
Jay S. Judge
CO-PARTIES: USE OF ADMISSIONS AND DECLARATIONS AGAINST INTEREST

Admissions and declarations against interest, which are commonly recognized and treated as exceptions to the Hearsay Rule, are often confused with one another. While Illinois courts and attorneys have from time to time shared in this confusion, Illinois does recognize the careful distinctions between the two. Because the permissible use of a statement sought to be admitted against a party or co-party as either an admission or a declaration against interest will be determined by the characterization of the statement, it is important to distinguish precisely between the two. Indeed, exclusion of evidence that should have properly been admitted or evidence, properly admitted, but mistakenly held binding on a co-party are but two consequences of a failure to distinguish between the two concepts. As a practical matter, when an admission is sought to be entered into evidence it will be against some interest of the party who made it or it would not and could not be offered. To keep this term from being confused with the term, “declaration against interest,” an exception requiring the statement be against the maker’s pe-

1 Wigmore does not treat an admission as an exception to the Hearsay Rule.

The theory of the Hearsay rule is that an extra-judicial assertion is excluded unless there has been sufficient opportunity to test the grounds of assertion and the credit of the witness, by cross-examination by the party against whom it is offered. . . . Hence the objection of the Hearsay rule falls away, because the very basis of the rule is lacking, viz. the need and prudence of affording an opportunity of cross-examination.

(How can a party complain that he did not get an opportunity to cross-examine himself?) 4 J. WIGMORE, EVIDENCE §1048 (3rd ed. 1940) [hereinafter cited as WIGMORE]. For further discussion as to whether an admission is technically an exception to the Hearsay Rule, see text at note 47 infra.

2 See Frazier v. Burks, 95 Ill. App. 2d 51, 238 N.E.2d 78 (1968). See also Kaye, Department of Popular Misapprehensions; Admissions Distinguished From Declarations Against Interest, TRIAL BRIEFS 880 (Mar., 1965); Department of Popular Misapprehensions Revisited, TRIAL BRIEFS 1066 (July-Aug., 1968).

3 Perhaps one fact tending to perpetuate this confusion is the unfortunate practice of calling an “admission” an “admission against interest.” As will be shown, admission of evidence as an admission does not require the finding that it was “against interest,” at least in the sense in which that phrase is used in connection with a declaration against interest. As a practical matter:

[A]nything said by the party-opponent may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony. (This proviso never needs to be enforced, because no party offers thus his opponent’s statement unless it does appear to be inconsistent.)

4 WIGMORE §1048. Further, were a party to offer, on his own behalf, a statement which was not against his interest it could not be received since it would be self-serving.
cuniary or proprietary interest at the time it is made, it should be referred to simply as an admission. Since each of the above exceptions are separate and distinct and the prerequisites to admissibility different, erroneous usage of the terminology may result in misapplication of the prerequisites and hence a wrongful application of the rules governing each. Therefore, to avoid confusion, and to be technically correct, admissions should be referred to as such and not as “admissions against interest.”

An excellent example of how important it is to distinguish between admissions and declarations against interest and the prerequisites necessary to each is the Illinois case of Frazier v. Burks. In that case a co-party defendant argued that a statement introduced into evidence was an admission of a party while the plaintiff argued that it was a declaration against interest. The Appellate Court of Illinois, First District, in Frazier held that a statement made by a co-party defendant, who was unavailable at the time of trial, was admissible against the other co-party defendant as a declaration against interest. A correct

4 Nevertheless, because most statements used as admissions do happen to state facts against interest, judges have been found who were misled by this casual feature and treated admissions in general as obnoxious to the Hearsay rule, and therefore as entering only under an exception to that rule.

4 Wigmore §1049. Wigmore is, in effect, saying that judges have applied the tests for a declaration against interest to a statement that was an admission and need not meet those tests.

5 95 Ill. App. 2d 51, 238 N.E.2d 78 (1968).

6 The facts of the Frazier case were: Plaintiff automobile guest passenger sued two alleged tortfeasors, defendant co-party dram shop (tavern) owner and co-party automobile driver. Plaintiff claimed personal injuries from the negligence of co-party defendant driver whose automobile crossed the median strip and struck headon the auto in which the plaintiff was riding. Several days after the accident the driver gave a written, signed statement as follows:

On Saturday, June 3, 1961, about 1:00 p.m. I left my apartment and drove my 1959 Buick Sedan over to Mosley's Lounge located at 4425 South Wells Street. I was alone and after I walked into the tavern I met Isiah Banks, Walter Banks and a fellow named Wolf. We sat down in the first booth from the front door and we ordered a couple of half pints of Ballentine Scotch. We sat there drinking and talking for awhile. A little after 7 p.m. I figured I had plenty to drink and decided to get home. I managed to get into my car and my head was spinning. I vaguely remember driving south on Wentworth Avenue, and suddenly there was a car ahead of me. The next thing I remembered was loud crashing noises. Later a policeman told me that I had hit two cars. He asked me if I had been drinking liquor and I told him that I had and where I drank it at.

Id. at 53, 238 N.E.2d at 80. The co-party driver could not be located for trial but his statement was introduced. The trial court refused to admit the statement saying it was an admission of a party and while it could be used against the driver it could not be used against the co-party tavern owner because there was no joint interest between the driver and the tavern owner (i.e. no privity, no principal-agent relationship, no master-servant relationship).

The Appellate Court of Illinois, First District, reversed and remanded. It found that the signed statement was a declaration against interest and was, as such, admissible against the co-party defendant tavern owner.

7 The Court found that the statement met the four requirements: (1) de-
understanding of the similarities, differences and respective uses of admissions and declarations against interest necessarily requires a thorough analysis of both. Such analysis must start with the nature and historical development of the Hearsay Rule and its exceptions.

**HISTORY OF THE HEARSAY RULE**

The genesis of the rule against the admission of hearsay evidence was a reflection of the change in the nature and function of the jury between 1400 and 1696. The jury of the early 1400’s consisted of so-called informed persons who were not actually clarant unavailable, (2) declaration against pecuniary interest, (3) knowledge, and (4) no motive to falsify. Depending upon the use to which the declaration is put it may or may not meet requirements two and four. When scrutinized closely the declaration may not pass the tests.

