules of Evidence and requires unavailability. The 1953 version, upon which section 1230 is modeled, did not require unavailability. No explanation was given by the drafters of the Uniform Rules for the change.

²⁴In 1961, the Judicial Conference of the United States authorized Chief Justice Earl Warren to appoint an advisory committee to study and make recommendations on a uniform code of evidence for the federal court system. In 1972, the Supreme Court promulgated a set of rules. Congress, however, undertook further studies and revision, resulting in enactment of the Rules of Evidence for United States Courts and Magistrates. H. RPT. NO. 93-650, 93d Cong., 1st Sess. 2-4 (1973). They became effective July 1, 1975.

²⁵FED. R. EVID. 804(b)(3). This rule contains only two major changes from the version proposed by the Supreme Court. Statements against social interest were eliminated "as lacking sufficient guarantees of reliability." H. RPT. NO. 93-650, 93d Cong., 1st Sess. 16 (1973). The requirement that a statement against penal interest exculpating the accused be corroborated was strengthened to necessitate corroboration by circumstances indicating the statement's trustworthiness; simple corroboration, which might be supplied by the accused, was not thought to be sufficiently reliable. *Id.*

²⁶Although federal rule 804(b)(3) does not in its text require personal knowledge by the declarant, the Advisory Committee's note to rule 803 states: "In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from the circumstances." FED. R. EVID. 803, Advisory Comm. notes.

federal rule does not. Second, rule 804(b)(3) requires that declarations against penal interest exculpating the accused be corroborated by circumstances indicating their trustworthiness; California places no such restrictions on declarations against penal interest.²⁷

A third difference between the two sections, not reflected in their wording, involves the definition of "unavailability." Both California Evidence Code section 1230 and federal rule 804(b)(3) require that the declarant be unavailable before his statement against interest can be admitted; however, the federal courts use a broader definition of "unavailability."²⁸

IV. RATIONALE FOR THE EXCEPTION

The basis for the declarations against interest exception is the principle of human experience that a person will not incorrectly or carelessly state something against his interest. There are two assumptions underlying this principle. First, the reasonable person will tell the truth; second, the reasonable person would not make a statement against interest unless it were true. There is no empirical data underlying these assumptions; although they may have been valid in the eighteenth century, their validity for the general populace today may be open to question. In addition to the basic assumption that reasonable people tell the truth, the extrinsic factors in any given situation may make it possible and advisable for an individual to make a statement against interest which admits less than the full truth. It might be more in the interests of the individual to tell a somewhat self-inculpatory lie rather than admit the whole truth, which might be more harmful.²⁹ It would seem, however, that generally the basic assumptions are true. When they are not, either because the declarant is one who does not usually tell the truth, or because the factors operating in the given situation induce the declarant to lie or tell less than the full truth, this should become apparent by considering the individual declarant and the factors influencing him when he made the alleged statement against interest.³⁰

Dean Wigmore limited the application of the exception to the situation in which the facts stated are themselves against interest,

²⁷See text accompanying notes 69-90 *infra*.

²⁸See text accompanying notes 44-49 *infra*. See also Comment, *Former Testimony: A Comparison of the California and Federal Rules of Evidence*, this volume.

²⁹*E.g.*, in a criminal case, where there is sufficient evidence to suggest to the declarant that he cannot make a claim of full innocence credible, it might be more to his interest to tell a partial truth or a less incriminating lie than to tell the whole truth. See discussion of motive to falsify at text accompanying notes 129-135 *infra*.

³⁰See text accompanying notes 105-113 *infra*.

e.g., where the declarant states he owes another money.³¹ The drafters of the Model Code agreed.

The theory of the Rule . . . is not that the declarant is making evidence against himself. The Rule does not require that the making of a declaration be against the declarant's interest; it is the matter declared which must have that quality.³²

Jefferson,³³ however, contends that there are two theories upon which reliability is predicated: first, if a fact is against the interest of the declarant, it is unlikely that he will concede or admit its existence unless it is true; second, if the statement itself is contrary to the declarant's interest, it is improbable that he would consciously make such an unfavorable statement falsely.³⁴ As examples of the latter, he poses the situation in which an agent receives money on behalf of his principal and records the receipt in an entry book. The fact that an employee has received money for his principal is neutral; it does not impose any pecuniary liability on the employee at all. On the contrary, the employee might consider the facts asserted to be in his interest, indicating to the employer that the agent is doing a good job in looking out for the employer's financial interest. However, an employee would not falsely assert an entry of the receipt of a sum for his principal, since a false entry would establish liability on his part to the principal for the sum stated. Therefore, the statement is against his interest.³⁵

In either instance, the context provides strong guarantees of trustworthiness. If the individual's declaration against interest is not made before witnesses or in a writing to which others have access so that he is not creating evidence which can be used against him, he has no reason to falsify and the probability is high that the statement is true. For example, the statement might be written in a secret diary which he expects no one else to see. If the individual makes the statement against interest before witnesses or in a writing to which others have access, the very fact that evidence is being created which might later be used against him is a strong impetus to tell the truth. Furthermore, whenever the facts contained in the declaration or writing are against interest, the *statement* of such facts would also seem to be against interest.

Thus, there is no logical reason for confining declarations against interest to statements of *facts* against interest, and neither California

³¹ 5 WIGMORE, *supra* note 3, § 1462.

³² MODEL CODE OF EVIDENCE rule 509, Comment c (1942).

³³ Justice Bernard S. Jefferson, California Second District Court of Appeal.

³⁴ Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 8 (1944) [hereinafter cited as Jefferson].

³⁵ *Id.* at 10.

Evidence Code section 1230³⁶ nor federal rule 804(b)(3)³⁷ so limits the exception. Both statutes are based on the theory that a person will not make statements which are against his interest unless he believes them to be true. Whether the assumptions underlying that theory are true for the general populace or in any given situation is open to question. This question should be kept in mind while considering this exception.

V. AREAS OF CONCERN

As mentioned previously,³⁸ the five major elements common to both California Evidence Code section 1230 and federal rule of evidence 804(b)(3) are personal knowledge, unavailability, statement against interest, types of interest, and the declarant's realization that the statement is against his interest. Of these, personal knowledge,³⁹ proprietary interest,⁴⁰ and pecuniary interest⁴¹ and its sub-categories, exposing oneself to civil liability⁴² and rendering invalid a claim against another,⁴³ are straightforward and should pose

³⁶6 CAL. LAW REV. COMM'N, REPORTS, RECOMMENDATIONS, AND STUDIES (1964) [App.—Tentative Recommendations and A Study Relating to the Uniform Rules of Evidence. Art. VIII. Hearsay Evidence. 323 (1962)].

³⁷FED. R. EVID. 804(b)(3), Advisory Comm. notes.

³⁸See text accompanying notes 23-28 *supra*.

³⁹See MCCORMICK (2d ed.), *supra* note 12, § § 10 & 276. The personal knowledge requirements for witnesses are found in California Evidence Code section 702 (West 1968) and federal rule of evidence 602.

⁴⁰See *People v. Weatherford*, 27 Cal. 2d 401, 421, 164 P.2d 753, 764 (1945) (decedent's statement that she had sold her interest in a cafe admissible as against proprietary interest); *Cohn v. Cohn*, 130 Cal. App. 349, 355, 20 P.2d 61, 63 (4th Dist. 1933) (grantor's declaration tending to show an absolute conveyance rather than one in trust for the grantor held admissible). See also Morgan, *Declarations Against Interest*, 5 VANDERBILT L. REV. 451, 468-70 (1952); 5 WIGMORE, *supra* note 3, § § 1458-59; MCCORMICK (2d ed.), *supra* note 12, § 277.

