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Declarations Against Interest a Critical Review of the Unavailability Requirement

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NOTES

DECLARATIONS AGAINST INTEREST: A CRITICAL REVIEW OF THE UNAVAILABILITY REQUIREMENT

*Alexander Grant's Sons v. Phoenix Assur. Co.**

The hearsay rule has long been a confused and disordered doctrine.[1] The confusion is typically manifested in the narrow application of the exception for declarations against interest and in the consequent judicial invention of the doctrine of vicarious admissions. In particular, one traditional but questionable requirement for the admissibility of a declaration against interest is that the declarant be unavailable for in-court examination. Where the declarant has been the principal[2] in a suretyship contract, however, courts have allowed evidence as to his admissions of theft on the distinct theory that a principal's admissions may be used against the surety in an action by the beneficiary, regardless of the availability of the principal.

In the recent case of *Alexander Grant's Sons v. Phoenix Assur. Co.*[3] a New York court invoked both doctrines. The action was brought by an insured employer to recover losses allegedly sustained through theft by certain employees during the term of a blanket fidelity policy issued by defendant. In order to establish the fact and the amount of the theft, plaintiff offered in evidence a detective's testimony concerning inculpatory statements made to him by the four employees involved, together with statements in the employees' handwriting in which they described and admitted the defalcations. The statements had all been made while the declarants were still in plaintiff's employ. The evidence was offered after plaintiff had established that one of the four employees was presently out of the state, and after the other three had been called as witnesses but had claimed their privilege against self-incrimination. The trial court refused the proof on the grounds that it was hearsay not constituting part of the *res gestae.* At the close of plaintiff's case, the court granted defendant's motion to dismiss. On appeal, the judgment was reversed, and a new trial was granted, the Appellate Division for the Fourth Department holding that both sets of statements were admissible either as declarations against interest or as part of the *res gestae.*[4] In so holding, the court expressly disapproved the decision in *Marcus v. Fidelity & Deposit Co.*[5] in which it had been held on similar facts that an employee's oral statements were not admissible as part of the *res gestae,* be-

* 25 App. Div. 2d 93, 267 N.Y.S.2d 220 (4th Dep't 1966).

1 In Dallas County v. Commercial Union Assur. Co., 286 F.2d 388, 392 (5th Cir. 1961), the court referred to the law governing hearsay as "somewhat less than pellucid." See Morgan, "The Hearsay Rule," 12 Wash. L. Rev. 1, 12 (1937): "The assertion is ventured that the hearsay rule in its present form is the result of a conglomeration of conflicting considerations modified by historical accident;" Model Code of Evidence, Introductory Note to Chapter VI, at 223 (1942).

For explanations of this continued lack of clarity, see Morgan, Foreword to Model Code of Evidence, at 5 (1942); Jefferson, "Declarations Against Interest: An Exception to the Hearsay Rule," 58 Harv. L. Rev. 1 (1944).

2 "Principal" is used here and throughout the note in the context of suretyship and denotes a person whose performance is guaranteed by a surety.

3 25 App. Div. 2d 93, 267 N.Y.S.2d 220 (4th Dep't 1966).

4 Ibid.

5 164 App. Div. 859, 149 N.Y. Supp. 1020 (1st Dep't 1914).

cause they were neither contemporaneous with the defalcation nor so connected with it as to be part of the transaction.

The issues in the *Alexander Grant* case were whether a declaration against interest is admissible in the absence of proof that the declarant is dead, and whether a principal's admissions during the course of his employment are competent evidence against the surety in an action by the employer. In answering both questions in the affirmative, the court, though it followed recent trends, did not undertake to discuss extensively the basic questions involved.

The Hearsay Rule and Its Exceptions

The Rule. Hearsay evidence is oral testimony or written proof of an extrajudicial statement, offered to show the truth of the matter asserted in the statement.[6] Its value therefore rests upon the credibility of a declarant who is neither present nor subject to the conditions imposed upon a witness.[7] Consequently, hearsay may easily mislead the triers of fact, since, though fair on its face, it may carry hidden dangers that could be exposed or eliminated by cross-examination.[8] Primary among these is the danger of deception resulting from faults in a declarant's memory or perception.[9] Although oath and confrontation may have a significant psychological effect, and although they are among the conditions to which in-court testimony is subjected, the principal reason for the rule which excludes hearsay evidence is that it cannot be subjected to the test of cross-examination.[10] It is the nature of the adversary system of law which makes the opportunity for cross-examination so essential,[11] and it is primarily for the protection of the adversary that hearsay evidence is excluded.[12] It is not cross-

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[6] Stevenson v. Abbott, 251 Iowa 110, 112, 99 N.W.2d 429, 431 (1959); Auseth v. Farmers Mut. Auto Ins. Co., 8 Wis. 2d 627, 630, 99 N.W.2d 700, 702 (1959); McCormick, Evidence § 225, at 460 (1954). There have been innumerable definitions of hearsay evidence. For a sampling of those similar to that in the text, see Hines v. Donaldson, 193 Ga. 783, 790, 20 S.E.2d 134, 139 (1942); Gass v. Carducci, 37 Ill. App. 2d 181, 187, 185 N.E.2d 285, 288-89 (1962); Kline v. Metcalfe Constr. Co., 148 Neb. 357, 360, 27 N.W.2d 383, 386 (1947); Strahorn, "A Reconsideration of the Hearsay Rule and Admissions," 85 U. Pa. L. Rev. 484, 486 (1937).

[7] See Stevenson v. Abbott, supra note 6, at 112, 99 N.W.2d at 431; Auseth v. Farmers Mut. Auto Ins. Co., supra note 6, at 630, 99 N.W.2d at 702; McCormick, supra note 6, at 460; Morgan, "Hearsay Dangers and the Application of the Hearsay Concept," 62 Harv. L. Rev. 177, 218 (1948); Thayer, "Bedingfield's Case—Declarations as a Part of the Res Gestae," 15 Am. L. Rev. 71, 71-74 (1881).

[8] See NLRB v. Imparato Stevedoring Corp., 250 F.2d 297, 302 (3d Cir. 1957); Buchanan v. Nye, 128 Cal. App. 2d 582, 585, 275 P.2d 767, 770 (Dist. Ct. App. 1954); Morgan, "Hearsay," 25 Miss. L.J. 1, 3-5 (1953).

[9] Morgan, supra note 7, at 218; see Thayer, supra note 7, at 107.

[10] Dallas County v. Commercial Union Assur. Co., 286 F.2d 388, 391 (5th Cir. 1961); NLRB v. Imparato Stevedoring Corp., supra note 8, at 302; Buchanan v. Nye, supra note 8, at 585, 275 P.2d at 770; Colgrove v. Goodyear, 325 Mich. 127, 134, 37 N.W.2d 779, 782-83 (1949). But see Glens Falls Indem. Co. v. Gottlieb, 80 Ga. App. 634, 638, 56 S.E.2d 799, 801 (1949) in which the court indicated a primary concern with the lack of oath.