See text at notes 73-75 infra.

It should be further pointed out that the declaration against interest must be analyzed in light of the fact that the *Frazier* case is a dramshop action brought under the Illinois Liquor Control Act commonly referred to as the Dram Shop Act. The section under which it was brought reads as follows:

§135. Actions for damages caused in intoxication — Lessor’s liability — Forfeiture of lease — Maximum recovery — Limitations. §14. Every person, who shall be injured, in person or property by any intoxicated person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that alcoholic liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any alcoholic liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving liquors aforesaid, provided, that if such building or premises belong to a minor or other person under guardianship or conservatorship the guardian or conservator of such person, shall be held liable instead of such ward; and a married woman shall have the same right to bring suit and to control the same and the amount recovered as a feme sole; and all damages recovered by a minor under this Act shall be paid either to such minor, or to his or her parent, guardian or next friend as the court shall direct; and the unlawful sale or giving away, of alcoholic liquor, shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place; and all suits for damages under this Act may be by any appropriate action in any of the courts of this State having competent jurisdiction. An action shall lie for injuries to means of support, caused by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, resulting as aforesaid. Such action shall be brought by and in the name of the person injured, or the personal representative of the deceased person, as the case may be, from whom said support was furnished, and the amount recovered in every such action shall be for the exclusive benefit of the person or persons injured in loss of support, and shall be distributed to such persons in the proportions determined by the judgment or verdict rendered in said action. If such right of action is settled by agreement with the personal representative of a deceased person from whom support was furnished, the court having jurisdiction of the estate of such deceased person shall distribute the amount of the settlement to the person or persons injured in loss of support in the proportion as determined by the Court, that the percentage of dependency of each such person upon the deceased person bears to the sum of the percentage of dependency of all such persons upon the deceased person...

**ILL. REV. STAT. ch. 43, §135 (1959).**
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called to give testimony on the witness stand in open court. Witness' testimony was obtained, for the most part, by the jury consulting with persons outside of court. That is, witnesses did not testify in court but had spoken with or been consulted by one or more jurors outside of the courtroom.

The jury, in the 1400's, did not sit in court and await testimony to be presented to it. The jury investigated for itself and based its verdict upon either personal knowledge (i.e., a juror heard or saw the transaction or matter in dispute) or through what is commonly referred to as hearsay (i.e., a juror listened to opinions of his father or such other persons as he thought were trustworthy). Not all testimony was gathered by the jurors in this fashion. There were certain deed witnesses and transaction witnesses who gave testimony in open court. These latter examples, however, were the exception rather than the rule. Hence, it can be said that generally, during the fifteenth century, juries were, due to the relatively small size of communities, drawn from persons who had either seen or heard of the incident now at trial or who were close enough to the incident or matter and parties to investigate and determine the facts and circumstances of it.

It appears that during the sixteenth century, consonant with the decentralization of trials as communities both spread and enlarged, a change in the jurors' function occurred, so that jurors depended upon the testimony of witnesses in court whom they might never before have seen or met. Thus, in contrast to the fifteenth century, where testimony (e.g., as the deed witness and the transaction witness) had been relied upon very little, testimonial statements became the basis of the jurors' verdict in the sixteenth century. Personal knowledge and personal investigation of the facts by the jurors began to fall into disuse. This development followed naturally and logically as communities expanded and became less homogeneous.

During the late sixteenth and early seventeenth centuries the role of the witness and the role of the jury as known today came into being. The jury began to depend exclusively upon the testimony of witnesses for facts upon which to base a verdict. In the seventeenth century especially, since jurors based their verdicts upon the testimony of strangers, it became natural to question the sufficiency of witness' testimony both as to quantity and quality. Jurors had no personal knowledge of the facts and relied completely upon testimony presented in court. What was presented to the jurors determined the outcome of the suit. There had hitherto been no prejudice against the jury's utilizing information from persons not produced. But now that their verdict depended so much on what was laid before them at the trial, and
now that the sufficiency of this evidence, in quantity and quality, began to be canvassed, it came to be asked whether a hearsay thus laid before them would suffice. It was asked, for example, whether, if there was one witness testifying in court from personal knowledge and another's hearsay statement offered, the two together would suffice.\(^8\)

Though this question of sufficiency arose in the late sixteenth and seventeenth centuries with regard to hearsay evidence, Wigmore maintains that it was clear that hearsay was admissible in the sixteenth century. In the early seventeenth century hearsay was admissible also, but it was often objected to, sometimes found to be of little or no value by judges, and occasionally even excluded.\(^9\)

It seems that somewhere between 1675 and 1690 the exclusionary rule against accepting hearsay became fixed. At first, the rule excluded hearsay only when offered by itself. Hearsay was still accepted if it merely supplemented or corroborated evidence already admitted. The Hearsay Rule at this date did not exclude extrajudicial sworn statements. It applied only to unsworn statements. So, in effect, hearsay in the form of a sworn statement was admissible. The reason for this appeared to be the manner of giving testimony at trial at that time. The sworn statement of a witness was read aloud to the jury and then the witness took the stand and swore he made the statement and made it voluntarily. By 1696, however, the Hearsay Rule excluded even sworn statements and became the Hearsay Rule as it is known today. The rule excluded testimony not subject to the right of cross-examination.\(^10\)

THE HEARSAY RULE AND ITS BASIS

The Illinois Supreme Court has defined hearsay as “testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.”\(^11\) More concisely, hearsay is evidence which, “consists in the testimonial use of an unsworn,\(^12\) out-of-court statement as proof of the fact asserted by the out-of-court declarant.”\(^13\) In People v. Carpenter

\(^8\) 5 Wigmore §1364.

\(^9\) Id.


the court quoted the example of hearsay cited by Wigmore where
A testifies that, "B told me that event X occurred." If the
testimony of A is offered merely to prove that B made the
statement, it is not hearsay and is admissible. If, however, the
testimony of A is offered to prove that event X occurred, it is hear-
say and inadmissible as such.