⁴¹See Morgan, *Declarations Against Interest*, 5 VANDERBILT L. REV. 451, 464-68 (1952); 5 WIGMORE, *supra* note 3, § 1460; MCCORMICK (2d ed.), *supra* note 12, § 277. See 5 WIGMORE, *supra* note 3, § 1461, and Jefferson, *supra* note 34, at 27-28, for contrasting views on whether a statement acknowledging the existence of an executory bilateral contract is against interest.

⁴²See *DeArmond v. Southern Pac. Co.*, 253 Cal. App. 2d 648, 659, 61 Cal. Rptr. 844, 851 (3d Dist. 1967) (In a wrongful death suit, admission by driver of car that he had pled guilty to involuntary manslaughter was admissible as exposing speaker to liability in tort). See MCCORMICK (2d ed.), *supra* note 12, § 277. The California Supreme Court instituted a system of pure comparative negligence in California in *Li v. Yellow Cab Company of California*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). Therefore, any statement indicating any degree of culpability will be against the declarant's interest. Even if his negligence was only one percent of the total negligence causing the damages, that small degree would be taken into account by a court in setting the amount of damages.

⁴³See *Estate of Weis*, 224 Cal. App. 2d 19, 25, 36 Cal. Rptr. 266, 270 (1st Dist. 1964) (decedent's admission that petitioner was his half-sister was admissible,

no significant practical problems. However, the remaining areas are problematic and merit further discussion.

A. UNAVAILABILITY

1. IN THE CALIFORNIA AND FEDERAL SYSTEMS

Both California Evidence Code section 1230 and federal rule 804(b)(3) condition admissibility of the declaration against interest upon the unavailability of the declarant. The federal definition of unavailability,⁴⁴ however, is broader than that found in the California Evidence Code.⁴⁵ Both systems find unavailability when the declarant does not testify because of privilege, death, mental or physical infirmity, or absence from the hearing when the proponent of the evidence is unable to procure his attendance.⁴⁶ The declarant is deemed not "unavailable" if the proponent of his hearsay statement procured his unavailability.⁴⁷ In addition, in federal courts, when unavailability is due to absence from the hearing, the proponent must show that he is unable to procure the declarant's attendance or testimony "by process or by other reasonable means."⁴⁸ Most importantly, however, the federal definition includes two types of unavailability that are not included in the California definition: contumacy or refusal to testify, and lack of memory.⁴⁹

as at time made, his share in the estate of another was reduced proportionately by his half-sister's share). See also MCCORMICK (2d ed.), *supra* note 12, § 277.

⁴⁴FED. R. EVID. 804(a).

⁴⁵CAL. EVID. CODE § 240 (West 1968).

⁴⁶In California, this includes the situation where the witness is beyond the court's subpoena power.

⁴⁷CAL. EVID. CODE § 240(b) (West 1968). FED. R. EVID. 804(a) has a corresponding provision.

⁴⁸FED. R. EVID. 804(a)(5).

⁴⁹In *People v. Rojas*, 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975), the California Supreme Court held that a witness who refused to testify because of fear of reprisal to him and his family was sufficiently "unavailable" for hearsay evidence of his former testimony to be admitted under California Evidence Code section 1291(a)(2) (West 1968). The California Supreme Court opinion incorporated part of the opinion of the lower appellate court, reported at 119 Cal. Rptr. 144 (1st Dist. 1975) but vacated and superseded by the Supreme Court's opinion. The Supreme Court indicated that fear was a kind of mental infirmity preventing the witness from testifying and thus making him unavailable under California Evidence Code section 240(a)(3). 15 Cal. 3d at 552, 542 P.2d at 236, 125 Cal. Rptr. at 364. Significantly, the California Supreme Court ignored the court of appeal's alternate ground, that the listing in California Evidence Code section 240 is not exhaustive and other types of unavailability not brought about by the proponent of the evidence are sufficient to meet the unavailability requirements of the hearsay exceptions. 119 Cal. Rptr. at 150. Thus, the question of judicial power to formulate new grounds for "unavailability" not set forth in the Code must be regarded as left open. *But cf.* 15 Cal. 3d at 551 n.7, 542 P.2d at 236 n.7, 125 Cal. Rptr. at 364 n.7, which indicates that the California Supreme Court looks favorably on the broader definition of unavailability found in the Federal Rules of Evidence. See generally,

2. IS UNAVAILABILITY NECESSARY?

For some time, scholars have debated whether unavailability should be a requirement for introducing declarations against interest. McCormick argued:

There is substantial argument for dispensing with any requirement that the declarant be unavailable as a witness as a prerequisite for receiving his declarations under this exception to the hearsay rule. The reasoning which admits the admission of a party and spontaneous declarations . . . without regard to the availability of the party or the declarant—namely that the admission, or the spontaneous declaration, is just as credible as his present testimony would be—seems equally applicable to the declaration against interest.⁵⁰

On the other hand, one commentator contends that dispensing with the unavailability requirement would place the burden on the opponent of the evidence to locate and bring the declarant into court for the purpose of cross-examination. Arguing that hearsay evidence is less reliable than in-court testimony, he says that dispensing with the unavailability requirement would permit the proponent of the hearsay declaration to use evidence of lesser reliability at his discretion, thereby depriving the jury of more reliable evidence.⁵¹

However, if one accepts the premise that a statement meeting the other criteria for declarations against interest has a special reliability, there is no sufficient reason to exclude it. The evidence is inherently reliable, sufficiently so to be admissible even where necessity, such as the declarant's unavailability, does not dictate its admission.⁵² The absence of the declarant from the hearing does nothing to increase the reliability of the evidence; indeed, his availability at the hearing for cross-examination provides stronger guarantees that the evidence is trustworthy.⁵³ The guarantee of reliability exists at the time the declaration was made, in the fact that the statement must be against interest and that a reasonable person would not make a statement against his interest unless he believed it

Comment, *Former Testimony: A Comparison of the California and Federal Rules of Evidence*, this volume.

⁵⁰MCCORMICK (2d ed.), *supra* note 12, § 280. Model Code of Evidence rule 509 (1942) dispenses with the unavailability requirement, as does Uniform Rule of Evidence 63(10) (1953 version, superseded 1974).

⁵¹Comment, *Evidence—The Unavailability Requirement for Declarations Against Interest—Should It Be Retained?*, 39 MO. L. REV. 461, 463 (1974).

⁵²Wigmore suggested that there are two basic principles underlying the exceptions to the hearsay rule, necessity and circumstantial guarantee of trustworthiness. For a further discussion of these principles and the exceptions accompanying them, see 5 WIGMORE, *supra* note 3, §§ 1421 & 1422. See also Comment, *Hearsay: The Threshold Question*, this volume.

⁵³See *Chambers v. Mississippi*, 410 U.S. 284, 301 (1973), and text accompanying notes 55-61 *infra*.

to be true. Although some argue that any hearsay evidence is less reliable than direct testimony,⁵⁴ the declaration against interest is sufficiently reliable to allow its introduction into evidence whether or not the declarant is available. The goal is not maximum reliability, but simply reliability sufficient to permit the jury to consider the evidence. The declarant's availability or unavailability is irrelevant to that determination.

