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# Evidence--Declarations against Interests Admissible As an Exception to the Hearsay Rule

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tion both to his client and to the profession, and upon the order of the court is free to disclose the requested information.[19]

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EVIDENCE—DECLARATIONS AGAINST PENAL INTERESTS ADMISSIBLE AS AN EXCEPTION TO THE HEARSAY RULE. *Howard v. Jessup*, 519 P.2d 913 (Okla. 1973).

In *Howard v. Jessup*,[1] Oklahoma joined an increasing number of jurisdictions that recognize a declaration against penal interests as an exception to the hearsay rule.[2] The defendant in the case was a livestock commission firm who took cattle on consignment from one Pfeifer. The cattle were allegedly stolen by Pfeifer from the plaintiff. On appeal, the defendant contended that the plaintiff's proof that Pfeifer stole the cattle and sold them through the defendant firm was established by hearsay testimony and should not have been allowed into evidence. The court agreed the testimony was hearsay; it was provided by the County Attorney of Jefferson County who testified that in his presence Pfeifer had confessed that he had stolen the cattle and sold them through the defendant firm in the Oklahoma City stockyards. However, the court affirmed, finding that the confession was a declaration against interest, an exception to the hearsay rule, for it subjected Pfeifer to criminal sanctions.

In a thorough discussion the court traced the history of the rule concerning declarations against interest and expressly overruled its previous decision in *Aetna Life Insurance Co. v. Strauch*.[3] In that case the court held that declarations against interest would only be admitted as exceptions to the hearsay rule if they were against the pecuniary or

tion" to mean that point in time when the IRS forwards a case to the Department of Justice for criminal investigation.

19. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULES, No. DR 4-101(c)(2).

1. 519 P.2d 913 (Okla. 1973).

2. People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964); Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945); Bohannon v. State, 100 Tex. Crim. 285, 273 S.W. 262 (1925).

3. 179 Okla. 617, 67 P.2d 452 (1937).

proprietary interests of the declarant. Declarations against penal interest would not qualify. This has been and is at the present time the majority rule in American courts. However, this limitation has caused so much confusion and controversy since its inception, it is to the credit of the Oklahoma Supreme Court that it has joined progressive courts in abolishing it.

A declaration against interest has traditionally been recognized as an exception to the rule excluding hearsay testimony. However, to be admissible certain prerequisites have been established to safeguard against the dangers implicit when allowing hearsay evidence. In *Aetna*, the Oklahoma court enumerated these requirements. The declaration must state facts which are adverse to the interest of the declarant, the declarant must be unavailable to testify at the time of the trial, and the declaration must be of a fact cognizable to the declarant, made under circmustances which would render unlikely a motive to falsify.[4] According to Professor Wigmore, "[t]he basis of the exception is the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect, and is thus sufficienctly sanctioned, though oath and cross-examination are wanting . . . ."[5]

The original instances of admitting declarations against interest as exceptions to the hearsay rule were in the receipt of accounting entries and oral declarations concerning title to property of the deceased declarant.[6] However, by the beginning of the 1800's all statements of fact which would be prejudicial to the declarant's self-interest were considered fairly trustworthy and admissible as an exception to the hearsay rule.[7] Then, in 1844, the House of Lords in England took a backward step. In the *Sussex Peerage Case*, the court held that declarations against penal interest were not sufficient so as to be an admissible exception.[8] English decisions since then have perpetuated the confusion, and illogical reasoning and confusing decisions have permeated the area.[9] Nevertheless, American courts have overwhelmingly adopted the rule established in *Sussex*.[10] In criminal cases it has been particularly upheld. In civil cases the courts have frequently reasoned around

4. *Id.* at 619, 67 P.2d at 454.
5. 5 WIGMORE, EVIDENCE § 1457, at 262 (3d ed. 1940).
6. *Id.* § 1476, at 281.
7. *Id.* § 1476, at 282.
8. Sussex Peerage Case, 8 Eng. Rep. 1034 (1844).
9. Morgan, *Declarations Against Interest*, 5 VAND. L. REV. 451, 463 (1952).
10. *Id.* at 473.

the rule by finding that the confession of a crime was against the declarant's pecuniary interests as well as his penal interests,[11] the usual premises being that every crime against persons or property creates a liability in tort, or that prison terms necessarily result in loss of ability to produce an income. This stretching to follow the rule would seem to be a good argument for eliminating the restriction altogether. Also, it is utterly illogical to argue that the guarantee of trustworthiness comes more from the presence of pecuniary or proprietary interests than the threat of penal confinement or some other personal sanction. The *Aetna* case, specifically overruled by *Howard*, illustrates the tortured illogical reasoning courts have used to follow the *Sussex* rule.

In *Aetna*, that company had issued a policy insuring the life of Della Oliver with Claude Oliver as named beneficiary. Claude murdered Della and was electrocuted for the crime. In an action by the administrators of Della's estate against Aetna, Aetna attempted to offer proof by a statement by Claude that he obtained the policy with the intent and purpose of murdering Della and collecting the insurance. The offer of proof was denied as hearsay. Upon appeal, however, the court reversed saying the offer was improperly denied. The declaration should have been admitted, the court said, on the basis that it was against Claude's pecuniary interests to make such a statement since it foreclosed the possibility of his collecting the insurance proceeds. The court asserted that it could not be allowed as an exception on the grounds that it was against his penal interests.[12] This application of the rule asserts the questionable assumption that a person would more readily confess to a crime than admit any matter against a possessory interest.

The major argument of those who favor continued exclusion of declarations against penal interests is that such evidence would open the door to obtaining false confessions. As the Oklahoma court said in an early case,

> If evidence of this kind was admissible as original testimony for a defendant, it would be impossible to convict any thief, because he could always find . . . someone who was absent [to] confess to being guilty of the crime. To hold that such evidence was competent would put a premuim on fraud, make perjury safe, and place the state at the mercy of criminals.[13]

11. McCORMICK, LAW OF EVIDENCE § 278, at 673 (2d ed. 1972).
12. Aetna Life Ins. Co. v. Strauch, 179 Okla. 617, 67 P.2d 452 (1937).
13. Davis v. State, 8 Okla. Crim. 515, 521, 128 P. 1097, 1099 (1913).