Criminal cases raise unique questions. See, e.g., State v. Gorden, 356 Mo. 1010, 204 S.W.2d 713 (1947) in which an extrajudicial statement was precluded on the basis of a constitutional right to confrontation. For a discussion of the constitutional right, see 5 Wigmore, Evidence §§ 1397-1400 (3d ed. 1940).

[11] United States v. United Shoe Mach. Corp., 89 F. Supp. 349, 352 (D. Mass. 1950); see Dallas County v. Commercial Union Assur. Co., supra note 10, at 391.

[12] Morgan, supra note 7, at 183-84; see United States v. United Shoe Mach. Corp., supra note 11. But see Thayer, supra note 7, at 77, where the author attributes the development of the hearsay rule to the judicial distrust of untrained jurors. If the rule were designed wholly to protect the unsophisticated jury from being misled, there would logically be no need to

examination but the opportunity for cross-examination that the rule aims to preserve.[13] Therefore, "the scope of the rule and the establishment of exceptions to it should depend upon the extent to which an adversary will be prejudiced by deprivation of his opportunity to cross-examine."[14]

The Exceptions. There have been various enumerations of the exceptions to the hearsay rule. The precise number of exceptions, of course, depends upon the particular classification,[15] but regardless of the number it is clear that the exceptions did not develop according to any rational scheme. Since courts determined the scope of the exceptions by finding prior cases which had held such evidence admissible, the growth of the exceptions was more likely to be controlled by some casual, arbitrary, or accidental circumstance involved in an early case than by a rational inquiry into the basis of the rule and the theory of the exceptions.[16]

In general, there are two principles which have been responsible for most of the exceptions to the hearsay rule. *First*, where the statement has been made under circumstances which render it unusually trustworthy,[17] the need for cross-examination, though not eliminated, is substantially diminished.[18] *Second*, where there is a necessity for resorting to hearsay, *i.e.*, where it represents the best or the only source of evidence,[19] the disadvantages which might accrue to the adversary are outweighed by the indispensability of the evidence to a proper

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exclude hearsay where a judge sits without a jury. Although in such cases the rule may be somewhat relaxed, Carman v. State, 208 Ind. 297, 312, 196 N.E. 78, 84 (1935), the fact that it is not dispensed with indicates that fear of the jury is not the sole reason for the exclusion of hearsay.

Authorities differ as to whether hearsay is admissible before administrative tribunals. Compare NLRB v. Imparato Stevedoring Corp., supra note 8, at 302 (hearsay admissible, but findings may not be based entirely upon the hearsay); Acosta v. Landon, 125 F. Supp. 434, 438-39 (S.D. Cal. 1954) (hearsay admissible); In re Mundy, 97 N.H. 239, 241-42, 85 A.2d 371, 373 (1952) (hearsay admissible), with Superior Engraving Co. v. NLRB, 183 F.2d 783, 792 (7th Cir. 1950), cert. denied, 340 U.S. 930 (1951) (exclusion of hearsay by NLRB held proper); State ex rel. Ball v. McPhee, 6 Wis. 2d 190, 205-06, 94 N.W.2d 711, 719-20 (1959) (hearsay inadmissible). For a discussion of the admissibility and probative value of one kind of hearsay, medical treatises, in workmen's compensation proceedings, see Note, 52 Cornell L.Q. 316 (1967).

[13] Model Code of Evidence, Introductory Note to Chapter VI, at 220 (1942). Hearsay evidence which is admitted at trial without objection may be considered on appeal as supporting the judgment. E.g., Merchant Shippers Ass'n v. Kellogg Express & Draying Co., 28 Cal. 2d 594, 599, 170 P.2d 923, 926 (1946). Contra, Boucher v. City Paint & Supply, Inc., 398 S.W.2d 352, 356 (Tex. Civ. App. 1966).

[14] Morgan, "The Hearsay Rule," supra note 1, at 4.

[15] The Model Code of Evidence, supra note 13, at 222 states that there are eighteen or nineteen exceptions. Wigmore lists fourteen: (1) dying declarations, (2) statements of facts against interest, (3) declarations about family history, (4) attestations of a subscribing witnesses, (5) regular entries in the course of business, (6) sundry statements of deceased persons, (7) reputation, (8) official statements, (9) learned treatises, (10) sundry commercial documents, (11) affidavits, (12) statements by a voter, (13) declarations of a mental condition, (14) spontaneous exclamations. 5 Wigmore, supra note 10, § 1426, at 208-09.

[16] Jefferson, supra note 1, at 1; see Morgan, "The Hearsay Rule," supra note 1, at 11.

[17] See, e.g., Dallas County v. Commercial Union Assur. Co., 286 F.2d 388, 396-97 (5th Cir. 1961); Vanadium Corp. of America v. Fidelity & Deposit Co., 159 F.2d 105, 109 (2d Cir. 1947); Olesen v. Henningsen, 247 Iowa 883, 889-90, 77 N.W.2d 40, 43-44 (1956); Jordan v. Parsons, 239 Mo. App. 766, 771, 199 S.W.2d 881, 884 (1947); Cohen v. Borough of Bradley Beach, 135 N.J.L. 276, 278, 50 A.2d 882, 884 (1947); 5 Wigmore, supra note 10, §§ 1420, 1422.

[18] Id. § 1420, at 202; see Deike v. Great Atl. & Pac. Tea Co., 415 P.2d 145, 147 (Ariz. App. 1966); cf. Ladd, "The Hearsay We Admit," 5 Okla. L. Rev. 271, 286 (1952).

[19] See Moore v. Atlanta Transit Sys., Inc., 105 Ga. App. 70, 123 S.E.2d 693 (1961); Jendresak v. Metropolitan Life Ins. Co., 330 Ill. App. 157, 171, 70 N.E.2d 863, 870 (1946). Also, see authorities cited in note 17 supra.

adjudication of the case.[20] The combined weight of the trustworthiness of the declaration and the necessity for its use has determined the extent of the exceptions.[21]

This note deals with two traditional categories of admissible hearsay: declarations against interest, and admissions of a principal as against his surety.

Declarations Against Interest

There are four general requirements for the admissibility of declarations against interest: (1) that the declarant be dead or otherwise unavailable, (2) that the declaration be against the declarant's pecuniary or proprietary interest when made, (3) that the declarant have competent knowledge of the facts, and (4) that the declarant, at the time of the declaration, have no probable motive to misrepresent the facts.[22] The rationale of the exception is that a person will not make a declaration against his own interest unless he believes it to be true.[23]

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[20] See 5 Wigmore, supra note 10, §§ 1420-21, at 202-04.

[21] Id., § 1420, at 203.

[22] E.g., Clark & Jones, Inc. v. American Mut. Liab. Ins. Co., 112 F. Supp. 889, 892 (E.D. Tenn. 1953); Wilkins v. Enterprise TV, Inc., 231 Ark. 958, 964, 333 S.W.2d 718, 722 (1960); Haskell v. Siegmund, 28 Ill. App. 2d 1, 9, 170 N.E.2d 393, 397 (1960); Dempsey v. Meighen, 251 Minn. 562, 570, 90 N.W.2d 178, 183 (1958); Straughan v. Asher, 372 S.W.2d 489, 494 (Mo. Ct. App. 1963); Matter of Estate of Lopes, 41 Misc. 2d 326, 329, 245 N.Y.S.2d 940, 943 (Surr. Ct. Bronx County 1964).