3. DUE PROCESS AND THE UNAVAILABILITY REQUIREMENT IN CRIMINAL TRIALS

In light of California's narrower definition of unavailability, and the arguments against requiring unavailability, the United States Supreme Court case of *Chambers v. Mississippi*⁵⁵ takes on added importance for the defense attorney seeking to introduce a declaration against interest in a criminal trial. When the declarant is available or when, in California, he does not testify because of contumacy or lack of memory, *Chambers* suggests that it may be a denial of the criminal defendant's right to due process to exclude a declaration against interest touching on the issue of guilt which is offered on his behalf.

Chambers was on trial for the murder of police officer Liberty, who had died from a gunshot wound incurred during an attempt to make an arrest at a bar. Before Liberty died, he fired several shots from his gun, one of which hit Chambers. Two witnesses, however, placed another man, McDonald, at the scene of the crime; one of them indicated that he had seen McDonald shoot the officer. Later, on four separate occasions, including in a statement made to Chambers' attorneys, McDonald confessed to the shooting of the officer. At trial, Chambers called McDonald as a witness after the prosecution failed to do so; McDonald denied shooting Liberty and repudiated his earlier confessions. Chambers' attempt to introduce McDonald's earlier confessions was thwarted by the application of two Mississippi rules of evidence. First, Mississippi adheres to the common law rule that a party may not impeach its own witness.⁵⁶ Second, the Mississippi declarations against interest exception to the hearsay rule admitted only statements against pecuniary or pro-

⁵⁴Both this objection and the objection that dispensing with the unavailability requirement places the burden of producing the witness on the opponent of the evidence could be met by imposing a requirement that, if requested by the opposing side, the proponent must produce the witness in court, if he is within court process. This requirement is analogous to that allowing inspection of a document for purposes of the "past recollection recorded" exception. CAL. EVID. CODE § 1237 (West 1968).

⁵⁵410 U.S. 284 (1973).

⁵⁶For a discussion of this rule, see MCCORMICK (2d ed.), *supra* note 12, § 38.

prietary interest,⁵⁷ thus preventing Chambers from introducing statements against penal interest made by McDonald to other witnesses. On appeal, Chambers contended that the application of these evidentiary rules rendered his trial fundamentally unfair and deprived him of due process of law.

In the majority opinion written by Mr. Justice Powell, the United States Supreme Court agreed with Chambers. The Court held that the cumulative effect of the Mississippi court's evidentiary rulings was to deny Chambers both the right to confront and cross-examine witnesses and to call witnesses in his behalf, and thus, due process of law.⁵⁸ The Court found it unnecessary to consider the narrower issue of whether either restriction alone was a denial of due process.⁵⁹

In finding error in the refusal of the trial court to admit McDonald's declarations against penal interest, the Court found a number of factors supporting the trustworthiness of the statements. Primary among these was the fact that McDonald was present in the courtroom and could have been cross-examined about his statements.⁶⁰ Furthermore, the Court said,

[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense. . . . The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.⁶¹

Arguably, a mechanistic application of the unavailability requirement of California Evidence Code section 1230 and federal rule of evidence 804(b)(3) to a statement against interest affecting guilt is, in a criminal case, a denial of due process. The state interest lies in ensuring that unreliable evidence is not used; the defendant's interest lies in maintaining his assertion of innocence. The *Chambers* Court appears to indicate that where the state interest is not jeopardized by the suspension of the rule, or if such interest is outweighed by the right of the defendant to present his case without interference, due process compels the suspension of the rule. The requirement of unavailability does not further the state's interest; on the contrary, the presence of the declarant in the courtroom for cross-examination does.⁶²

⁵⁷*Brown v. State*, 99 Miss. 719, 55 So. 961 (1911).

⁵⁸410 U.S. at 302.

⁵⁹*Id.* at 298.

⁶⁰*Id.* at 301.

⁶¹*Id.* at 302.

⁶²However, a statement against interest is sufficiently reliable to be admitted

So long as the proponent of the evidence does not procure the unavailability of the declarant, it does not matter what the cause of unavailability is. Certainly the inherent reliability of the statement meeting the other requirements for the exception is not changed because the witness refuses to testify out of stubbornness rather than from privilege. Likewise, the declaration against interest of a witness whose present memory fails him is no less reliable than that of a declarant who is not present in the courtroom. Again, due process counsels and may compel expansion of the California definition of unavailability in criminal cases where the declaration, offered by the defendant, goes to the question of guilt.

Unless California expands its definition of unavailability, the due process argument will have special importance for the California trial attorney. It may enable him to introduce a declaration against interest affecting the issue of guilt which is offered on behalf of a criminal defendant when the declarant is present in court but refuses to testify or fails to remember his statement. Before presenting the due process argument, however, the practitioner should try to have the statement admitted as a prior inconsistent statement which is admissible for substantive use.⁶³ Normally, the testimony of a witness that he does not remember something is not inconsistent with a prior statement by him on the subject.⁶⁴ A witness' deliberate evasion, equivocation, or refusal to testify, however, may constitute inconsistency in effect, thus making the prior statement admissible.⁶⁵ If the court does not accept contumacy as inconsistent, or the witness simply cannot remember and there is no inconsistent effect, the attorney should proceed to the due process argument developed in *Chambers*.

In asserting that due process requires the admission of the declaration against interest under the circumstances previously described,

regardless of the declarant's availability. See text accompanying notes 52-53 *supra*.

⁶³See CAL. EVID. CODE § 1235 (West 1968).

⁶⁴*People v. Sam*, 71 Cal. 2d 194, 208-10, 454 P.2d 700, 709-09, 77 Cal. Rptr. 804, 812-13 (1969). A witness' testimony at trial, two years after the occurrence, that he could not remember a fight, was not inconsistent with his having given the police a report on the date of the fight.

⁶⁵*People v. Green*, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971). Green was on trial for selling marijuana to a juvenile, Porter. At the preliminary hearing, Porter identified Green as his supplier. At the trial two months later, Porter equivocated in response to the prosecution's questions, saying he "wasn't sure," he "guessed so," and so on. The California Supreme Court held that the effect of Porter's testimony was a denial of his statement made at the preliminary hearing and admitted it for substantive use as a prior inconsistent statement. *Id.* at 988-89, 479 P.2d at 1002, 92 Cal. Rptr. at 498. There must be at least some evidence to show that the prior statement is the witness', so that the judge or jury can be sure that the two conflicting statements were made by the same witness. *Id.* at 990, 479 P.2d at 1003, 92 Cal. Rptr. at 499.

the attorney should stress the reliability of the declaration against interest. This reliability is not affected by the reason for the declarant's unavailability, if that unavailability is not procured by the proponent of the evidence. Refusal under these circumstances to admit a declaration against interest on behalf of a criminal defendant is a "mechanistic" application of the hearsay rule tending to defeat the defendant's fundamental constitutional right to present witnesses on his own behalf and therefore denying the defendant due process of law.⁶⁶

B. PENAL INTEREST

The admissibility of statements against penal interest is an innovation in both the California and federal systems. In California, the test is "not whether the statement could provide a link in the chain of evidence leading to the declarant's criminal liability,"⁶⁷ but whether the statement is "distinctly" against the declarant's penal interest.⁶⁸ No federal test has been enunciated. Both jurisdictions recognize statements tending to expose one to the risk of criminal liability as being against interest. There is, however, a significant difference between the two systems in their use of declarations against penal interest tending to exculpate the accused in a criminal trial.⁶⁹

California Evidence Code section 1230 places no restrictions on the use of exculpatory declarations against penal interest, nor has the judiciary added any restrictions. In *People v. Gullet*,⁷⁰ defendant, charged with armed robbery, sought to introduce a note written to him by his co-defendant which stated that the co-defendant had borrowed defendant's car and committed the robbery with another person. The court admitted the note.