The Hearsay rule points out that B's assertion, offered testimoni-
ally, [by A as a conduit] is not made on the stand and presently,
but out of court anteriorly, and challenges it upon that ground.
The Hearsay rule tells us that B's assertion (even assuming B to
have been qualified, by knowledge and otherwise, as a witness)
cannot be accepted because it has not been made at a time and place
where it could be subjected to certain essential tests or investiga-
tions calculated to demonstrate its real value by exposing such
latent sources of error.

Various reasons have been put forth to explain why hearsay
testimony is objectionable: (1) lack of oath, (2) lack of confron-
tation, and (3) lack of opportunity to cross-examine. William
Reynolds gives a concise and competent explanation of these
reasons as he explains:

The reasons for the rule excluding hearsay, or, as Mr. Best more
accurately terms it, "derivative evidence," are not difficult to dis-
cover, for apart from circumstance that the probabilities of
falsehood and misrepresentation, either wilful or unintentional,
being introduced into a statement are greatly multiplied every time
it is repeated, there remains the further fact that the original
statement, even if correctly reported, has scarcely ever been made
under the safeguards of the personal responsibility of the author
as to its truth, or the tests of a cross-examination as to its ac-
curacy. It is indeed true, that, in the ordinary affairs of life,
men often act upon information received at second hand, but this
is seldom done in matters of much importance, unless either they
or their informants possess sufficient personal knowledge of the
party from whom the statement originated to form an intelligent
estimate of his general disposition to speak the truth, the tempta-
tion he may be under to deceive, and his probable means of accurate
information in regard to the subject matter of his statement.

The Illinois Supreme Court recognized these objections in 'he

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14 People v. Carpenter, 28 Ill. 2d 116, 121, 190 N.E.2d 738, 741 (1963).
See also 5 Wigmore §1361.
15 5 Wigmore §1361.
16 There are five "traditional reasons" offered to justify the exclusion
of hearsay: (1) declarant not under oath, (2) witness may have a faulty
recollection, (3) lack of confrontation, (4) fraud could be facilitated, and
(5) no opportunity to cross-examine the declarant (though upon his credi-

17 W. Reynolds, LAW OF EVIDENCE, 18-19 (2d ed. 1890).
Carpenter case when it asserted that the real reason for objection to hearsay was the fact that the witness' testimony or statement would be admitted into evidence without the opponent having an opportunity to cross-examine the witness. The court in Carpenter said:

The fundamental purpose of the hearsay rule was and is to test the real value of testimony by exposing the source of the assertion to cross-examination by the party against whom it is offered. While the administration of an oath and the right of confrontation are also spoken of as necessary elements, the essential feature, without which testimonial offerings must be rejected, is the opportunity for cross-examination of the party whose assertions are offered to prove the truth of the act asserted.18

The rule against hearsay is a basic and fundamental rule of evidence today.19 It is generally accepted today that the primary objection to hearsay, as was stated in Carpenter, is the lack of opportunity to cross-examine.20 Jendresak v. Metropolitan Life Insurance Co.21 exemplifies the Illinois view that hearsay is excluded for lack of cross-examination. This case also indicates

18 28 Ill. 2d 116, 121, 190 N.E.2d 738, 741 (1963). The court was quoting Wigmore.

19 Fantozzi v. Board of Fire & Police Comm'rs, 35 Ill. App. 2d 248, 257, 182 N.E.2d 577, 580 (1962). However, hearsay can be competent if it is not objected to when introduced. See Arkansas Sweet Potato Growers' Exch. v. Wignall-Moore Co., 249 Ill. App. 34 (1928).

This point is further illustrated in a case which gives an excellent example of classic hearsay. In Hoover v. Empire Coal Co., 149 Ill. App. 268, 262-63 (1909), the court said:
The only testimony having any tendency to show how deceased received his injuries was the evidence of a physician who attended deceased after he had been removed to his brother's home and who testified that his brother asked deceased how he got hurt, and that deceased said that the mule backed up and that he went down. No objection was interposed to this testimony and it therefore is to be treated as competent, but that conversation was not a part of the res gestae, and we fail to see how proof that deceased made that statement is any proof that that was the manner in which deceased came to go under the car. It is proof that he made the statement, but not proof of the fact. (emphasis added.)

20 "The theory of the Hearsay rule... is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination." 5 WIGMORE §1420. That lack of cross-examination could allow error is illustrated by the Hall case wherein the court said:
The court instructs the jury, that they must reject all hearsay evidence of the number of hogs delivered by Hall at Chicago. That it was Hall's duty to count them himself or have them counted by some person at Chicago and if they were counted by any other person than Hall, then the evidence of the man who counted the hogs should have been given to the jury.


that the exceptions to the Hearsay Rule are based upon necessity and built-in trustworthiness.\textsuperscript{22}

**Reasons for Exceptions to the Hearsay Rule**

The Hearsay Rule excludes all extra-judicial statements that are offered to prove the truth of the matter that is therein asserted. The reason, as indicated above, is because there is no oath and no opportunity to cross-examine. This is understandable when it is seen that the witness is not himself testifying but is serving as a conduit for a declarant not in court and not subject to cross-examination. If the witness in court is testifying to what another declarant said, "[t]here is considerable danger that he may have heard inaccurately or have a faulty recollection, and there is always the risk that he may, where the declarant is dead, insane, or otherwise unavailable, be tempted to falsify."\textsuperscript{23} The oath and cross-examination will guarantee that the witness is truthfully and accurately portraying what he heard. Hence, these factors serve as sufficient safeguards for proof that the statement (by the declarant) was made. However, they fail to provide sufficient safeguards as to the accuracy and truthfulness of the declaration made by the declarant and now testified to by the witness.

Now when the declaration is offered for its truth, the witness is testifying only as to its fact and content, and the declarant is really testifying to the matter asserted in the declaration. Consequently, since the declarant is not under oath and not subject to cross-examination, his declaration is deemed *prima facie* too untrustworthy to be received.\textsuperscript{24}

\textsuperscript{22} In *Jendresak* the plaintiff sought to recover on a life insurance policy where the insured had disappeared and was presumed by the plaintiff to be dead. The defendant insurance company contended that the plaintiff's daughter had seen the insured alive several years after he disappeared. The defendant sought to introduce letters from the daughter supporting his contention. The court said:

The admission of the hearsay evidence contained in these letters on Grady's hearsay testimony would have deprived plaintiff of her right to cross-examine Stella and Helen as to whether they had written the letters and as to the truth of the facts set forth therein and it might well have developed, if they were subjected to cross-examination, that neither of them had written the letters or seen their father in 1931 or at any other time since he disappeared. That this is true is clearly indicated by the conflicting statements contained in the letters.