Some jurisdictions have allowed declarations against penal interest. E.g., People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964); Brady v. State, 226 Md. 422, 174 A.2d 167 (1961), aff'd, 373 U.S. 83 (1963); Hines v. Commonwealth, 136 Va. 728, 739-45, 117 S.E. 843, 846-49 (1923).

Compare Model Code of Evidence rule 509 (1942):

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.

A similar statement is adopted by Uniform Rule of Evidence 63(10), 9A U.L.A. 637 (1965). A slightly different version appears in Cal. Evid. Code § 1230 (effective Jan. 1, 1967):

Declarations Against Interest. Evidence of a statement hy 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 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] E.g., Public Utilities Corp. v. Carden, 182 Ark. 858, 861, 32 S.W.2d 1058, 1059 (1930); Weber v. Chicago, R.I. & Pac. R.R., 175 Iowa 358, 384, 151 N.W. 852, 861 (1916); Smith v. Moore, 142 N.C. 277, 287, 289-90, 55 S.E. 275, 278-79 (1906) (containing an extended and fairly complete discussion); G. M. McKelvey Co. v. General Cas. Co. of America, 166 Ohio St. 401, 404, 142 N.E.2d 854, 855 (1957); see Cal. Evid. Code § 1230 (effective Jan. 1, 1967), quoted in note 22 supra; Model Code of Evidence rule 509 (1942), quoted in note 22 supra; Uniform Rule of Evidence 63(10); 5 Wigmore, supra note 10, § 1457, at 262-63. See also Jefferson, supra note 1, at 8-17 where two theories are distinguished: (1) that a declaration against interest, to be admitted in evidence, must be a statement of a fact which is detrimental to declarant's interest, and (2) that it must be a statement which is itself detrimental to declarant's interest. The analysis is quite refined, and the author himself remarks that the courts do not ordinarily make the distinction. Id. at 8-9.

Sometimes the rationale is questioned. Ward v. H. S. Pitt & Co., [1913] 2 K.B. 130, 138 (Hamilton, L.J., referring to the traditional justification):

As a reason this seems sordid and unconvincing. Men lie for so many reasons and some

Since such a statement is imbued with a circumstantial probability of trustworthiness, there is a minimal need for the test of cross-examination.[24]

It was not until after the exception for declarations against interest had been established that the unavailability of the declarant became a recognized precondition for admissibility.[25] The first cases in which the exception was applied were naturally ones in which the declarant was dead,[26] and in a short time courts considered the declarant's death to be a requisite for admissibility.[27] Because declarations against interest comprised a new exception to the comparatively settled hearsay rule, the courts were loath to extend it beyond the bounds of precedent.[28] As a result, the requirement of death became firmly entrenched in the exception for declarations against interest, and it is only relatively recently that some jurisdictions have begun to question and reject the old dogma.[29]

The Weber Case. The 1916 case of *Weber v. Chicago, R.I. & Pac. R.R.*[30] was one of the first to discard the death requirement. Plaintiff, having suffered personal injuries when defendant's train was derailed, brought an action to recover damages, alleging that the derailment was the result of defendant's negligence. Defendant, claiming that the accident was caused by the malicious acts of a third person, sought to introduce sworn statements in which that person admitted such acts. Despite the fact that, prior to trial, the declarant had been judicially adjudged insane, the trial court sustained plaintiff's objection to the evidence on the grounds that it was hearsay. In reversing, the Iowa Supreme Court asserted:

> Every rule ought to be as broad as the reason upon which it rests. Proof of death establishes the impossibility of producing the declarant upon the trial .... [A] showing that the defendant [declarant?] was intellectually dead—insane—and therefore incapable of being produced as a competent witness, and incapable of testifying because of such insanity, would meet the requirements of the first ground [unavailability] of the exception ....[31]

The thrust of the opinion was that the necessity for resorting to hearsay is just as great when the declarant is insane as when he is dead.

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for no reason at all; and some tell the truth without thinking or even in spite of thinking about their pockets, but it is too late to question this piece of eighteenth-century philosophy.

The objection is not persuasive, since our concern is with probabilities and not certainties. The probability is that a reasonable man will not speak falsely against his interest.

[24] See Weber v. Chicago, R.I. & Pac. R.R., supra note 23, at 384, 151 N.W. at 861; Smith v. Moore, supra note 23, at 287, 55 S.E. at 278; see generally 5 Wigmore, supra note 10, §§ 1457-69; Jefferson, supra note 1, at 8-17.

[25] See Doe ex dem. Hindly v. Rickarby, 5 Esp. 4, 170 Eng. Rep. 718 (N.P. 1803); Walker v. Broadstock, 1 Esp. 458, 170 Eng. Rep. 419 (N.P. 1795); Morgan, "Admissions," 12 Wash. L. Rev. 181, 202 (1937).

[26] Jefferson, supra note 1, at 2.

[27] Manby v. Curtis, 1 Price 225, 145 Eng. Rep. 1384 (Ex. 1815); Barough v. White, 4 Barn. & C. 325, 107 Eng. Rep. 1080 (K.B. 1825); Phillips v. Cole, 10 Ad. & E. 106, 113 Eng. Rep. 41 (K.B. 1839).

[28] Harrison v. Blades, 3 Camp. 457, 170 Eng. Rep. 1444 (N.P. 1813); Stephen v. Gwenap, 1 M. & Rob. 120, 174 Eng. Rep. 41 (N.P. 1831). The judges seem to have felt the threat of widespread collusion. See Harrison v. Blades, supra at 458, 170 Eng. Rep. at 1445 (Ellenborough, L.).

[29] See, e.g., Weber v. Chicago, R.I. & Pac. R.R., 175 Iowa 358, 383-93, 151 N.W. 852, 861-64 (1916); G. M. McKelvey Co. v. General Cas. Co. of America, 166 Ohio St. 401, 142 N.E.2d 854 (1957); Johnson v. Sleizer, 268 Minn. 421, 129 N.W.2d 761 (1964).

[30] 175 Iowa 358, 151 N.W. 852 (1916).

[31] Weber v. Chicago, R.I. & Pac. R.R., 175 Iowa 358, 384, 151 N.W. 852, 861 (1916).

Despite the fact that the court expressly limited its extension of the exception to insanity,[32] Judge Deemer, in a dissent, expressed the fear that the majority had enunciated a doctrine which would lead logically to the admission of all declarations against interest whenever it is impossible or inconvenient to take the declarant's testimony in court.[33] In a concurring opinion, Judge Salinger attempted to alleviate that fear by distinguishing between insanity and other forms of unavailability:

> The vital difference is (1) that absence from the jurisdiction or asserting privilege, and the like, may be the basis of a motion for continuance, and (2) that such are created by voluntary act, and, hence, might be made a method of forcing the admission of such declarations. Manifestly, collusion cannot create total insanity.[34]

After reducing the dissent to a claim that it is more difficult to be sure of total insanity than of death, Judge Salinger concluded that the solution is not to reject insanity as a basis for admitting hearsay, but to be more careful in accepting it.[35]

Judge Salinger's attempt to draw a clear line is not persuasive. With crowded court calendars, a continuance is not a practicable alternative. Nor would it be of much help to a litigant when the declarant is permanently removed from the jurisdiction or permanently entitled to the privilege against self-incrimination. Moreover, the fact that there would be much greater opportunity for bad faith and collusion need not entail an exclusion of hearsay where the declarant is unavailable for reasons other than death or insanity. The bad-faith removal of a declarant from the jurisdiction is no more voluntary an act than would be the collusion leading to a false claim that the declarant is dead or insane. It may be much more difficult to ascertain that there is no bad faith in a litigant's claim that a declarant is absent, or in a declarant's assertion of privilege, but the solution, as in the case of insanity, is not to reject these as bases of admissibility, but to be more cautious in accepting them.