Whether a note was written by a co-defendant or a third-party, in itself would not necessarily bear on the admissibility or non-admissibility of a declaration tending to incriminate the speaker.

⁶⁶The last paragraph of Powell's opinion may indicate that *Chambers* was a "shock the conscience" type of due process case. 410 U.S. at 302-03. While it therefore tends to be less reliable as a precedent, the language used by Powell elsewhere in the opinion is strong enough to serve as a forceful argument for the practitioner and should give pause to even the most reluctant of judges. See text accompanying note 61 *supra*.

⁶⁷*People v. Traylor*, 23 Cal. App. 3d 323, 331, 100 Cal. Rptr. 116, 120 (2d Dist. 1972).

⁶⁸*Id.*, 100 Cal. Rptr. at 121.

⁶⁹The standards for admissibility of inculpatory and exculpatory declarations against interest differ, the standards for the latter being more lenient. Inculpatory declarations against penal interest are most often involved in the co-conspirator or co-defendant cases. See, e.g., *People v. Aranda*, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965). See also Comment, *Co-Conspirator Declarations: Constitutional Defects in the Admission Procedure*, this volume.

⁷⁰245 Cal. App. 2d 685, 54 Cal. Rptr. 308 (2d Dist. 1966).

The appropriate test would be the degree of reliability or trustworthiness of such a declaration regardless of who is the declarant.⁷¹

The identity of the declarant and his relationship to the defendant go to the weight to be accorded the statement.⁷²

Federal rule of evidence 804(b)(3), on the other hand, provides that:

[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Contrary to what the Advisory Committee's notes appear to indicate,⁷³ a federal district court recently held that the requirement for corroborating circumstances is not limited to a confession relieving the accused of blame, but is applicable to *any* declaration against penal interest tending to exculpate the accused. Thus, in *Lowery v. Maryland*,⁷⁴ a witness' out-of-court admission of false testimony which tended to exculpate the defendant was inadmissible as a declaration against penal interest because corroborating circumstances were not found.⁷⁵

The purpose of the corroboration requirement is to prevent fabrication.⁷⁶ To achieve this purpose, Weinstein suggests that "[t]he court should only ask for sufficient corroboration to 'clearly' permit a reasonable man to believe that the statement might have been made in good faith and that it could be true."⁷⁷ Looking primarily at the exculpatory confession, he suggests as examples of corroborating circumstances the presence of the declarant near the crime, motive of the declarant to commit the crime of which defendant is accused, or background connecting the declarant with the crime.⁷⁸ Each of these circumstances suggests that the declarant could have committed the crime, and therefore provides some substantiation for his declaration against penal interest.

Weinstein's examples, however, were expressly rejected by the court in *Lowery* as the type of "simple corroboration" which

⁷¹*Id.* at 688, 54 Cal. Rptr. at 310.

⁷²For special limitations on the use of inculpatory confessions by co-defendants, see *People v. Aranda*, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965).

⁷³FED. R. EVID. 804(b)(3), Advisory Comm. notes.

⁷⁴401 F. Supp. 604, 608 (D. Md. 1975).

⁷⁵The court found that the declaration against penal interest was not spontaneous, that it was made three years after trial, and that it was made to prison officials. *Id.*

⁷⁶FED. R. EVID. 804(b)(3), Advisory Comm. notes.

⁷⁷4 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE, ¶ 804(b)(3) [03], at 804-90 [hereinafter cited as 4 WEINSTEIN].

⁷⁸*Id.*

Congress rejected.⁷⁹ Instead, the court looked to *Chambers v. Mississippi*⁸⁰ for guidance in determining what constitutes “corroborating circumstances.” In *Chambers*, the Supreme Court found the following corroborating circumstances: First, each of McDonald’s confessions was made spontaneously to a close acquaintance shortly after the murder occurred. Second, other evidence in the case corroborated the truth of the confessions, including McDonald’s sworn confession, the testimony of an eyewitness to the shooting, testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a gun of the same caliber used to shoot the police officer. Third, “[t]he sheer number of independent confessions provided additional corroboration for each.”⁸¹

Further guidance in defining “corroborating circumstances” may be found by examining the analogous federal requirement that confessions and admissions by the accused be corroborated. In *Opper v. United States*,⁸² for example, the Supreme Court stated that the requirement called only for

... the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. . . . It is sufficient if corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth.⁸³

The corroboration may be supplied by evidence bearing directly on the material matters admitted,⁸⁴ or by independent evidence which bolsters the confession itself and proves the offense by means of the statements of the accused.⁸⁵ This may be accomplished by producing significant evidence of the commission of the crime charged, even though separate corroboration of specific elements of guilt admitted by the accused is lacking.⁸⁶

The guidelines contained in these cases for confessions of the accused should be applicable to an exculpatory declaration against penal interest of a third party. In both instances, the corroboration requirement is an attempt to prevent fabrication. Both involve self-incriminating statements, although in one case that statement tends to exculpate another. Since the situations are very nearly identical

⁷⁹ 401 F. Supp. at 607.

⁸⁰ 410 U.S. 284 (1973). See text accompanying notes 56-58 *supra*.

⁸¹ *Id.* at 300.

⁸² 348 U.S. 84 (1954).

⁸³ *Id.* at 93.

⁸⁴ *United States v. Bukowski*, 435 F.2d 1094, 1107 (7th Cir.), *cert. denied*, 401 U.S. 911 (1970).

⁸⁵ *Smith v. United States*, 348 U.S. 147, 156 (1954).

⁸⁶ *United States v. Bukowski*, 435 F.2d 1094, 1107 (7th Cir.), *cert. denied*, 401 U.S. 911 (1970).

and the purpose of the requirement is the same, the same standards should apply to both.

One commentator suggests looking at the requirements imposed by state courts for the admission of exculpatory confessions.⁸⁷ He argues that circumstances such as opportunity or motive, both rejected in *Lowery v. Maryland*,⁸⁸ or acts subsequent to the crime, are sufficient corroboration to allow introduction of the exculpatory declaration against interest. He contends:

A higher requirement of corroboration is a perversion of the balancing-of-interests test used for admissibility, a confusion of the issues of admissibility and burden of proof, and a negation of the overriding element of need assumed by rule 804(b)(3).⁸⁹

These guidelines should give the federal practitioner some idea of the corroborating evidence he needs in order to have an exculpatory declaration against penal interest admitted on behalf of his client.⁹⁰ He should keep in mind, however, that no firm rules have been adopted. If the corroboration is similar to that suggested by Weinstein, counsel should be prepared to argue that, despite rejection by the court in *Lowery v. Maryland*, his evidence does constitute sufficient corroboration to insure against fabrication.