*Id.* at 170, 70 N.E.2d at 869.

The court in *Jendresak* further stated:

Every exception to the hearsay rule with which we are familiar is predicated upon necessity and public policy and the reason for such exceptions is that hearsay evidence is the best evidence obtainable and that material facts would not otherwise be capable of proof. Where material facts are susceptible of proof by persons who are alive and are claimed to have personal knowledge thereof, it is never permissible to resort to hearsay evidence to prove such facts.

*Id.* at 171, 70 N.E.2d at 870.


\textsuperscript{24} *Id.*
Cross-examination serves not only to test the truthfulness of the witness but also to test his qualities of "perception, memory, narration." Since "[i]t is only by the use of cross-examination that the various defects of testimony can be exposed," lack of such cross-examination or lack of opportunity for such cross-examination is given as the basic reason for not admitting hearsay. Whether the lack of oath is also a reason is questioned by legal scholars. McCormick seems to feel that the oath impresses the witness with the danger of punishment for lying, and hence its value, while Wigmore seems to feel it is incidental.

Wigmore disposes of the right of confrontation as being one of the reasons advanced for excluding hearsay:

Now Confrontation is, in its main aspect, merely another term for the test of Cross-examination. It is the preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-examination is essential. The right of confrontation is the right to the opportunity of cross-examination. Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand, as a minor means of judging the value of his testimony.

Various other theories advanced as reasons for excluding hearsay are spoken of by Wigmore and shown to be merely minor reasons, if reasons at all. These include: (1) the risk of incorrect transmission — this would apply to oral statements but the hearsay rule excludes both written and oral statements; and (2) intrinsic weakness — this weakness is obviously the ill that is sought to be corrected by cross-examination. As noted above, the Illinois courts accept the lack of opportunity to cross-examine as the basis for the Hearsay Rule.

Exceptions to the Hearsay Rule developed due to two considerations: (1) a circumstantial probability of trustworthiness and (2) necessity. The fact was that cross-examination was

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26 Experience on the bench and at the bar makes it abundantly clear that the chief value of cross-examination is to disclose defects relating to perception or memory; occasionally it reveals misleading qualities in narration, and rather infrequently exposes intentional falsehood.
27 Id.
28 Wheaton, What Is Hearsay?, 46 Iowa L. Rev. 221 (1960-61). "Most writers, both judicial and non-judicial, feel that this lack of opportunity to cross-examine is the basic reason for rejecting hearsay." Id.
29 Id. at 220. See C. McCormick, Evidence §224 at 457 (1954); 5 Wigmore §1362.
30 5 Wigmore §1365.
32 5 Wigmore §1420.
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designed to guarantee accuracy and trustworthiness but in some instances these two guarantees could be satisfied by considerations other than cross-examination. In fact, cross-examination proves to be superfluous. Wigmore says that, "[i]t may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." Consequently, in some instances there will be an implicit trustworthiness (i.e., a declaration against interest has a built-in trustworthiness inasmuch as one would not say something against his pecuniary interest unless it were true). Also, a witness or declarant may be dead, hence, creating the necessity of receiving the uncross-examined or unchallenged statement rather than no statement at all upon the issue.

The rationale of necessity means that certain hearsay evidence will be accepted untested by cross-examination rather than to have no evidence admitted at all. It is based upon the principle of accepting the best possible evidence, regardless of its probative value. Dying declarations are accepted out of necessity (death causing the necessity). Declarations against interest are accepted out of necessity (the unavailability of the declarant being the cause of the necessity). Spontaneous declarations are received out of necessity (the evidence may never have the same value as when uttered spontaneously).

With respect to the principle of the circumstantial probability of trustworthiness, Wigmore cites three classes which make the test of cross-examination superfluous:

- a. Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;
- b. Where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force;
- c. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

The exceptions for Declarations of Mental Condition, Spontaneous Declarations, and Declarations against Interest rest entirely on Reason a; while the exception for Declarations about Family History (Pedigree) rests largely upon Reason a, though partly also on Reason c. The exception for Dying Declarations rests entirely on Reason b (the fear of divine punishment). The exception for Regular Entries rests chiefly on Reason b, though partly also on Reason a and c. The exception for Official Statements rests chiefly on Reasons b and c, though a also enters.

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33 Id.
34 See 5 WIGMORE §1421.
35 5 WIGMORE §1422.
36 Id.
While it is seen that exceptions have developed because of necessity and trustworthiness, "[t]hese two principles — Necessity and Trustworthiness — are only imperfectly carried out in the detailed rules under the exceptions." 37

**ADMISSIONS**

According to Wigmore, "anything said by the party opponent may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony." 38 The Illinois courts have defined an admission as, "[t]he statement of a fact against the interest of a party making it . . . ." 39 or the [w]ords or acts of a party opponent offered as evidence against him." 40

An admission is the statement of a party. It is, "[r]ecivable in evidence only when the declarant or someone identified with him in legal interest is a party to the suit and the admission is offered against him." 41 Thus an admission is a statement made by a party. A statement made by one not a party cannot be an admission. But it is not merely any statement made by a

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37 5 WIGMORE §1423. In discussing the fact that the principles of necessity and trustworthiness are not always properly applied Wigmore says: The two principles are not applied with equal strictness in every exception; sometimes one, sometimes the other, has been chiefly in mind. In one or two instances one of them is practically lacking. Nevertheless they play a fundamental part. It is impossible without them to understand the exceptions. In these principles is contained whatever of reason underlies the exceptions. What does not present itself as an application of them is the result of mere precedent, or tradition, or arbitrariness. Id.

38 4 WIGMORE §1048.


