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The proposed Rules of Evidence for federal courts have renewed interest in substantive reformation of common law evidence in a number of states, including Illinois. Professor Burns discusses a recent Illinois case which illustrates how influential the proposed rules are likely to be in the process of self-reform by the courts.

THE path of change, direction or reform in Illinois common law evidence seems to be in the direction of considered incorporation of selected code provisions from other jurisdictions,[1] *especially* the proposed Rules of Evidence for Federal District Courts.[2] In *Naylor v. Gronkowski*[3] for instance, a First District Appellate Court in a Dram Shop Act suit, found occasion to suggest that the unavailability requirement for admitting declarations against interest[4] should be considered satisfied if a witness is unable to give his former firsthand knowledge of the facts.

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1. *See, e.g.*, CAL. EVID. CODE §§ 1 *et seq.* (West Supp. 1973); MICH. STAT. ANN. §§ 600.2101 *et seq.* (Supp. 1973); N.J. REV. STAT. §§ 2A:84A-1 *et seq.* (Supp. 1972). *See also* MODEL CODE OF EVIDENCE (1942); UNIFORM RULES OF EVIDENCE (1953).

2. *See* proposed FEDERAL RULES OF EVIDENCE rules 101-1101, 51 F.R.D. 315 (1971). Illinois, relying on Rule 609, changed its crime impeachment law in People v. Montgomery, 47 Ill. 2d 510, 268 N.E.2d 695 (1971).

3. 9 Ill. App. 3d 302, 292 N.E.2d 227 (1972).

4. *See generally* 5 WIGMORE, EVIDENCE §§ 1455-77 (Chadbourn rev. 1972); Jefferson, *Declaration Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1 (1944); Morgan, *Declarations Against Interest*, 5 VAND. L. REV. 451 (1952).

Morgan sets out all the rules which different courts have applied in varying combinations to govern the admission of declarations against interest:

(a) the declarant had peculiar knowledge of the fact,

(b) the fact was to the declarant's immediate prejudice, that is, against his interest at the time of the declaration,

(c) the declarant at the time of the declaration knew the fact to be against his interest,

(d) the declarant had no motive to falsify,

(e) the declaration was made *ante litem motam*,

(f) the interest was pecuniary or proprietary, and

(g) the declarant is dead.

In *Naylor,* plaintiff's husband was killed in a bar brawl when struck with a pool cue. In the course of trial, plaintiff called witness Spagnola who had been convicted of the murder of plaintiff's decedent. At his own trial, growing out of the affray, Spagnola had given evidence that he had gone to the defendant's establishment numerous times on the day of the murder, had purchased intoxicating beverages there and was "drunk." At the dram shop trial, civil witness Spagnola stated that he was unable to remember anything of what happened on the evening in question, despite all attempts to refresh his memory. Plaintiff then offered Spagnola's prior testimony and the court received it as a declaration against penal interest. The defendant appealed, contending that the prior testimony was hearsay, with no exception to the hearsay rule applicable.[5]

Is non-recollection of his prior declaration by a witness sufficient "unavailability" to qualify for declaration against interest treatment in Illinois? The First Appellate District Court has answered yes.[6]

That *Naylor* constitutes a departure from precedent is demonstrated by the noticeable absence of Illinois citations within the court's decision. Rather, the court looked to federal cases, learned articles or hornbooks to support its reasoning. Illinois law traditionally has held that in order for a declaration to fit into the "against interest" exception, it must be against pecuniary or proprietary interest and the declarant must be dead at the time of the trial.[7] The

5. It is to be noted that the prior recorded testimony exceptions would be inapplicable for the parties and proceedings would be different.

6. If Spagnola actually did not remember the events of February 19, 1965, leading to the death of Naylor, then his testimony as to that matter is unavailable. His total loss of memory concerning such facts as his leaving the home of Wisniewski, what he had to drink, or if he had purchased any alcohol, makes his testimony unavailable even though he was a witness in court at the time of trial. If he does remember the facts and is simply refusing to testify, his testimony is likewise unavailable. Spagnola was in jail for the murder of Naylor, and the court could not use its contempt power as leverage to force him to testify. Under the facts of the case, this testimony was therefore unavailable, and such unavailability satisfies the requirement with respect to the introduction in evidence of a declaration against interest.