C. SOCIAL INTEREST

The "social interest" concept is a comparatively new one and has been adopted in only a few jurisdictions.⁹¹ Federal rule of evidence 804(b)(3) does not recognize declarations against social interest; the version promulgated by the Supreme Court, however, did include them. The holding of *People v. Parriera*,⁹² subsequently codified

⁸⁷Note, *Declarations Against Penal Interest: What Must Be Corroborated Under the Newly Enacted Federal Rule of Evidence, Rule 804(b)(3)?*, 9 VALPARAISO UNIV. L. REV. 421 (1975). For example, Idaho admits the use of third-party hearsay declarations against penal interest "only when there is other substantial evidence which tends to show clearly that the declarant is in fact the person guilty of the crime for which the accused is on trial. . . ." *State v. Larsen*, 91 Idaho 42, 49, 415 P.2d 685, 692 (1966). Texas admits exculpatory confessions only when the evidence against the defendant is circumstantial and there is evidence connecting the declarant with the crime. *Blocker v. State*, 114 S.W. 814 (Tex. Crim. App. 1908).

⁸⁸401 F. Supp. 604 (D. Md. 1975).

⁸⁹Note, *Declarations Against Penal Interest: What Must Be Corroborated Under the Newly Enacted Federal Rule of Evidence, Rule 804(b)(3)?*, 9 VALPARAISO UNIV. L. REV. 421, 440 (1975).

⁹⁰For further discussion, see *Developments in the Law—Confessions*, 79 HARV. L. REV. 935 (1966).

⁹¹It is found in Uniform Rule of Evidence 63(10) (1953 version, superseded 1974), which has been adopted in Kansas, New Jersey, the Canal Zone and the Virgin Islands. FED. R. EVID. 804(b)(3), Advisory Comm. notes.

⁹²237 Cal. App. 2d 275, 46 Cal. Rptr. 835 (5th Dist. 1965). See text accompanying notes 20-21 *supra*.

in California Evidence Code section 1230, does recognize declarations against social interest.

For a statement to be admissible as a statement against social interest, the content of the statement, as well as the fact that the statement was made, must be against the declarant's social interest.⁹³ Otherwise, whenever a declarant violated a confidence, he could argue that his revelations were against social interest, because by betraying the trust placed in him, he has made himself an object of social disgrace. In a recent case, *In re Weber*,⁹⁴ petitioner sought to introduce a sworn statement of inmate *D* that inmate *A* had told him that he, *A*, had framed petitioner. Inmate *D* claimed the privilege against self-incrimination. Petitioner attempted to have the statement introduced as a declaration against social interest because *D* would be regarded as a "snitch" and had "risked the ultimate sanction."⁹⁵ The court refused to admit the evidence, saying that the content of the statement revealed nothing about inmate *D*'s character.⁹⁶

To date only confessions of suicide or suicide attempts have been admitted as being against social interest.⁹⁷ The statute defines a statement against social interest as one which creates "a risk of making [declarant] an object of hatred, ridicule, or social disgrace in the community." This definition is vague. The California practitioner has wide latitude to argue that various types of statements would be against the declarant's social interest.

Some guidelines as to what may constitute a "social interest" can be found in the law of defamation, which involves exposing a person to "hatred, contempt, ridicule, or obloquy."⁹⁸ Some statements

⁹³*In re Weber*, 11 Cal. 3d 703, 722, 523 P.2d 229, 242, 114 Cal. Rptr. 429, 442 (1975).

⁹⁴*Id.*

⁹⁵*Id.* at 721, 523 P.2d at 241, 114 Cal. Rptr. at 441.

⁹⁶*Id.* The court did not deal with the double hearsay problem, *i.e.*, inmate *A*'s out-of-court statement to inmate *D*, and inmate *D*'s out-of-court statement to prison authorities.

⁹⁷*People v. Parriera*, 237 Cal App. 2d 275, 46 Cal. Rptr. 835 (5th Dist. 1965); *People v. Salcido*, 246 Cal. App. 2d 450, 54 Cal. Rptr. 820 (5th Dist. 1966).

⁹⁸The definition of defamation in California is found in the following two sections of the California Civil Code (West 1970):

§ 45. Libel is a false and unprivileged publication by writing, [or] printing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

§ 46. Slander is a false and unprivileged publication . . . which:

- (1) Charges any person with crime, or with having been indicted, convicted, or punished for crime;
- (2) Imputes in him the present existence of an infection, contagious, or loathsome disease;
- (3) Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those

which would be defamatory if uttered by a third person are not against social interest but are against some other type of interest. For example, a statement charging oneself with a crime⁹⁹ is a declaration against penal interest. Others, however, fit only in the social interest category, as, for instance, when a person admits to being unchaste.¹⁰⁰ Arguably, a statement made by someone which exposed another to ridicule or obloquy would, if made by a person about himself, expose him to the same consequences. Such a statement would therefore be against the speaker's social interest.

Statements that might be against social interest are: admission of paternity of an illegitimate child;¹⁰¹ a statement by an unmarried woman that she is pregnant;¹⁰² a man's admission of impotence;¹⁰³ admission of membership in the Communist Party;¹⁰⁴ admission of one's own illegitimacy; admission of prior or present mental illness.

The law of defamation gives the California attorney a good basis from which to try to broaden the "social interest" concept. In attempting to define a new type of social interest, the attorney must show that the statement contravenes a type of social interest valued by the declarant and his relevant community and that such interest is sufficiently strong so that the declarant would not make the statement unless it were true.

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- respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profits;
 - (4) Imputes to him impotence or a want of chastity; or
 - (5) Which by natural consequence, causes actual damage.

⁹⁹CAL. CIV. CODE § 46(1) (West 1970).

¹⁰⁰Peterson v. Rasmussen, 47 Cal. App. 694, 696, 191 P. 30, 31 (3d Dist. 1920) (action for libel contained in letter saying that plaintiff, an unmarried woman, was pregnant). Whether an admission of lack of chastity is a statement against interest is one which, particularly in today's society, depends on the declarant and the declarant's background. See text accompanying notes 105-113 *infra*.

¹⁰¹Estate of Baird, 193 Cal. 225, 241, 223 P. 974, 980 (1924) (appeal from the distribution of estate brought by the alleged illegitimate son of the decedent). Decedent's admission of paternity was held not against interest because it was not against pecuniary or proprietary interest. *Id.* This statement could also be admitted today as tending to expose the declarant to civil liability.

¹⁰²Thrasher v. Board of Med. Examiners, 44 Cal. App. 26, 185 P. 1006 (1st Dist. 1919) (Action to repeal a physician's license to practice on the ground that he performed a criminal abortion). The Board sought to introduce the statement of the patient, an unmarried woman, that she was pregnant.

¹⁰³*In re James' Estate*, 124 Cal. 653, 659, 57 P. 578, 581 (1899). In an appeal from a decree of distribution of an estate, decedent's declaration that he was impotent was admissible against his alleged son.

¹⁰⁴MacLeod v. Tribune Pub. Co., 52 Cal. 2d 536, 543, 343 P.2d 36, 39 (1959) (action for libel against the Oakland Tribune, which had printed an article saying that a Communist group had endorsed the plaintiff for city council and implying that he was a "fellow traveler").