40 McNealy v. Illinois Cent. R.R., 43 Ill. App. 2d 460, 472, 193 N.E.2d 879, 886 (1963) (emphasis added). See also Woodruff v. Pennsylvania R.R., 52 Ill. App. 2d 341, 202 N.E.2d 113 (1964) which cites Wigmore's definition as anything a party-opponent says being used as an admission against him. Accord, Schutt v. Terminal R.R. Ass'n, 79 Ill. App. 2d 69, 223 N.E.2d 264 (1967); Sidwell v. Sidwell, 75 Ill. App. 2d 133, 220 N.E.2d 479 (1966); People v. Marshall, 74 Ill. App. 2d 472, 221 N.E.2d 128 (1966). This latter case defines an admission as, "a statement made out of court by a party and may take either the form of uttered words or the form of conduct from which is inferred a belief of the party." Id. at 481, 221 N.E.2d at 133.

An interesting case is Elliotte v. Lavier, 299 Mich. 353, 300 N.W. 116 (1941) which by way of dicta defines admissions as, "statements made by or on behalf of a party to the suit in which they are offered which contradict some position assumed by that party in that suit." Id. at 357, 300 N.W. at 118. See also Malby v. Chicago Great W. Ry., 347 Ill. App. 441, 106 N.E.2d 879 (1952).

41 C. CHAMBERLAYNE, THE MODERN LAW OF EVIDENCE §2770 (1913) (emphasis added) [hereinafter cited as CHAMBERLAYNE]. See also W. REYNOLDS, LAW OF EVIDENCE (2d ed. 1890). Reynolds defines an admission as:

[ A] statement, oral, written, or by tacit acquiescence, suggesting an inference as to any fact in issue or relevant thereto, made by or on behalf of any party to any proceeding, and is (subject to the rules hereinafter stated) relevant as against the person by or on whose behalf it was made, but not in his favor unless admissible in evidence for some other reason.

Id. at 21.
party, it must be a statement against the party's interest. Wigmore points out this second requirement is never actually enforced because an opponent will not introduce the party's statement unless it is in fact unfavorable.42

It should be pointed out that an admission has other essential features complementary to being a statement against interest made by a party, which should be mentioned though they are not germane to the present discussion. These other features or characteristics will help distinguish it from a declaration against interest. They include: (1) the fact that it need not be against pecuniary or proprietary interest; (2) that it is primary evidence even if the maker is present and in court; (3) that it may be made at any time, and; (4) admissions are determined largely by procedure.43

It has been mentioned above that an admission is an exception to the Hearsay Rule. Before explaining this statement, it is necessary to clarify the position that an admission, as used in general context in this article, refers only to extra-judicial statements—it does not refer to admissions made in pleadings or made in open court. Hence, when an extra-judicial or out-of-court statement made by a party is introduced by the opponent, it must be tested by the Hearsay Rule. In other words, is such a statement to be excluded as hearsay because it is not tested by the Hearsay Rule test of cross-examination? The statement is offered to prove the truth of it and not just as proof that it was made. It then must be subject to cross-examination or it is hearsay and is excluded. However, perhaps it is an exception to the Hearsay Rule. Exceptions are based upon the principles of necessity and circumstantial probability of trustworthiness.44 It does not appear that there is necessity for admitting the statement, but it does appear that there is some guarantee of trustworthiness because one would not ordinarily admit something which is against his interest unless it is true. It is readily apparent that there is a question as to whether or not an admission is an exception to the Hearsay Rule. Wigmore believes that an admission satisfies the Hearsay Rule test, i.e., cross-examination, and therefore is not an exception to the Hearsay Rule. The party himself is the only one who could invoke the Hearsay Rule when his own statement is used against him and he can hardly say that he did not have the opportunity to cross-examine himself.45 This

42 4 WIGMORE §1048.
43 2 CHAMBERLAYNE §1235; 4 CHAMBERLAYNE §2770.
44 See text at note 22 supra.
45 4 WIGMORE §1048.

The theory of the Hearsay rule is that an extra-judicial assertion is excluded unless there has been sufficient opportunity to test the grounds of assertion and the credibility of the witness, by cross-examina-
very point is stressed by the Illinois Appellate court in *Hudson v. Augustine's, Inc.* when it said:

[B]ut a decedent's statements against interest [admissions] are not objectionable because of the lack of opportunity to cross-examine, because the lack of opportunity to cross-examine is deprived of significance by the incongruity of the party's objecting to his own statement on the ground that he was not subject to cross-examination by himself at the time.47

It is contended that admissions are admissible, not as an exception to the Hearsay Rule, but on the basis of estoppel.48 "The true theory would seem to be that, if relevant, it is admissible against the party making it, because, having admitted the fact to be true, he cannot complain if it is treated as true, and that whatever a party has voluntarily admitted to be true, whether against his interest or not, may reasonably be taken as true.49

But admissions, both party and vicarious, when not within some other exception to the Rule, come in simply because the party or one for whom he is held responsible, has said them, without reference to probative value. This leads irresistibly to the conclusion that an estoppel is being invoked against the party to assert the hearsay objection.50

Whether the admissibility of an admission is accepted under an estoppel theory, or under a satisfaction of the Hearsay Rule theory, or under an exception to the Hearsay Rule, it remains that, "admissions of a party to a suit are always competent and admissible as substantive evidence when offered by the opposite

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48 Other theories are advanced.
49 No matter on what basis admissions are received, whether as a substitute for proof, as Wharton maintained, or that the Hearsay Rule is satisfied, as Wigmore argued, or, as suggested by Morgan, under an exception to the Hearsay Rule permitted by dispensing with the necessity of cross-examination, or as relevant conduct under the thesis of Strahorn, it is easily perceived that the rules of substantive law should have no application.
51 *Elliot, Evidence* §220 (1904). See 2 B. JONES, COMMENTARIES ON EVIDENCE §§899-901 (2d ed. 1926).
party, and that evidence of such admissions is not subject to the objection that the evidence is hearsay.\(^5\)

Consequently, the statement of the co-defendant driver in the *Frazier* case was an admission of a party. For the party to admit that he was intoxicated is an admission against his interest. His statement could have been used against him.\(^5\) A question arises as to what binding effect the admission of the co-defendant driver would have on the co-defendant tavern owner.