9 Ill. App. 3d at 307, 292 N.E.2d at 230.

7. Bird v. Bird, 218 Ill. 158, 75 N.E. 760 (1905). German Ins. Co. v. Bartlett, 188 Ill. 165, 173, 58 N.E. 1075, 1077 (1900); Frazier v. Burks, 95 Ill. App. 2d 51, 56, 238 N.E.2d 78, 81 (1968); Haskell v. Siegmund, 28 Ill. App. 2d 1, 9, 170 N.E.2d 393, 397 (1960).

At the close of the State's evidence, appellant's attorney offered into evi-

death or unavailability criterion has been liberally construed in Illinois and elsewhere. In *Frazier v. Burks*,[8] for example, an appellate court decided that a declarant *in abscontia* who could not be subpoenaed was sufficiently unavailable to satisfy the spirit of the exception.

Insanity, grave illnesses, being without the jurisdiction, and privilege are more and more commonly regarded as fulfilling the unavailability requirement of this common law exception.[9] But, in stating that a witness, present in court and otherwise competent, is unavailable "due merely to a lapse of time" or "because he no longer recalls the facts," the court has gone beyond the gradual broadening which this and other jurisdictions have witnessed[10] and begun, instead, to ogle Rule 63(10) of the Uniform Rules of Evidence[11] or the new

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dence on behalf of appellant, the following letter. . . . Upon objection by the State the trial judge asked defense counsel if Hall was available and the defense attorney replied, "Not to my knowledge." The trial judge then sustained the objection.

It is the rule in every jurisdiction that before evidence of this kind should be admitted, it must first be shown that the declarant is unavailable to testify by reason of death, illness, insanity, or that he is out of the state. . . . Since no attempt was made to show that Hall was unavailable to testify for any of the foregoing reasons, the trial court properly sustained the objection to the Hall letter.

People v. Archibald, 129 Ill. App. 2d 400, 402-03, 263 N.E.2d 711, 712-13 (1970) (per curiam).

8. 95 Ill. App. 2d 51, 238 N.E.2d 78 (1968).

9. *See* R. HUNTER, TRIAL HANDBOOK FOR ILLINOIS LAWYERS § 66:27 (4th ed. 1972); 29 AM. JUR. 2d *Evidence* § 617 (1967).

10. In People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970), the court said:

> The rule in New York should be modernized to hold that an admission against penal interest will be received where material and where the person making the admission is dead, beyond the jurisdiction and thus not available; or where he is in court and refuses to testify as to the fact of the admission on the ground of self incrimination.

11. Under Rule 62(7) of the UNIFORM RULES OF EVIDENCE (1953), "Unavailable as a witness" includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant, (b) disqualified from testifying to the matter, (c) unable to be present or to testify at the hearing because of death or then existing physical or mental illness, (d) absent beyond the jurisdiction of the court to compel appearance by its process or (e) absent from the place of hearing because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

A witness is not unavailable (a) if the judge finds that his exemption, disqualification, inability or absence is due to procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying, or to the culpable neglect of such party or (b) if unavailability is claimed

Rule 803 of the proposed Federal Rules of Evidence which dispense with the requirement of *real* unavailability altogether.[12]

If Illinois courts are to adopt the "spirit" of proposed Federal Rules 803 and 804[13] just as the Illinois Supreme Court in the *Montgomery* opinion quite abruptly adopted *the letter* of proposed Federal Rule 609 on impeachment as future Illinois law,[14] perhaps we

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under clause (*d*) of the preceding paragraph, the judge finding that the deposition of the declarant could have been taken by the exercise of reasonable diligence and without undue hardship, and that the probable importance of the testimony is such as to justify the expense of taking such deposition.

12. *See* Rule 804 comments, 51 F.R.D. at 439-45.

13. Rule 804 contains a definition of unavailability applicable to the exceptions for former testimony, statements of recent perception, dying declarations, statements against interest and statements of pedigree. It provides as follows:

> (a) *Definition of Unavailability.* "Unavailability as a witness" includes situations in which the declarant:
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> (1) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or
>
> (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so; or
>
> (3) Testifies to a lack of memory of the subject matter of his statement; or
>
> (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) Is absent from the hearing and the proponent of this statement has been unable to procure his attendance by process or other reasonable means.
>
> A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

Id. at 438.