Subsequent Developments. With the issues thus aired by *Weber*, courts, true to the predictions of the minority, extended the exception even further. In *G. M. McKelvey Co. v. General Cas. Co. of America*,[36] an action by an employer against its insurer on an employee fidelity bond, the Ohio Supreme Court held that absence from the jurisdiction was a sufficient basis for the admission of written confessions made by the employees involved. In rejecting the dicta of past cases, the court explained:

> [W]e are compelled by logic and reason to the conclusion that there may be circumstances other than death which render a witness as unavailable to testify as if he were in fact dead, and that under such circumstances a declaration, if it meets the other requirements of the rule, loses none of its trustworthiness or probability of truthfulness and veracity.[37]

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[32] Id. at 394, 151 N.W. at 864-65.

[33] Id. at 405, 151 N.W. at 869 (dissenting opinion). Judge Deemer apparently was concerned with the possible injustices which could be practiced under so lax a rule. He cited the case of Harrison v. Blades, supra note 28.

[34] Weber v. Chicago, R.I. & Pac. R.R., supra note 31, at 400, 151 N.W. at 867 (concurring opinion).

[35] Id. at 402, 151 N.W. at 867-68 (concurring opinion).

[36] 166 Ohio St. 401, 142 N.E.2d 854 (1957).

[37] Id. at 405, 142 N.E.2d at 856.

Other courts have agreed,[38] some of them adding that an inability to find the declarant is sufficient.[39]

Similarly, several courts have held that declarations against interest are admissible where the declarant is called as a witness but claims his privilege against self-incrimination.[40] In *Sutter v. Easterly*,[41] the court stated in even broader language that whenever, as a practical proposition, a witness is unavailable, as is the case when he asserts his right to remain silent, his out-of-court declaration should be received.[42] In fact, the circumstances make it even safer to admit the declarations than if the witness were dead, because his refusal to testify is added assurance that the declaration was not a forgery or obtained by fraud or coercion. If it were, the witness would most likely have taken the stand and repudiated it.[43]

Not all courts have been willing to expand the exception quite so far.[44] One court specifically rejected the prodding of the text-writers and, holding that the disqualification of a witness because of infamy does not constitute unavailability, stated that reason and authority agree that the exception should not be extended beyond death and insanity.[45]

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[38] Walnut Ridge Mercantile Co. v. Cohn, 79 Ark. 338, 345, 96 S.W. 413, 416 (1906) (on rehearing) (dictum); People v. Spriggs, 60 Cal. 2d 868, 873-74, 389 P.2d 377, 381, 36 Cal. Rptr. 841, 845 (1964) (dictum); Johnson v. Sleizer, 268 Minn. 421, 424-26, 129 N.W.2d 761, 763-64 (1964); Neely v. Kansas City Pub. Serv. Co., 241 Mo. App. 1244, 1247-48, 252 S.W.2d 88, 91-92 (1952); Alexander Grant's Sons v. Phoenix Assur. Co., 25 App. Div. 2d 93, 95, 267 N.Y.S.2d 220, 223 (4th Dep't 1966) (alternative holding).

In Johnson v. Sleizer, supra, the Minnesota Supreme Court refused to follow its own prior decision in Beebe v. Kleidon, 242 Minn. 521, 65 N.W.2d 614 (1954), and held that absence from the jurisdiction was sufficient unavailability. It reasoned that "the necessity for resorting to hearsay is just as great when the declarant is outside the jurisdiction or cannot he found after a diligent search as when he is dead." Johnson v. Sleizer, supra at 425, 129 N.W.2d at 763.

[39] Pennsylvania R.R. v. Rochinski, 158 F.2d 325 (D.C. Cir. 1946); Johnson v. Sleizer, supra note 38.

[40] Sutter v. Easterly, 354 Mo. 282, 294-95, 189 S.W.2d 284, 289 (1945); Moore v. Metropolitan Life Ins. Co., 237 S.W.2d 210, 212 (Mo. Ct. App. 1951); Alexander Grant's Sons v. Phoenix Assur. Co., supra note 38, at 95, 267 N.Y.S.2d at 223 (alternative holding); Band's Refuse Removal, Inc. v. Borough of Fair Lawn, 62 N.J. Super. 522, 557-60, 163 A.2d 465, 484-85 (Super. Ct. 1960); Harriman v. Brown, 35 Va. (8 Leigh) 697, 713 (1837).

[41] 354 Mo. 282, 189 S.W.2d 284 (1945).

[42] Sutter v. Easterly, 354 Mo. 282, 295, 189 S.W.2d 284, 289 (1945). But see State v. Gorden, 356 Mo. 1010, 1013-14, 204 S.W.2d 713, 714 (1947) in which the same court held that a constitutional right of confrontation precludes the admission, as against a criminal defendant, of extrajudicial statements of a witness who claims his privilege. The case illustrates the different problems involved in the context of criminal procedure.

[43] Sutter v. Easterly, supra note 42, at 295, 189 S.W.2d at 289.

[44] There have been frequent judicial statements reaffirming the requirement that the declarant be dead. See, e.g., Clark & Jones, Inc. v. American Mut. Liab. Ins. Co., 112 F. Supp. 889, 892 (E.D. Tenn. 1953); Turgeon v. Woodward, 83 Conn. 537, 541, 78 Atl. 577, 579 (1910); Smith v. Moore, 142 N.C. 277, 286, 55 S.E. 275, 278 (1906). It is arguable that none of these cases is binding, because in each one the declarant was actually dead. The statement that he would have to be dead is therefore probably gratuitous. Similarly, Davis v. Fuller, 12 Vt. 178 (1840), in which it was said that a declaration against interest is inadmissible where the declarant is alive, might not govern a case in which the declarant is proved to be insane or absent from the jurisdiction, because the holding of Davis apparently was that the declaration would be inadmissible where the declarant is alive and available. Any broader statement may well be regarded as dictum.

For a suggested explanation of the reluctance of courts to extend the meaning of unavailability, see Jefferson, supra note 1, at 5-6, where the author points out that a declaration against interest which is admitted carries with it other, possibly self-serving, statements connected with it. See id. at 57-63 for a discussion of the collateral statement rule.

[45] Tom Love Co. v. Maryland Cas. Co., 166 Tenn. 275, 277-79, 61 S.W.2d 672, 673 (1933).