D. REALIZATION THAT THE DECLARATION
IS AGAINST INTEREST:
SUBJECTIVE OR OBJECTIVE TEST

In both the federal and California exceptions, the requirement that the declarant realize that the statement is against his interest is "that a reasonable man in his position would not have made the statement unless he believed it to be true." It appears that the standard is an objective one; only a reasonable man, not necessarily the specific declarant, need realize that the statement is against his interest.¹⁰⁵

Among the factors which may be relevant in deciding whether the reasonable man would realize that the statement is against his interest are the following:

1. Is the injury remote and contingent or present and actual? The rationale of the exception is that no one will say something detrimental to his interests unless it is true; the possible injury to his interests is the truth-compelling factor. If, however, the possible injury is remote and conjectural, it would probably not occur to the declarant and thus would provide no guarantee of truthfulness.

2. What was the relative size or degree of the interest? For example, would the statement injure declarant in the amount of \$1 or \$100? It is frequently said that the amount of interest which declarant possesses is immaterial to its admissibility, affecting only its weight.¹⁰⁶ The size of the interest, however, should be considered a factor in determining whether the declarant probably realized that his statement was against interest.¹⁰⁷ The larger the interest involved, the more probable it would be that the declarant realized his statement was against that interest.

Both California¹⁰⁸ and the federal courts¹⁰⁹ have adopted the objective, reasonable man standard, which avoids the difficulty of determining the actual state of mind of the declarant. The difficulties in ascertaining the declarant's subjective state of mind are compounded by the requirement that the declarant be unavailable.

Close consideration of the rationale underlying the exception, however, suggests that the objective standard fails to provide the necessary guarantees of reliability. If the declarant does not realize that

¹⁰⁵The drafters of the Evidence Code and the Federal Rules of Evidence assume that a person will be more likely to make a true statement against interest. See text accompanying notes 29-37 *supra*.

¹⁰⁶Jefferson, *supra* note 33, at 19 n.42.

¹⁰⁷*Id.*

¹⁰⁸See *People v. Johnson*, 39 Cal. App. 3d 749, 114 Cal. Rptr. 545 (1st Dist. 1974). See also B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK ¶ 6.1 (1972).

¹⁰⁹4 WEINSTEIN, *supra* note 77, ¶ 804(b)(3)[02].

the statement is against his interest, where is the compulsion for truth? At best, it can be said that the declaration is neutral with respect to reliability.

The statements of the particular declarant are being considered, not those of the hypothetical reasonable man. If the declarant does not believe that his statement is against his interest, the fact that a reasonable man would consider it so does not provide any assurance of truthfulness. If the declarant does not believe the statement to be against his interest, the impetus for truth is missing and the rationale behind the exception fails. Unless the qualifying words "in his position" mean that the reasonable man has the same education, morals, knowledge,¹¹⁰ priorities, and other background as the declarant, the objective test fails as a standard for determining whether the necessary guarantees of truthfulness exist in any declaration against interest situation.¹¹¹

A subjective test expressed in the form of a rebuttable presumption is preferable to an objective standard.¹¹² If a reasonable man in declarant's position would have believed the statement to be against his interest, the statement should be admitted as a declaration against interest unless the opponent of the statement can show by a preponderance of the evidence that the declarant did not in fact believe the statement to be against his interest. The existence of this subjective realization would be a preliminary question of fact for the judge. Such a presumption is preferable to the objective standard because the opponent of the evidence can prevent the use of unreliable evidence by showing that the guarantee of trustworthiness is lacking.¹¹³

The practitioner in both California and federal courts should be prepared to argue against the existing objective standard. When the declarant does not realize that the statement is against his interest,

¹¹⁰This would include, *e.g.*, knowledge of the statute of limitations for crimes.

¹¹¹*See, e.g., Demasi v. Whitney Trust and Savings Bank*, 176 So. 703 (La. App. 1937), for a clear example of a court's recognition of the need for subjective realization by the declarant. Weinstein, in analyzing the federal rules, argues against the objective standard. He suggests that it is within the trial judge's discretion to determine if a hearing is warranted on the question of whether the declarant would not have made the statement unless it were true; he feels that the pre-trial conference is a particularly appropriate time for such a hearing. 4 WEINSTEIN, *supra* note 77, ¶ 804(b)(3)[02].

¹¹²*See, e.g.*, the presumptions found at California Evidence Code sections 660-69 (West 1968).

¹¹³One writer has suggested that the declaration be admitted unless a preponderance of the evidence shows that the declarant was probably lying. Comment, *Declarations Against Interest—Rules of Admissibility*, 62 NW. U.L. REV. 934, 942 (1968). However, the declarant need not have been lying for the guarantee of truthfulness to be missing. The statement is equally unreliable when the declarant does not believe it to be against his interest. The rebuttable presumption test proposed here would cover both situations.

there is no special guarantee of reliability, and the statement should be treated as ordinary inadmissible hearsay.

E. DETERMINATION OF THE DECLARANT'S INTEREST

Beyond the considerations raised in the preceding section, there is the problem of determining whether the statements offered are, in fact, against the declarant's interest. This determination involves the analysis of three separate issues: the statement that has both self-serving and disserving aspects; collateral statements accompanying a disserving statement; and the importance of the presence of a motive to falsify.

1. STATEMENTS WITH SELF-SERVING AND DISSERVING ASPECTS

A statement may appear in one light to be self-serving and in another to be disserving. For example, the words "I robbed the bank" clearly appear to be against penal interest; if they were spoken to a police officer, the situational context, or extrinsic factors, also points to their being against interest. However, if the same words were spoken by one prison inmate to other prison inmates, the context might well indicate that the statement served to enhance the declarant's standing in the prison community and was, therefore, in favor of, rather than against, the declarant's interest.

One determines a statement to be against interest by looking at the facts asserted in the statement and then considering the extrinsic factors.¹¹⁴ In those cases where the statement appears to have both self-serving and disserving aspects, close examination of the context in which the statement is made will most often indicate which aspect preponderates. Examining the words alone does not suffice. In the statement "I robbed the bank," the context determines whether the statement was against interest; only by looking at the statement in light of where and to whom it was made can the interest be determined.

The example of "I robbed the bank" is one which lends itself to clear analysis; it is either self-serving or disserving. However, some statements are both self-serving and disserving simultaneously. McCormick posed as the "classic" instance the acknowledgment of receipt of part payment on a note.¹¹⁵ When one acknowledges payment on a debt, one's statement is both self-serving and disserving; it is self-serving because one claims a debt is owed and it is disserving because one acknowledges that the debt is reduced. If the payment is acknowledged as having been made before the statute of limita-

¹¹⁴ 5 WIGMORE, *supra* note 3, § 1468.

¹¹⁵ MCCORMICK (2d ed.), *supra* note 12, § 279, at 677.

tions has run, the statement is preponderantly against interest and comes within the exception. The primary import is that the debt has been reduced. If the payment is acknowledged to have been made after the running of the statute in a jurisdiction where such a payment revives the note, the acknowledgment is considered to be primarily in the creditor's interest.¹¹⁶

Jefferson, also, urges the weighing of the conflicting interests if the declaration has a double aspect.