**ADMISSIONS BY CO-PARTIES**

According to one legal commentator:

The mere fact that parties, without joint interests, are co-defendants or coplaintiffs, does not render the statement of one admissible against the other. The admission of one defendant is not evidence against a plaintiff pursuing another defendant on independent grounds. While such admissions are evidence against the party himself, they cannot be used against those who have been joined with him merely for purposes of the action, either as plaintiff or defendant as the case may be, but not as joint contractors.\(^5\)

This statement seems to summarize the law on admissions by co-parties. Certainly, if an admission is viewed on an estoppel theory, it is conceivable that one party's admission should not bind the other party unless there is a close relationship between the parties — i.e., unless there is a joint interest. Lev has stated:

Whether one should be bound by the declarations of another, conceding the premise that admissions of a party are received by way of an estoppel, should be made to depend on the affirmative acts of the party in selecting his co-venturer, a conduct of association with the declarant whose utterances are sought to be admitted, such that the identity of interest created by the behavior


\(^5\) Co-defendant driver could not be located for trial.

of the party would estop him from denying that the declarations should be treated as his own. This may be illustrated by an 1884 case, *McMillan v. McDill,* which serves as a classic illustration of the effect of an admission where the interest among the co-parties is either joint or several. In that case, the deceased had bequeathed all of his personal and real property to seven persons. The executor, who was a party to the suit, had made a statement to the effect that the testator did not have the mental capacity to make the will. The court refused to allow the admission by the executor into evidence. The court said:

It is plain that the admission of one who is the sole party interested in the issue before the jury, would always be competent evidence, when called out, against such party; but where several parties are interested, as here, can the declarations of one be admitted as evidence against that one, when such admission will directly affect the issue as against the other parties? The court's answer was no. Its reasoning was summed up as follows:

If the interest of the devisees had been joint, the evidence might have been admitted against all of them, as we understand it to be a rule of evidence where the parties have a joint interest in the matter in suit, an admission made by one is in general competent evidence against all. The court then went on to conclude that the interest of each of the seven was several or separate, not joint, and therefore the admission of one co-party defendant was not admissible against the other defendants. Similarly in *Worthy v. Birk,* the appellate court refused to admit an admission of a co-defendant as against another co-defendant stating that it would only be proper to do so if the two defendants were co-conspirators or one had authorized the other to make such an admission. Another excellent example wherein admissions of one defendant were not allowed to be used against a co-defendant, because the interests of the two were not joint, is the Arizona case of *Bristol v. Moser.* The

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55 110 Ill. 47 (1884).
56 *Id.* at 50.
57 *Id.* at 51.
58 224 Ill. App. 574 (1922).
59 *Bristol v. Moser,* 55 Ariz. 185, 190-91; 99 P.2d 706, 709 (1940) provides a good example. The facts were as follows:
court said: "It is true that the admission of one defendant may be offered in evidence as against a co-defendant whose interest in the transaction is the same, but when the interest or liability of the co-parties is several, the admissions of one are not competent against the others."^{60}

The logic of this rule is explained in *Belfield v. Coop*^{61} where it is stated:

This court has consistently followed the rule that statements or admissions made by a devisee or legatee concerning the testamentary capacity of a testator, or acts of undue influence in procuring the execution of a will, while admissible where the interests of all the devisees or legatees are joint, are not admissible where their interests are separate and no conspiracy is charged. This rule is adhered to in other jurisdictions and represents the great weight of authority elsewhere. The reason for the rule is that the declarant is not the only one interested in the issue to be tried and that it would be unjust to allow the interests of one beneficiary to be affected by admissions or declarations against interest of another with whom he is not in privity. ...^{62}

In summary, it appears that the admission of one co-party may not be used against another co-party unless there is privity, joint interest, consent, or a relationship so close as to imply a consent or agency. The interest or closeness must be real not feigned. With respect to *Frazier*, there does not appear to be any privity, joint interest, consent, or other close relationship between the co-party driver and the co-party tavern owner. There is no interest that would justify one speaking for the other. In fact, they are adversaries. Consequently, the admission of the co-party driver should not be admissible against the co-party

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We come then to the admission of Mrs. Bristol, and for the purpose of the case we must assume she did make the statements above set forth. Upon examining the complaint, it will be seen therefrom that there is no allegation that Alma Bristol had any part in the employment of plaintiff. The allegation is that she and L. J. Bristol were wife and husband, and that L. J. Bristol was his employer. This is not an allegation of a joint obligation of two parties to a third, and under these allegations no judgment could be rendered as against the wife which would bind her separate property. She was not even a necessary party to the suit for it was one to enforce an obligation contracted by the husband in the interest of the community and enforceable against the community assets.

^{60} *Id.* at 191, 99 P. 2d at 709.

^{61} *Belfield v. Coop*, 8 Ill. 2d 293, 134 N.E.2d 249 (1956).

^{62} *Id.* at 300; 134 N.E.2d at 253. See also 1 *Elliott*, Evidence §248 (1904) which indicates that the admission of one co-party is not admissible against the other co-party unless there is joint interest or privity. Accord, *Lowe v. Huckins*, 356 Ill. 360, 190 N.E. 683 (1934); *Republic Iron & Steel Co. v. Industrial Comm'n*, 302 Ill. 401, 134 N.E. 754 (1922); *Phillips v. Gannon*, 246 Ill. 98, 92 N.E. 616 (1910); *McMillan v. McDill*, 110 Ill. 47 (1884); *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. D. 551 (1869); *Van Meter v. Gurney*, 240 Ill. App. 195 (1926); *Worthy v. Birk*, 224 Ill. App. 574 (1926); *Hill v. Hiles*, 30 Ill. App. 321, 32 N.E.2d 933 (1941). It also appears that *Pellico v. Jackson*, 70 Ill. App. 2d 313, 217 N.E.2d 281 (1966) supports the proposition that the admission of one co-party is not binding upon another co-party where their relation is several, not joint.
tavern owner. A question remains now as to whether the statement involved in Frazier could qualify as a declaration against interest.