14. The Illinois Supreme Court in People v. Ray, 54 Ill. 2d 377, 380-82, 297 N.E.2d 168, 170-71 (1973) recently recalled *their* processes which led to the change:

> In its argument in *Montgomery*, the People, relying on our 1947 decision in People v. Buford, 396 Ill. 158, 71 N.E.2d 340, took the position that the concerned statute (Ill. Rev. Stat. 1967, ch. 38, par. 155-1) "requires the trial judge to admit evidence of a prior conviction to impeach the credibility of a defendant whenever the prosecution sees fit to offer it. . . . The question is inherently judicial. . . ."
>
> We then continued with a discussion of factors to be considered by a trial court in deciding whether to allow impeachment by a prior conviction. We cited Rule 609 of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (since adopted with changes by the Supreme Court of the United States, Federal Rules of Evidence [citation omitted]), which sets out a number of criteria for deciding whether prior convictions may be used to attack a witness' credibility. We concluded our opinion in *Montgomery* by declaring that "* * * the provisions of this Rule [609] should be followed in future cases. . . ."
>
> It is clear from a reading of *Montgomery* that this holding was based on the interpretation we there gave the statute.

should get all of the form, including proposed Rule 804(b)(4) which allows into evidence declarations against interest which would tend to subject the declarant to criminal liability—the penal interest exception. The law in Illinois with respect to declarations admitting criminal liability is, at best, cloudy.[15] The majority opinion in *Naylor* ducked incorporating new hearsay penal interest law into their holding that the state of the record was such that they could not ascertain whether the prior testimony of Spagnola amounted to a declaration against pecuniary interest.[16] The court found as grounds for this holding that declarant would suffer tort liability for intentional assault, a contention that would have stretched the knot of pecuniary interest, but saved the camel's view that Illinois just does not recognize statements against a penal interest alone.[17]

15. *See* cases cited in People v. Lettrich, 413 Ill. 172, 108 N.E.2d 488 (1952), which stated the general rule of exclusion of declarations against penal interest in Illinois but allowed, "in the interest of Justice" a confession of murder by a third party offered as exculpatory evidence by a defendant in a criminal trial; *Hunter's Handbook* speaks of "older cases" not admitting penal declarations and the present tendency to admit a declaration against penal interest:

> It is submitted that the distincion between pecuniary and penal interest is highly unrealistic. In the first place, an admission that might tend to subject the declarant to criminal punishment necessarily involves his pecuniary interest, since it will probably subject him to a fine, loss of earnings through incarceration, and the legal and other expenses involved in defending himself. Furthermore, there is normally greater, rather than less assurance of the reliability of the declaration against penal interest because of the graver consequences that can flow from the admission.

R. HUNTER, TRIAL HANDBOOK FOR ILLINOIS LAWYERS § 66:27, 630 (4th ed. 1972). *See* excellent commentary in Note, *Declarations Against Interest—Rules of Admissibility*, 62 NW. U.L. REV. 934 (1968); Note, *Evidence—Declaration Against Penal Interest Exception to Hearsay Rule*, 12 DEPAUL L. REV. 323 (1963).

16. In the instant case, no disserving statement was admitted into evidence. There may have been a declaration against interest made by Spagnola at his prior criminal trial [admission of an assault] which would have allowed the relevant portion of that testimony read into evidence in the instant case to be properly received as a statement collateral to a declaration against interest. However, from the present state of the record it cannot be determined if the statements admitted into evidence were in fact collateral to a declaration against interest.

9 Ill. App. 3d at 308, 292 N.E.2d at 231.

17. People v. Lettrich, 413 Ill. 172, 108 N.E.2d 488 (1952); People v. Moscatello, 114 Ill. App. 2d 16, 251 N.E.2d 532 (1969). For examples of declarations against penal interest, *see* Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1 (1944). The raison d'etre to both the penal and pecuniary interest exceptions centers on the importance of the interests of the declarant. It is a nice point in an age of spirit rights and liberties whether a declaration which if true could subject one to possible criminal penalty or loss of freedom is more or less, interest-wise, of importance to a declarant than mere prospect of property or money loss.