Nevertheless, the trend towards a broader conception of unavailability is well-founded. The prior declarations against interest of a living person are no less trustworthy than those of a deceased person.[46] An adversary is no more likely to be prejudiced if the declarant is alive than if he is dead. When the declarant is not available for testimony, the practical necessity of introducing hearsay evidence is just as great as when the declarant is dead.[47] Extending the meaning of unavailability therefore violates neither the spirit of nor the reason for the exception. *Alexander Grant's Sons v. Phoenix Assur. Co.*,[48] holding that absence from the jurisdiction and refusal to testify on constitutional grounds were sufficient unavailability, was in this regard a sound decision.

Abandonment of the Unavailability Requirement. The remaining question is whether unavailability should be disposed of altogether as a requisite for the admission of declarations against interest.[49] The theory behind the requirement is that hearsay evidence, with its attendant dangers, should be resorted to only when it is impossible to obtain other evidence from the same source.[50] But under other exceptions to the rule, notably that for spontaneous exclamations, evidence of a hearsay character is admitted regardless of the availability of the declarant.[51] The rationale in such cases is that the circumstances under which the utterance was made render it the most valuable and trustworthy evidence obtainable;[52] even if the declarant is present and available for cross-examination, his prior declaration is of such value that it may be accepted in evidence. The same rationale should apply to declarations against interest. Such statements are, like spontaneous exclamations, as reliable as the declarant's cross-examined testimony at trial would be.[53]

Both the Model Code of Evidence and the Uniform Rules of Evidence dispense with the requirement of unavailability.[54] Under these provisions, if a declaration against interest meets the other requirements, it may be entered into evidence irrespective of the availability of the declarant. The adversary is not

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This case may not be binding where the declarant is shown to be unavailable for some other reason.

[46] Cf. People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964).

[47] See Jefferson, supra note 1, at 2:

> On principle it would seem equally clear that other forms of unavailability [aside from death] should satisfy the necessity principle for this exception. If a witness cannot be produced in court, his declarations must be admitted, if at all, without the usual safeguards of the oath and cross-examination, no matter what the cause of nonproduction of the witness may be.

[48] 25 App. Div. 2d 93, 267 N.Y.S.2d 220 (4th Dep't 1966).

[49] People v. Spriggs, supra note 46, and People v. Parriera, 237 Cal. App. 2d 275, 46 Cal. Rptr. 835 (Dist. Ct. App. 1965) have so held. But these cases will be superseded in this regard by Cal. Evid. Code § 1230 (effective Jan. 1, 1967), quoted in note 22 supra. See text accompanying notes 61-63 infra. On the question of the abandonment of the requirement, see Notes, 64 Colum. L. Rev. 1347, 1350-51 (1964), 17 Stan. L. Rev. 322, 326-27 (1965), 12 U.C.L.A.L. Rev. 638, 647-49 (1965).

[50] See 5 Wigmore, supra note 10, §§ 1420-21, 1456; notes 17-20 supra and accompanying text.

[51] State v. Dunn, 10 Wis. 2d 447, 103 N.W.2d 36 (1960); see 5 Wigmore, supra note 10, § 1421; Jefferson, supra note 1, at 6.

[52] 5 Wigmore, supra note 10, § 1421; Jefferson, supra note 1, at 6.

[53] See Jefferson, supra note 1, at 6.

[54] The pertinent rule of each omits any mention of unavailability. Model Code of Evidence rule 509 (1942), quoted in note 22 supra; Uniform Rule of Evidence 63 (10). But see Cal. Evid. Code § 1230 (effective Jan. 1, 1967), quoted in note 22 supra, which retains the unavailability requirement. See text accompanying notes 61-63 infra.

prejudiced by this rule. In fact, there is less danger in admitting the declaration than there would be if the declarant were unavailable,[55] since the declarant's availability provides the adversary with an opportunity to interrogate him at trial. If the declarant affirms his prior statement, he does so under oath, subject to cross-examination in the presence of the triers of fact. If he denies making the statement, then the issue is whether or not he did in fact make it.[56] If he concedes he made the statement but claims that it was false, the triers of fact will be able to decide which story is true in light of all the facts and the other evidence.[57] Moreover, since the triers are not required to put faith in anyone who is not present and not subject to the conditions imposed upon witnesses, the declaration, in one sense, is not hearsay evidence.[58] Clearly, the dangers normally accompanying hearsay evidence are eliminated when the declarant himself is in court.[59]

It is arguable that the effectiveness of cross-examination is greatly diminished when it is not conducted immediately, and that a false or inaccurate statement is more difficult to discredit when the declarant has had an opportunity to consider its implications prior to being interrogated.[60] But where the out-of-court statement was made under circumstances which render it unusually trustworthy, as is the case with declarations against interest, the likelihood is that the subsequent testimony, rather than the utteraunce involved, will be false or inaccurate. The introduction of the declaration would therefore facilitate rather than impede the disclosure of truth.

The practical results of the summary abandonment of the unavailability requirement might work to the disadvantage of the adversary. The party seeking to introduce a declaration against interest would be required only to present the evidence, and, if the other requirements were met, the court would admit it. This would have the effect of shifting to the adversary the burden of finding the declarant if the adversary entertains any hope of refuting the hearsay testimony.[61] Since the proponent of the evidence, although knowing of the declarant's whereabouts and of his availability to testify, would nevertheless be able to deprive the trier of fact of valuable first-hand information by relying solely on the hearsay evidence, it would probably be more prudent to rest the burden on the proponent. One means of accomplishing this would be to require that, before the declaration is admitted, the proponent either produce the declarant in court or show that he is unavailable. Thus if a declarant were not shown to be unavailable, his extrajudicial statement would be admitted only if the adversary were provided with the option of examining him in court. A second approach would be to retain the unavailability requirement while making admissible, as substantive evidence, any prior statements of a witness which are inconsistent

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55 People v. Spriggs, 60 Cal. 2d 868, 875, 389 P.2d 377, 381, 36 Cal. Rptr. 841, 845 (1964); cf. Sutter v. Easterly, 354 Mo. 282, 295, 189 S.W.2d 284, 289 (1945).

56 Under these circumstances, the witness would probably swear that whenever he does make a statement he attempts to speak truthfully. If, then, it is proved that he did utter the declaration in question, its credibility may be enhanced by virtue of the witness' own assurance of the truthfulness of his statement. See Morgan, supra note 7, at 195-96.

57 See ibid.

58 See text accompanying notes 6-7 supra.

59 People v. Spriggs, supra note 55, at 875, 389 P.2d at 381, 36 Cal. Rptr. at 845.

60 Cf. State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939).

61 See Note, 17 Stan. L. Rev. 322, 327 (1965).

with his testimony at trial.[62] This would force the proponent to produce the declarant if he were available and to call him as a witness. If the proponent were disappointed by the declarant's testimony, he would be permitted to introduce the prior declaration, not merely to impeach the witness but to show the truth of the matter asserted in the statement.[63] Although the unavailability requirement would be retained, the total effect would be substantially similar to that achieved by dropping the requirement. The proponent would bear the burden of finding the declarant or of showing that he is unavailable. The difference would be that if the declarant were not shown to be unavailable, neither party would have the option of relying solely on the hearsay; the declarant would have to testify before the proponent could hope to introduce the out-of-court declaration.