**Declaration Against Interest**

Chamberlayne indicates that a declaration against interest is a statement made by a third person (not a party) which is against the maker's pecuniary or proprietary interest. It is said to be secondary evidence, incompetent unless the declarant is dead or unavailable for sufficient reason and it may not be made post litem motam (after the suit has commenced). It appears that almost all writers agree that a declaration against interest is a statement that meets the following four, often-stated, tests: (1) the declarant must be dead or unavailable, (2) the declaration, when made, must be against the declarant's pecuniary or proprietary interests, (3) the declarant must have competent knowledge of the facts, and (4) the declarant must have no probable motive to falsify.

The declaration against interest is treated as an exception to the Hearsay rule. Thus, it is admissible, even though not subject to cross-examination, because of (1) necessity and (2) the circumstantial probability of trustworthiness. Wigmore explains why the declaration against interest has the special test of trustworthiness, releasing it from the necessity of a cross-examination to verify such trustworthiness, when he says, "[a] statement of a fact against interest is receivable on the ground that such a statement is one which would presumably not be made unless truth compelled it, and that it is therefore as trustworthy as if made on the stand under cross-examination."

The declaration against interest exception seems very clear, but it presents a difficult gray area of application where the writers and courts have not been explicit. The question arises whether an admission of a party can become admissible as a declaration against interest. This problem came to light in the Frazier case. Since the admission of the co-party defendant driver was not admissible against the defendant tavern owner as an admission because there was no joint interest between the two, it became

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63 Chamberlayne §1235.
64 See Jefferson, Declarations Against Interest: An Exception to the Hearsay Rule, 58 Harv. L. Rev. 451 (1944); Morgan, Declarations Against Interest, 5 Vand. L. Rev. 451 (1951-52); See also Haskell v. Siegmund, 28 Ill. App. 2d 1, 170 N.E.2d 393 (1960); German Ins. Co. v. Bartlett, 188 Ill. 165, 173, 58 N.E. 1075, 1077 (1900); 31A C.J.S. Evidence §217 (1964); E. Cleary, Handbook of Illinois Evidence §17.22 (2d ed. 1963). See also an excellent case from Minnesota involving a Dram Shop statute but slightly different facts from the principal case: Windorski v. Doyle, 219 Minn. 402, 18 N.W.2d 142 (1945).
65 Wigmore §1455.
66 Wigmore §1457.
clear that it could only be admitted if it was found to be a declaration against interest. Thus the question became whether an admission not admissible against a co-party because of lack of joint interest could become admissible as a declaration against interest if the co-party making the declaration became unavailable.

It would appear unnecessary to resort to the declaration against interest tests when a statement against interest is sought to be used against a party. It is manifestly easier to get the statement in as an admission. However, when a statement against interest is sought to be used against a co-party it may not be possible to get it in as an admission. If the interest between the co-parties is not joint, representative, or consensual, the admission of one cannot be used or introduced as the admission of the other. This is where the problem arises. No court has ruled upon the question of whether a party's admission can be turned into a declaration against interest — i.e. whether a declaration against interest can be made by a party. In Frazier, defendant-appellees, co-party tavern owners, contended that declarations against interest pertained merely to non-party witnesses because of the consideration of reliability. Certainly a party to a lawsuit is, by definition, interested in its outcome. As previously observed, Chamberlayne stated that a declaration against interest is made by a third person, not by a party. Mr. Kaye, in an article on admissions and declarations against interest, indicates that a declaration against interest, "is an out of court statement by a 'non-party' [a stranger to the suit] which ordinarily is inadmissible if the 'non-party' who made it is available to testify." Contrary to this view that a declaration against interest cannot be made by a party, but must be made by a non-party declarant, there are cases which are often cited as classic cases on declarations against interest that seem to indicate that a party may make a declaration against interest. In Elliotte v. Lavier.

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68 Department of Popular Misapprehensions Revisited, TRIAL BRIEFS 1065 (July-Aug. 1968).

The appellate court in Frazier quoted from American Jurisprudence regarding declarations against interest:

An important exception to the hearsay rule renders admissible in evidence relevant declarations against interest by one not a party nor in privity with a party to the action, where the declarant has since died or is not available as a witness, even though there is no opportunity to confront the declarant or to cross-examine him. (emphasis added.) Frazier at 54; 238 N.E.2d at 80. The seeming implication is that one must be a non-party to make a declaration against interest. However, these seeming implications exist in many decisions and many articles and never are clearly explained. See other definitions in Frazier. See also Morgan, Declarations Against Interest, 5 VAND. L. REV. 451 (1951-52).
the court stated, "[d]eclarations against interest are statements which, when made, conflicted with the pecuniary interest of the person making them, who need not have been party, privy or witness to the suit in which they are offered." 71 The phrase, "who need not have been party" would seem to indicate that there are cases where a party may make a declaration against interest, or that an admission of a party may be admitted in evidence as a declaration against interest if it meets the four point test of the declaration against interest. Phrases like this are found scattered throughout various cases and comments. 72

Before analyzing whether a party can make a declaration against interest it is necessary to restate some conclusions made above. An admission is not the same as a declaration against interest. An admission can only be a statement of a party. An admission is, in effect, an exception to the Hearsay Rule. It permits the use of a statement without the opportunity for cross-examination. The admission may be admitted into evidence for one of several reasons: (1) as an exception to the Hearsay Rule, (2) because it satisfies the Hearsay Rule, or (3) on an estoppel theory. In any case, when a party makes a statement against his interest it is admitted on the basis that it is an admission. This indicates an admission is the only way to introduce a statement against interest by a party. This conclusion is justified inasmuch as there is no need for a party's statement against interest to meet the four tests of a declaration against interest if it is to be introduced against the party himself. There is no need to go to the trouble of showing the declarant was unavailable, when in fact, this usually is not the case. There is no reason to show a pecuniary or proprietary interest when this is not necessary. The same appears true when a co-party seeks to use a statement against interest against his fellow co-party. If their interest is joint, an admission of one can be used against the other. Again, there is no need to try to qualify the statement as a declaration against interest when it is easily admitted as an admission. Logic compels the conclusion that a declaration against interest must always be made by a non-party, and a party's statements against interest will always be an admission.