Only if the disserving feature of the declaration predominates can it logically be said that the declarant realizes that the declaration is against his interests, and, therefore, that the declaration is trustworthy. If the self-serving feature of the declaration equals or predominates over the disserving feature, the declaration would not appear to be sufficiently trustworthy to be admitted.¹¹⁷

The practitioner should be sensitive to this issue. Particularly if the statement is of a type traditionally held to be against interest, the courts may look only at the words and not at the context.¹¹⁸

2. COLLATERAL STATEMENTS

From the beginning of the exception, declarations against interest have been admissible to prove not only the disserving fact stated, but also to prove other neutral and self-serving facts contained in statements collateral to the disserving statement.¹¹⁹ This frequently creates a problem between co-defendants in criminal cases when one of them confesses to the crime and implicates his co-defendant in the confession.¹²⁰

¹¹⁶ *Id.*

¹¹⁷ Jefferson, *supra* note 34, at 51 n.128. The Model Code of Evidence takes the position that if a fact stated has a double aspect, the admissibility of the declaration should depend upon whether it is being offered in its disserving aspect or self-serving aspect. MODEL CODE OF EVIDENCE rule 509, Comment b (1942). Yet, this is contrary to the rationale of the exception. The only guarantee of a statement's truthfulness is that it is wholly or principally against interest. If the admissibility is predicated upon the use to which the statement is to be put in court, rather than on whether it is disserving when uttered, the hearsay declaration loses its special quality of reliability and the exception fails.

¹¹⁸ See *Lehman v. Sherger*, 68 Wis. 145 (1887), where the court admitted a declaration by the payee of a note, secured by a mortgage, that he had parted with the note and mortgage and transferred them to a furniture company. The court failed to take into account evidence showing that, at the time of the transfer, declarant was indebted to the furniture company and received a sum of money for the transfer. It is difficult to say that the declaration was against interest, because the transfer was for consideration in the form of cash and extinguishment of a debt.

¹¹⁹ Jefferson, *supra* note 34, at 57.

¹²⁰ For a more complete review of this problem from the perspective of the confrontation clause of the sixth amendment, see *Dutton v. Evans*, 400 U.S. 74 (1970); *Bruton v. United States*, 391 U.S. 123 (1968); Fine, *Declarations Against Penal Interest in New York: Carte Blanche?*, 21 SYR. L. REV. 1095

Three methods of dealing with collateral statements have been advocated:¹²¹

(a) Admit the entire declaration because part is disserving and hence by a "contagion" of truthfulness, all will be trustworthy.¹²² Jefferson takes issue with this suggestion. He argues that the basis for the exception is not declarant's general trustworthy frame of mind, but the disserving character of the facts asserted. "Once those facts are left behind the probability of trustworthiness for other statements seems highly speculative and conjectural."¹²³

(b) Compare the strength of the self-serving interest to the strength of the disserving interest in the statement. If the disserving interest is greater, admit the whole statement; if the self-serving interest is greater, exclude it all. Jefferson criticizes this approach as unsound for the reasons given above.

(c) Admit the disserving parts of the declaration and exclude the self-serving and neutral parts. This approach is most appropriate when the self-serving, neutral, and disserving parts of the statement can be severed. Jefferson¹²⁴ and McCormick¹²⁵ adhere to this position.

The California Supreme Court has taken the position advocated by McCormick and Jefferson. In *People v. Leach*, the court held that the declarations against interest exception is "inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant."¹²⁶ The neutral and self-serving parts of the statement must be severed from the disserving parts or the statement may not be admitted under section 1230. This holding adheres most closely to the underlying rationale of the exception, that the compulsion toward truth is in the fact that the

(1970); Note, *The Admission of a Codefendant's Confession After Bruton v. United States: The Questions and a Proposal for Their Resolution*, 1970 DUKE L.J. 329; Note, *Bruton v. United States: A Belated Look at the Warren Court Concept of Criminal Justice*, 44 ST. JOHN'S L. REV. 54 (1969); Note, 14 VILLANOVA L. REV. 132 (1968). In California, see *People v. Leach*, 15 Cal. 3d 419, 541 P.2d 296, 124 Cal. Rptr. 752 (1975); and *People v. Aranda*, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965).

¹²¹MCCORMICK (2d ed.), *supra* note 12, § 279. For the method favored by McCormick, see text accompanying note 125 *infra*.

¹²²Wigmore agreed with this method. "All parts of the speech or entry may be admitted which appear to have been made while the declarant was in the trustworthy condition of mind which permitted him to state what was against his interest." 5 WIGMORE, *supra* note 3, § 1465.

¹²³Jefferson, *supra* note 34, at 60.

¹²⁴*Id.* at 50.

¹²⁵MCCORMICK (2d ed.), *supra* note 12, § 279. The Model Code of Evidence does not permit admissibility of the entire statement as offered, but only the disserving statement and such additional parts "as the judge finds to be so closely connected with the declaration against interest as to be equally trustworthy." MODEL CODE OF EVIDENCE rule 509(2) (1942).

¹²⁶15 Cal. 3d 419, 441, 541 P.2d 296, 311, 124 Cal. Rptr. 752, 767 (1975).

statement is against interest.

Although no federal courts have as yet addressed the issue, the Advisory Committee's Notes to federal rule 804 indicate that collateral statements will be admissible under rule 804(b)(3).¹²⁷ The only exception is when the declarant has a motive to falsify the collateral statement.¹²⁸

3. MOTIVE TO FALSIFY

Although not stated as a separate requirement in either federal rule of evidence 804(b)(3) or in California Evidence Code section 1230, an additional requirement, absence of a motive to misrepresent or falsify the facts declared, has sometimes been asserted. Jefferson argues that the motive to falsify must be considered as a separate factor.¹²⁹ Wigmore, however, said that this alleged additional requirement merely refers to a declaration of facts having a double aspect; the presence of a motive to falsify means the facts declared are primarily self-serving.¹³⁰ Professor Morgan indicates that the motive to falsify, disclosed by extrinsic circumstances, is to be treated as a factor bearing on whether the statement is self-serving or dis-serving, and therefore directly affects the central determination of truthfulness.¹³¹

The position taken by Wigmore and Morgan appears to be the more valid,¹³² and is the position taken in California and in the federal system. The motive to falsify bears directly on whether or not the statement is against the declarant's interest. If there is a motive to falsify, the guarantees of truthfulness are missing and the statement should not be admitted.

This conclusion was reached by a California court in *People v. Shipe*.¹³³ Three men were accused of murder, but two of them pled guilty to lesser offenses. At the trial of the third, the two men refused to testify on fifth amendment grounds. The prosecutor proceeded through a type of questioning held to be error in *Douglas v. Alabama*,¹³⁴ that is, he introduced their extrajudicial confessions

¹²⁷FED. R. EVID. 804, Advisory Comm. notes.

¹²⁸*Id.* See also text accompanying notes 129-135 *infra*.

¹²⁹Jefferson, *supra* note 34, at 53.

¹³⁰5 WIGMORE, *supra* note 3, § 1464. See text accompanying notes 114-118 *supra*.

¹³¹Morgan, *Declarations Against Interest*, 5 VANDERBILT L. REV. 451, 470 (1952).

¹³²The practical effect of either position on the admissibility of the evidence is the same, although making the lack of a motive to falsify a positive requirement for admissibility would impose an additional burden on the proponent of the evidence.

¹³³49 Cal. App. 3d 343, 122 Cal. Rptr. 701 (5th Dist. 1975).