Vicarious Admissions and the Principal-Surety Rule

The court in *Alexander Grant* held that the declarations were also admissible on the alternative grounds that they were declarations of the principal made during the transaction of the business for which the surety was bound and, therefore, part of the *res gestae*.[64] The term *"res gestae"* adds little to the statement of the rule. The phrase enjoys innumerable definitions in the law of evidence,[65] and its use often conceals a lack of reasoning.[66] It is, at best, a useless concept, since every rule to which it has been applied can be explained in terms of some other independent principle. It is probably a harmful concept, because its ambiguity promotes confusion of the various independent rules, and its use tends to obscure their boundaries.[67]

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[62] This is the approach of the Cal. Evid. Code §§ 1230 (quoted in note 22 supra), 1235 (effective Jan. 1, 1967).

[63] See Cal. Evid. Code § 1230 Comment of the Assembly Committee on the Judiciary, § 1235 Comment of the Law Revision Commission (effective Jan. 1, 1967).

[64] Alexander Grant's Sons v. Phoenix Assur. Co., 25 App. Div. 2d 93, 267 N.Y.S.2d 220 (4th Dep't 1966).

[65] The phrase is most often used to refer to hearsay which is admissible as a spontaneous exclamation made while the declarant was under the influence of a startling occurrence. The rationale of the exception for spontaneous exclamations is that under the stress of excitement, the declarant's reflective faculties are dulled so that considerations of self-interest do not pollute the sincere response to the shocking sensations. See, e.g., Perry v. Haritos, 100 Conn. 476, 484-85, 124 Atl. 44, 47 (1924); Drake v. Moore, 184 Kan. 309, 317, 336 P.2d 807, 814 (1959); Missouri Pac. Ry. v. Baier, 37 Neb. 235, 242, 55 N.W. 913, 915 (1893); People v. Marks, 6 N.Y.2d 67, 71-72, 160 N.E.2d 26, 28, 188 N.Y.S.2d 465 (1959), cert. denied, 362 U.S. 912 (1960); see generally 6 Wigmore, Evidence §§ 1745-64 (3d ed. 1940). For a discussion of the similar theory of contemporaneous statements, also often referred to as res gestae, see 6 Wigmore, supra § 1756; Thayer, "Bedingfield's Case—Declarations as a Part of the Res Gestae," 15 Am. L. Rev. 71, 83 (1881). Thayer was the foremost proponent of the theory.

[66] Most critics of the term, and they are numerous, have suggested that it be excised from legal parlance. For an example of a vehement attack, see Morgan, "A Suggested Classification of Utterances Admissible as Res Gestae," 31 Yale L.J. 229 (1922):

> The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as *"res gestae."* It is probable that this troublesome expression owes its existence and persistence in our law of evidence to an inclination of judges and lawyers to avoid the toilsome exertion of exact analysis and precise thinking. Certain it is that since its introduction at the close of the eighteenth century, on account of its exasperating indefiniteness it has done nothing but bewilder and perplex.

Also, see United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944) (L. Hand, J.); Hardman, "Spontaneous Declarations (Res Gestae)," 56 W. Va. L. Rev. 1, 19 (1954); Thayer, supra note 65, at 10.

[67] 6 Wigmore, supra note 65, § 1767, at 182.

The independent principle actually relied upon by the court in *Alexander Grant* is that which makes admissible against a surety the statements made by the principal during the course of the business for which the surety is bound.[68] Where the action has been brought by an employer on an employee fidelity bond, the rule as it is usually stated requires that the statements be made while the principal is still in the employ of the insured,[69] or still performing the guaranteed duties.[70]

Justifications of the Principal-Surety Rule. Although the courts generally have not explained their reasons for the principal-surety rule, the commentators often classify it as a "vicarious admission."[71] An admission is any statement made by a party, or by one identified in legal interest with a party, which tends to establish or disprove any material fact in a case, and, as such, is competent evidence against the party.[72] Where the statement has been made by a person in privity with a party, it is termed a vicarious admission.[73] Admissions are distinguished from declarations against interest in several respects: (1) admissions must be made by a party or one in privity with a party, whereas declarations may be made by disinterested third persons; (2) admissions are acceptable in evidence as inconsistent with the party's *present* position,[74] whereas declarations are acceptable as contrary to the declarant's interest *when made*; (3) admissions function as waivers of proof, whereas declarations are admitted as proof of the facts stated.[75] Admissions are accepted in evidence not as an

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[68] Fidelity & Deposit Co. v. People's Bank, 72 F.2d 932, 939 (4th Cir.), cert. denied, 293 U.S. 627 (1934), affirming 4 F. Supp. 379 (M.D.N.C. 1933); Guarantee Co. of North America v. Phenix Ins. Co., 124 Fed. 170, 174 (8th Cir. 1903); Indemnity Ins. Co. of North America v. Krone, 177 Ark. 953, 956-60, 9 S.W.2d 33, 34-36 (1928) (alternative holding); Piggly Wiggly Yuma Co. v. New York Indem. Co., 116 Cal. App. 541, 542-43, 3 P.2d 15 (1931); see Cal. Civ. Pro. Code § 1851 (to be superseded by Cal. Evid. Code § 1224, effective Jan. 1, 1967), Mahoney v. Founders' Ins. Co., 190 Cal. App. 2d 430, 12 Cal. Rptr. 114 (1961) (applying statute to action against surety); Model Code of Evidence rule 508(c) (1942); Uniform Rule of Evidence 63(9)(c); cf. Board of Supervisors v. Bristol, 99 N.Y. 316, 321-23, 1 N.E. 878, 881-82 (1885). Contra, Glens Falls Indem. Co. v. Gottlieb, 80 Ga. App. 634, 636, 56 S.E.2d 799, 800 (1949); John T. Stanley Co. v. National Sur. Corp., 179 Misc. 493, 495-96, 39 N.Y.S.2d 509, 511 (Sup. Ct. New York County 1943) (illustrates confusion caused by res gestae terminology); Wieder v. Union Sur. & Guar. Co., 42 Misc. 499, 500-01, 86 N.Y. Supp. 105, 105-06 (Sup. Ct. 1904) (semble).

[69] Fidelity & Deposit Co. v. People's Bank, supra note 68; Guarantee Co. of North America v. Phenix Ins. Co., supra note 68; Indemnity Ins. Co. of North America v. Krone, supra note 68; Piggly Wiggly Yuma Co. v. New York Indem. Co., supra note 68. Contra, Nock v. Fidelity & Deposit Co., 175 S.C. 188, 193-95, 178 S.E. 839, 841-42 (1935).

[70] United Am. Fire Ins. Co. v. American Bonding Co., 146 Wis. 573, 578-80, 131 N.W. 994, 996-97 (1911).

[71] See, e.g., Morgan, "The Rationale of Vicarious Admissions," 42 Harv. L. Rev. 461, 466-68 (1929); Model Code of Evidence rule 508(c) (1942); Uniform Rule of Evidence 63(9)(c).