It was suggested above that the introduction of a statement against interest by a party as a declaration against interest is necessary only when co-parties are involved and the interest of the co-parties is not joint (in which case the admission of the

71 Id. at 357; 300 N.W. at 118 (emphasis added).
72 See note 64 supra. See also Levy v. American Auto. Ins. Co., 31 Ill. App. 2d 157, 175 N.E.2d 607 (1961) which discusses declarations against interest though the court did not find a declaration against interest in the case.
one co-party may not be used against the other.) However, it appears that even under these circumstances the statement of the co-party can never meet the qualifications of a declaration against interest when the tests are analyzed and applied.

With respect to test one, the declarant must be dead or unavailable. There is a strong movement today to eliminate this requirement. It is obvious that the unavailability does not go to the guarantee of trustworthiness. It is no more accurate or truthful because the declarant is dead or not available. The point was emphasized by the defendant-appellees tavern owners in the Frazier case when they argued in requesting a rehearing in the appellate court: "The upshot of the Court's opinion is that though an admission by party A is inadmissible against co-party B when both A and B are present in Court, an admission by party A arises to the level of admissibility against B when A is absent." This requirement of unavailability satisfies the necessity requirement for an exception to the Hearsay Rule. Hence, it becomes immediately clear that a party's admission which is not admissible against a co-party does not or could not become any more admissible because the declarant (party) has become unavailable. Unavailability merely goes to the necessity of accepting a witness' out-of-court statement and it is not a prerequisite to receiving an admission.

With respect to test two, the declaration must be against pecuniary or proprietary interest. The statement must be analyzed closely to determine whether or not it is actually against interest. Appropo is a statement made by Morgan:

At times a statement may have a double aspect: the fact stated may be against interest to a given degree and for interest otherwise. Thus if T, a taxpayer, in making his return, states his income to be in the highest figure which calls for no surtax, say $4,000, he must realize the fact stated is against his interest to the extent that it subjects him to a tax upon at least $4,000. If there is a question whether his income is more than $4,000, he must realize that the fact stated is for his interest in that it relieves him from a larger normal tax and from all surtaxes. If in an action between third parties the question is whether T's income was at least $4,000, evidence of T's tax return to the extent that it was against interest is relevant and admissible; if the question is whether T's income was more than $4,000, his tax return has no relevant statement against his interest and seems to have no guaranty of trustworthiness.

This double aspect of a declaration against interest is evi-

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75 Model Code of Evidence, Comment, rule 509 at 187-88.
enced in the Frazier case when the co-party defendant driver stated that he became intoxicated in the co-party defendant tavern owner's tavern. In one respect, it is against the driver's interest to state he was intoxicated, and hence it becomes trustworthy with regard to his liability in that respect. However, when this declaration is viewed from the point that the declarant became intoxicated in the defendant co-party's tavern, it is no longer trustworthy because it is against another's interest. When examined from this posture, the declaration is not against the interest of the co-party defendant driver. This conclusion would always follow when there is no joint interest between co-parties. That is, lacking a joint interest it would appear that when a party's statement against interest (an admission) is sought to be introduced against the co-party as a declaration against interest it will lack the necessary quality of being against interest. It will become self-serving in the sense that it will not be against the declarant's interest and quite possibly will help the declarant show fault on the part of his co-party.

**CONCLUSION**

The statement of the co-party defendant driver in the Frazier case would not appear to have been a declaration against interest and it should not have been permitted to be introduced as such. The statement was an admission. Since it was an admission by a co-party, and since there was no joint interest between the co-parties, it was not admissible against the co-party defendant tavern owner.76

In Frazier the appellate court set a dangerous precedent when it allowed an admission of a co-party which ordinarily

76 Dramshop cases involve some very special dangers because of the practical realities involved. The courts must be particularly careful in dramshop cases when analyzing a statement to determine whether or not it meets the requirement of being against pecuniary or proprietary interest. The writer has worked as an investigator and also as an adjustor and claim supervisor for an insurance company and is familiar with the practical realities involved in some types of dramshop cases. An example of what can happen is presented by the following hypothetical situation.

Tortfeasor A is the driver and owner of an automobile which rear ends the automobile driven by plaintiff C. A may or may not have purchased liquor from tortfeasor B (the dramshop owner). This question will be resolved by the trier of the facts based upon the evidence presented. A has no insurance and seemingly no assets. B carries insurance. C has an excellent liability case against A but a questionable case against B. C hires an investigator with instructions to obtain a statement signed by A involving B in the matter. C will tell the investigator, D, how to proceed or hire an experienced investigator who will know how to proceed. D will approach A.

The danger arises at this point. A will at first refuse to sign a statement admitting his drinking. D will inform A that C knows A is uninsured and does not want to hurt A, if A will only cooperate and sign a statement involving B. D will tell A that he can avoid much unpleasantness by signing a statement. D may also inform A that he won't have to show up for the trial or that he'll eventually be dismissed out of the case, if he cooperates now. D may have to threaten A with all the unpleasantness of a lengthy
Admissions and Declarations Against Interest

would not have been admissible against a co-party because of lack of joint interest to be admitted into evidence as a declaration against interest.\(^7\) It would appear that this was not the intent of the court but merely a misapplication or mixing of the fine distinctions between admissions and declarations against interest which are entirely separate concepts and must be carefully distinguished.

Jay S. Judge

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As was mentioned earlier in this article the concept of admissions and declarations against interest is often confused. Quite often this results when the term, “admissions against interest” is used. The Illinois case of Clements v. Schless Constr. Co., 91 Ill. App. 2d 19, 234 N.E.2d 578 (1968) illustrates this point. The court said, “(L)ikewise, we believe that the trial court erred in allowing the defendant to introduce in evidence part of plaintiff’s depositions as admissions against interest. At all times the plaintiff, who had suffered a brain injury was present and available to testify. Id. at 25; 234 N.E.2d at 581. This is the classic example of mixing an admission with a declaration against interest. Since the plaintiff was a party any statement against interest may be admitted into evidence as an admission. The fact of availability or unavailability does not matter. The court was obviously looking to test one of the four point tests for declarations against interest and using that to test an admission. This was error.