¹³⁴380 U.S. 415 (1965). Petitioner and Loyd were tried separately for assault with intent to commit murder. At petitioner's trial, Loyd asserted the privilege

under the guise of cross-examination, while they continued to assert their privilege. Citing this questioning as error, defendant appealed his conviction. The prosecution contended, among other things, that the information put into evidence by the improper questioning would have been admissible anyway as a declaration against penal interest and so the error was harmless. In rejecting this argument and reversing the conviction, the court said:

Each confession was made when the declarant had a motive for lying. . . . In our view, the statements in question do not come within Section 1230 of the Evidence Code and are not clothed with sufficient indicia of reliability to satisfy the confrontation clause of the United States Constitution.¹³⁵

Thus, the motive for lying affects the underlying trustworthiness of the evidence. It is not and should not be a separate requirement for admissibility; this would place an additional burden on the proponent of the evidence without adding any further guarantee of reliability.

VI. DECLARATIONS AGAINST INTEREST DISTINGUISHED FROM PARTY-OPPONENT AND VICARIOUS ADMISSIONS

The declarations against interest exception is often confused with two other exceptions to the hearsay rule, admissions of a party-opponent and vicarious admissions. This confusion arises because many party-opponent admissions and vicarious admissions are also statements against the declarant's interest. As a result, a statement which is admissible under one exception may be erroneously excluded because it fails to meet the requirements of another exception.

A. ADMISSIONS OF A PARTY-OPPONENT

California Evidence Code section 1220¹³⁶ contains only two requirements for the admission of a statement by a party to the action: the declarant must be a party to the action; and the statement must be offered against the declarant.¹³⁷ Admissions of a party-opponent

against self-incrimination. Under the guise of cross-examination to refresh Loyd's recollection, the prosecutor purported to read from a document said to be a confession signed by Loyd. This confession implicated the petitioner. The United States Supreme Court held that the petitioner's sixth amendment rights had been violated. Although the prosecutor's reading of Loyd's alleged statement was not testimony, it might have had an equivalent effect in the jury's mind. Petitioner's inability to cross-examine the prosecutor or Loyd denied him the right of cross-examination secured by the confrontation clause. *Id.* at 419.

¹³⁵ 49 Cal. App. 3d at 353, 122 Cal. Rptr. at 707. *See also* *People v. Chapman*, 50 Cal. App. 3d 872, 123 Cal. Rptr. 862 (2d Dist. 1975).

¹³⁶ CAL. EVID. CODE § 1220 (West 1968).

¹³⁷ *See* Comment, *Admissions of a Party-Opponent: An Advocate's Guide to Personal, Adoptive and Judicial Admissions in Civil Cases in California and*

differ from declarations against interest in four ways. First, the declarant need not have firsthand knowledge of the fact admitted.¹³⁸ Second, the statement need not have been against the declarant's interest when it was made. Confusion arises because most admissions of a party-opponent are against the declarant's interest at the time the statements are made, as well as when they are offered at trial. Third, the declarant must be a party to the action. Fourth, the rationale for the admissions of a party-opponent exception is that a party cannot object to the trustworthiness of his own out-of-court statements.¹³⁹ The rationale for admitting declarations against interest is quite different: no person would make a statement against his interest unless he believed it to be true.

B. VICARIOUS ADMISSIONS

The vicarious admissions exception to the hearsay rule is similar to the admissions of a party-opponent exception. A vicarious admission is a statement by a declarant who has a special relationship with the party against whom the statement is admitted such that the declarant's statements are attributed to the party. California Evidence Code sections 1222¹⁴⁰ and 1224¹⁴¹ and federal rule of evidence 801(d)(2)(D)¹⁴² govern the admissibility of vicarious admissions.¹⁴³

Federal Courts, this volume.

¹³⁸CAL. EVID. CODE § 1220, Law Rev. Comm'n Comment. Federal rule of evidence 801(d)(2) specifically excludes admissions of a party-opponent from the definition of hearsay. This does not solve the confusion, however, because such an admission has the appearance of traditional hearsay and may erroneously be excluded as hearsay.

¹³⁹Wigmore and Morgan take this position. 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1048 (Chadbourn rev. 1972); E. MORGAN, BASIC PROBLEMS OF EVIDENCE 265 (1962). McCormick, however, argued that the rationale is that one would not make a statement concerning his interests without investigating the truth of it. MCCORMICK (2d ed.), *supra* note 12, § 263. See also Comment, *Admissions of a Party-Opponent: An Advocate's Guide to Personal, Adoptive and Judicial Admissions in Civil Cases in California and Federal Courts*, this volume.

¹⁴⁰CAL. EVID. CODE § 1222 (West 1968). This section provides an exception for authorized admissions. When the party has authorized an agent to speak on his behalf, any statements made by the agent are admissible under the same circumstances as if they had been made by the party himself. The authority to speak may be express or implied; it is to be determined under the substantive law of agency. *Id.*, Law Rev. Comm'n Comment.

¹⁴¹CAL. EVID. CODE § 1224 (West 1968). This section is applicable in civil actions only. It simply requires that the liability or diminution of interest of the party be through the declarant and that the statement be one which would be admissible against the declarant. See Comment, *Negligence at Work: Employee Admissions in California and Federal Courts*, this volume.

¹⁴²Federal rule of evidence 801(d)(2)(D) requires that the statement be by the party's agent or servant concerning a matter within the scope of his agency or employment made during the existence of the relationship. Such statements are defined as non-hearsay.

¹⁴³California Evidence Code section 1223 (West 1968) deals with another

Vicarious admissions differ in three ways from declarations against interest. First, the declarant need not have personal knowledge of the matter stated.¹⁴⁴ Second, the statement need not have been against the declarant's interest when made.¹⁴⁵ Third, the rationales are different. The rationale for vicarious admissions is that the agent's words and acts are attributable to the principal.¹⁴⁶ The rationale for declarations against interest is that one will not make statements against his interest unless he believes them to be true.

VII. CONCLUSION

This article has compared the exceptions to the hearsay rule for declarations against interest found in California Evidence Code section 1230 and federal rule of evidence 804(b)(3). Three major differences have been highlighted: first, section 1230 encompasses declarations against social interest while rule 804(b)(3) does not; second, only rule 804(b)(3) requires that corroborating circumstances be shown for the admission of a declaration against penal interest tending to exculpate a criminal defendant; and third, "unavailability" appears to be broader under the federal rules. In addition, guidelines have been suggested to the attorney to assist in the use of these differences.

The attorney should be aware of the various problems in interpreting and applying this exception to the hearsay rule. He should realize the difficulties in determining whether the declarant realized that the statement was against his interest and attempt to prevent the admission of evidence without the reliability such realization supplies. This guarantee of reliability must be present for all statements admitted, including collateral statements. Finally, the practitioner should be aware of the possibility of confusion, by the courts and by himself, of party-opponent and vicarious admissions with declarations against interest.

The declarations against interest exception to the hearsay rule is still in a stage of development; several areas are left to the attorney to interpret and apply to his own advantage. With study of the requirements and care in avoiding their pitfalls, the attorney can incorporate this most valuable tool into his repertoire of skills.

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type of vicarious admission, admissions of a co-conspirator, which is not considered in this article. See Comment, *Co-Conspirator Declarations: Constitutional Defects in the Admission Procedure*, this volume.

¹⁴⁴See Comment, *Negligence at Work: Employee Admissions in California and Federal Courts*, this volume.

¹⁴⁵CAL. EVID. CODE § 1224, Law Rev. Comm'n Comment (West 1968).

¹⁴⁶MCCORMICK (2d ed.), *supra* note 12, § 267, at 639.