[72] Maltby v. Chicago Great W. Ry., 347 Ill. App. 441, 458, 106 N.E.2d 879, 888 (1952); Elliotte v. Lavier, 299 Mich. 353, 357, 300 N.W. 116, 118 (1941); City of Okmulgee v. Wall, 196 Okla. 536, 537, 167 P.2d 44, 45 (1946); Oxley v. Linnton Plywood Ass'n, 205 Ore. 78, 98, 284 P.2d 766, 775 (1955); National Union Fire Ins. Co. v. Richards, 290 S.W. 912, 915 (Tex. Civ. App. 1927).

[73] See generally Morgan, supra note 71.

[74] Buhl v. Kavanagh, 118 F.2d 315, 322 (6th Cir. 1941); Sollows v. McCann Erickson, Inc., 27 F. Supp. 491, 493 (S.D.N.Y. 1939); McNealy v. Illinois Cent. R.R., 43 Ill. App. 2d 460, 472, 193 N.E.2d 879, 886 (1963); Dobrowolski v. Glowacki, 136 N.J.L. 167, 171, 54 A.2d 758, 760 (Ct. Err. & App. 1947); Negociacion Agricola y Ganadera v. Love, 220 S.W. 224, 230 (Tex. Civ. App. 1920).

[75] Jelser v. White, 183 N.C. 126, 127, 110 S.E. 849, 850 (1922).

exception to the hearsay rule but as not within its purview.[76] Since it is the party's own statement, he cannot demand that it be subjected to the test of cross-examination.[77]

Whether a vicarious admission qualifies as a party's "own" statement depends upon the law of agency.[78] Thus one of the justifications of the principal-surety rule proceeds on an implied agency theory. Since the surety in an employee fidelity bond undertakes to guarantee the faithfulness of the employee, it in effect authorizes and insures the employee's accounting of the monies to which he has access. When an employee, in the course of his employment, admits that he has misappropriated funds, he is in effect accounting for such funds. The surety, therefore, cannot be heard to object to the admission in evidence of the very activity the truthfulness of which it undertook to guarantee.[79]

Even assuming that this argument has validity,[80] it creates some practical difficulties. Because the theory makes the employee an agent of the surety for the purpose of the admissions,[81] it cannot be used to admit in evidence statements made by the employee after termination of the employment. Because the only authorized statements are those which can be said to constitute an accounting, statements made to someone other than the employer would likewise be inadmissible. The difficulties with such a formulation are twofold. *First*, it would allow in evidence against the surety statements by the employee which were in some way self-serving at the time made.[82] Such declarations are imbued with no unusual credibility. *Second*, by requiring that the statement be made to the employer while the employment relationship is still in existence, the rule could lead to the exclusion of some highly credible declarations which were against the declarant's interest when made. Although such statements might be admissible under the exception for declarations against interest, there is the danger that judges and counsel, in the confusion born of a multitude of rules and exceptions, will fail to realize that a statement which does not qualify as a vicarious admission might well be admissible under another principle.[83]

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[76] SEC v. Glass Marine Indus., Inc., 194 F. Supp. 879, 882-88 (D. Del. 1961); United States v. United Shoe Mach. Corp., 89 F. Supp. 349, 352 (D. Mass. 1950) (Wyzanski, J.).

[77] See ibid.:

> The hearsay rule is a feature of the adversary system of the common law. It allows a party to object to the introduction of a statement not made under oath and not subject to cross-examination. Its purpose is to afford a party the privilege if he desires it of requiring the declarant to be sworn and subjected to questions. That purpose does not apply . . . where the evidence offered against a party are *his* statements.

[78] Ibid.

[79] Morgan, supra note 71, at 466-68, citing the Canadian case of Trustees of Jordan Hill School Dist. v. Gaetz, 8 Alta. 433, 440-41, 23 D.L.R. 739, 745 (App. Div. 1915) (Stuart, J.); see Indemnity Ins. Co. of North America v. Krone, 177 Ark. 953, 957-58, 9 S.W.2d 33, 35 (1928); Morgan, "Admissions," 12 Wash. L. Rev. 181, 195 (1937) where the author suggests that the justification is most appropriate where a formal accounting has revealed the misappropriation; cf. Board of Supervisors v. Bristol, 99 N.Y. 316, 321-23, 1 N.E. 878, 881-82 (1885).

[80] The agency here is actually a fiction manufactured by courts in an effort to admit the employee's declarations. See text accompanying notes 86-87 infra.

[81] Morgan, supra note 79.

[82] For example, an employee might find it to his pecuniary advantage to admit to a defalcation, in return for money or other material benefit from his employer. But cf. Osborne v. Purdome, 250 S.W.2d 159 (Mo. 1952) in which it was held that where declarant had admitted to a lesser crime in the belief that he would thereby avoid prosecution for a more serious crime, the admission nevertheless qualified as a declaration against interest.

[83] For an example of such confusion, see Marcus v. Fidelity & Deposit Co., 164 App. Div. 859, 149 N.Y. Supp. 1020 (1st Dep't 1914). The court refused to accept the principal's

A second explanation of the principal-surety rule is grounded in the theory that whenever it is the liability of the declarant which is at issue between the parties to the action, it is reasonable to use the same evidence as would be used to establish the same liability in an action to which the declarant would be a party.[84] Since a statement by an employee could be used against him if he were a party to a subsequent action,[85] it follows by this theory that the same self-serving statement could be used against the surety. Again, such statements can boast no guaranty of trustworthiness.

Both explanations are necessarily founded upon a construction of the declarations of the employee as the surety's "own" statements.[86] The only way to so construe the declarations is to find in the principal-surety relationship an agency or authorization. Such implications provide a weak basis for the admission in evidence of a statement not subject to the test of cross-examination. Whereas it is absurd to expect a party to demand cross-examination of his own prior statements, it is understandable that he would expect to cross-examine a third person so remote as to be barely an implied agent. An ordinary suretyship contract probably would not contemplate an authorization to the principal to speak for the surety.[87] It is difficult to justify the principal-surety rule in terms of vicarious admissions.

The Abandonment of the Rule. Vicarious admissions probably came to be admissible as a result of an attempt by courts to bypass the strict requirements for the admissibility of declarations against interest, namely that the declarant be dead, and that the declaration be against his pecuniary or proprietary interest, as opposed to his penal or social interest.[88] Various circumstances rendered a declarant just as unavailable as if he were dead, and declarations against penal or social interest were apparently just as likely to be true as those against pecuniary or proprietary interest. Since the unavailability and interest requirements did not apply to admissions, courts selected the concept of privity or joint interest upon which to rely in many cases. The result has been that some self-serving statements without any guaranty of trustworthiness have been rendered admissible, whereas some highly reliable disserving statements have been excluded.[89]

As the requirement that the declarant must be dead begins to disappear, and as

statements because they were not part of the res gestae. The facts indicate that the declarant was dead, and that the statements were against his pecuniary interest when made. They should, therefore, have been received as declarations against interest. The court, however, excluded the evidence without mention of the latter exception.