This is a perspective the concurring judge apparently shared, adding that since plaintiff failed to satisfy the interest exception it was, therefore, unnecessary and inadvisable to determine whether the requirements of unavailability were satisfied.[18]

Parenthetically, the status and evidentiary admissibility of witness Spagnola's prior testimony made a difference. Plaintiffs had to prove a sale of liquor and had only witnesses' statements to show that any of the four assailants in the case had actually purchased liquor from defendant, a matter collateral to the drunkenness or assault testimony to be sure, but admissible under the murky doctrine that where and if a declaration against interest is admissible, other statements occurring at the same time, though collateral to property, pecuniary or penal declarations, as such, are *pari passu* also admissible.[19]

The point is that if the court selects the unavailability doctrine, newly to be found in proposed Federal Rule 804 dealing with declarations against interest, is there any special reason to stop short with half a pint, so to speak? If *Naylor*, for instance, were to be decided under the proposed Federal Rules, the declaration that he (witness Spagnola) was drunk—a declaration independent to whether he also admitted a stretched pecuniary or penal assault—could conceivably be admissible under proposed Rule 804(b)(4) as a declaration against *social* interest,[20] defined as a statement which would "make him an object of hatred, ridicule, or disgrace,

18. 9 Ill. App. 3d at 309, 292 N.E.2d at 232 (1972) (Stamos, J., concurring).

19. A North Carolina court stated in Smith v. Moore "that the portion which is trustworthy, because against interest, imparts credit to the whole declaration," 142 N.C. 231, 238, 55 S.E. 275, 278 (1906). This area shares the fascination and problems of "connection proximity" and relevance with the verbal act doctrine where related and contemporary verbs occurring at the time of an equivocal act are admissible as part of the relevant verbal act. The MODEL CODE OF EVIDENCE provdes in Rule 509(2) that collateral statements are admissible if the judge finds them to be closely connected with and thereby equally as trustworthy as the declaration against interest.

If the so-called collateral statement has no bearing, other than contemporaneousness, it would presumably not be admissible as would be the case, for instance, where a witness declares implication in an illegal abortion and adds a declaration concerning property, contract or another subject having no special relevance or relation to the penal declaration.

20. 51 F.R.D. at 438, 444. For comparable provisions *see* CAL. EVID. CODE § 1230 (West 1966); KAN. STAT. ANN. § 60-460(j) (1964); N.J. REV. STAT. § 2A: 84A Rule 63(10) (Supp. 1973); UNIFORM RULES OF EVIDENCE Rule 63(10) (1953).

that a reasonable man in his position would not have made . . . unless he believed it to be true."[21]

In all events, if Illinois would reform its law of admissibility of declarations against interest, it is suggested that interest sufficient to satisfy the implied assumption of hearsay exception reliability, that is, the premise that people do not make statements damaging to themselves unless true,[22] should not be severed from the always relative principle of necessity underlying the unavailability rquirements.

Perhaps, for instance, declarations against *social* interests ought to be admissible in Illinois only if the declarant is truly unavailable, declarations against penal interest if partially unavailable and proprietary interest whenever declarant just can not remember. Reform of the concepts of interest[23] and unavailability is needed in Illinois. It is hoped that one will not, however, proceed to set the pace without the other.[24]

21. 51 F.R.D. at 439. MCCORMICK, EVIDENCE §§ 253, 255 (Cleary 2d ed. 1972). A good guide to the range of possible social interests reached beyond defamation of character might be those kinds of declarations involving specific acts of misconduct admissible in some jurisdictions to impeach, i.e., bankruptcy or non-support. In Illinois, drunkenness holds special sway in evidence law with lay opinions admissible even where drunkenness is the ultimate issue.

22. I am reminded of a work called "How to be Your Own Best Friend," based on the assumption that people do say untrue damaging statements against themselves.

23. The importance of the interest sufficient to insure relative sincerity is based, of course, on the Folkquist and values of the age. Today, anti-discrimination and civil rights compete in some manner with property or pecuniary interests, which admittedly were the dominant motif of the mercantile era which nurtured the exception in the first place.

24. Under the proposed Federal Rules of Evidence, the unavailability requirement applies to former testimony, statements under belief of impending death, statements against interest, statements of recent perception, statements of personal or family history and former testimony. Rule 804(b), 51 F.R.D. at 438-39.