[84] Model Code of Evidence rule 508(c), Comment (b), at 251 (1942). The Uniform Rules adopt the policy of the Model Code. Uniform Rule of Evidence 63(9)(c), Commissioner's Note at 644. See Piggly Wiggly Yuma Co. v. New York Indem. Co., 116 Cal. App. 541, 542-43, 3 P.2d 15, 15-16 (1931).

[85] Johnson v. Rockaway Bus Corp., 145 Conn. 204, 209, 140 A.2d 708, 710 (1958); W. T. Harvey Lumber Co. v. J. M. Wells Lumber Co., 104 Ga. App. 498, 122 S.E.2d 143, 144 (1961); Hickey v. Anderson, 210 Miss. 455, 463, 49 So. 2d 713, 717 (1951); Harvey v. Provandie, 83 N.H. 236, 242, 141 Atl. 136, 140 (1928).

[86] Cf. State v. Sweeney, 180 Minn. 450, 457, 231 N.W. 225, 229, 73 A.L.R. 380, 385-86 (1930). See text accompanying notes 76-77 supra.

[87] See John T. Stanley Co. v. National Sur. Corp., 179 Misc. 493, 495, 39 N.Y.S.2d 509, 511 (Sup. Ct. New York County 1943).

[88] Morgan, supra note 79, at 202. Chadwick v. Fonner, 69 N.Y. 404 (1877) suggests by its reasoning that the basis of vicarious admissions may well have been declarations against interest. See text accompanying notes 16, 26-29 supra for a discussion of the reluctance of courts to eliminate the requirements governing declarations against interest.

[89] Morgan, supra note 79, at 202-03.

courts begin to accept declarations against penal and social interest,[90] it is reasonable to return the principal-surety rule to its proper classification as part of the rule admitting declarations against interest. To dispose of the principal-surety rule as an independent ground of admissibility would be to repudiate any cases which have admitted self-serving statements on the sole ground of privity or implied agency. It would be to admit statements of the employee if and only if they were against his interest when made, and regardless of whether he was still employed at the time. The consequences would be that every statement admitted would have an unusually high probability of truthfulness. Furthermore, if the unavailability criterion for declarations against interest were eliminated,[91] every such declaration would be admissible regardless of the presence or absence of the declarant. Such a rule would go far towards clarifying and making rational the law of hearsay.

Effect of the Alexander Grant Case

Before the decision in *Alexander Grant* the law of New York on the admissibility of declarations against interest was sparse, and the law on the admissibility of a principal's admissions against his surety was confused. Although it had been held that declarations against interest were admissible when the declarant was dead,[92] no case had expressly considered other forms of unavailability.[93] Cases involving a principal's admissions as against his surety were buried in the obscurity of *res gestae* terminology.[94] The holdings were, at best, unclear,[95] and at times seemingly inconsistent.[96] *Hatch v. Elkins*,[97] in excluding a principal's admissions, had set up the rule that "the declarations of the principal made during the transaction of the business for which the surety is bound, so as to become part of the *res gestae* are competent evidence against the surety; but his declarations subsequently made are not competent."[98] This was inter-

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90 Penal: People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964); Brady v. State, 226 Md. 422, 174 A.2d 167 (1961), aff'd, 373 U.S. 83 (1963); Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923). Social: People v. Parriera, 237 Cal. App. 2d 275, 46 Cal. Rptr. 835 (Dist. Ct. App. 1965). Model Code of Evidence rule 509 (1942), quoted in note 22 supra, and Uniform Rule of Evidence 63(10) would allow declarations against penal or social interest.

91 See text accompanying notes 50-60 supra. The test of necessity may be met, despite the fact that the declarant is not indisposed, where the evidence is of great value. See 5 Wigmore, supra note 65, § 1421.

92 Kittredge v. Grannis, 244 N.Y. 168, 175, 155 N.E. 88, 90 (1926); Tompkins v. Fonda Glove Lining Co., 188 N.Y. 261, 264, 80 N.E. 933, 934 (1907).

93 The language in the cases had been phrased only in terms of deceased persons. E.g., ibid.

94 See Board of Supervisors v. Bristol, 99 N.Y. 316, 313-23, 1 N.E. 878, 881-82 (1885); Hatch v. Elkins, 65 N.Y. 489, 496-99 (1875); Marcus v. Fidelity & Deposit Co., 164 App. Div. 859, 861, 149 N.Y. Supp. 1020, 1021 (1st Dep't 1914); John T. Stanley Co. v. National Sur. Corp., 179 Misc. 493, 495-96, 39 N.Y.S.2d 509, 511-12 (Sup. Ct. New York County 1943).

95 See Wieder v. Union Sur. & Guar. Co., 42 Misc. 499, 86 N.Y. Supp. 105 (Sup. Ct. 1904) where it is not mentioned whether the declaration was made during or after the employment; John T. Stanley Co. v. National Sur. Corp., supra note 94, at 495, 39 N.Y.S.2d at 511, where the court says the declarations must be made "in regard to a transaction depending at the very time they are made." The meaning of this statement is far from clear.

96 Compare Board of Supervisors v. Bristol, supra note 94, with John T. Stanley Co. v. National Sur. Corp., supra note 94.

97 65 N.Y. 489 (1875).

98 Id. at 496.

preted by later cases to mean that the declaration had to be made while the specific acts of defalcation were in the process of being carried out.[99] One case had clearly held that, even where an employee's admissions were made while he was still employed, the declarations would not be admissible.[100]

The *Alexander Grant* case has liberalized the law of evidence in New York. In holding that absence from the jurisdiction and refusal to testify on constitutional grounds constitute sufficient unavailability for the admission of declarations against interest, the court followed a respectable array of recent authority which had been expanding the exception to the hearsay rule.[101] In holding that a principal's admissions made during the course of his employment are admissible against his surety, the court brought New York law into harmony with the general rule.

The court may be criticized not for what it did but for what it failed to do. Although a sensible result was reached, the court failed to deal with the basic issues involved in the exceptions to the hearsay rule, and thereby ignored an opportunity to conduct an authoritative analysis of the proper application of the rule.

Conclusion

The hearsay rule and its exceptions have had a haphazard history. The justification of the rule and the rationale of the exceptions point towards revision of the law in two respects. The traditional requirement that a declarant be dead or otherwise unavailable before his declaration against interest may be admitted should be eliminated. Further, a principal's admissions should be accepted in evidence against his surety if and only if they qualify as declarations against interest. There is no need for the requirement that the statement be made during the course of the business for which the surety is bound. This new formulation would insure that statements of unusual credibility would be admitted into evidence irrespective of the availability of the declarant, that no such statements would be excluded simply on the basis of when they were made, and that unreliable self-serving statements would not be admitted on a tenuous theory of vicarious admissions.

*Mark L. Evans**

[99] Wieder v. Union Sur. & Guar. Co., supra note 95 (semble); John T. Stanley Co. v. National Sur. Corp., supra note 94; see Marcus v. Fidelity & Deposit Co., supra note 94.

[100] Marcus v. Fidelity & Deposit Co., 164 App. Div. 859, 861, 149 N.Y. Supp. 1020, 1021 (1st Dep't 1914).

[101] See cases cited in notes 29, 36, and 38-40 supra.

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