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the Florida court did not point out any specific provision of the federal constitution with which this objective of the uniform act was incompatible. Indeed, it would seem that there is no clause in the federal constitution that prohibits state legislatures from passing acts having extraterritorial effect. It seems to have been assumed by the Florida court such an act *would not* be passed because the state would have no means of enforcing it.[29]

It is well established that, except as limited by constitutional restrictions, the state acting through the legislature has absolute and unrestrained power over its own citizens and over those who may be within its boundaries.[30] Therefore, as long as a citizen is unable to point out a specific provision of the federal constitution which enjoins a state from requiring him to go into another state and testify, the power should constitutionally exist in a state to enact such a statute.[31]

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RELIABILITY OF DECLARATIONS AGAINST PENAL INTEREST

A curious development concerning the hearsay rule has been the distinction drawn between declarations by persons against their pecuniary interests, and declarations that tend to show the commission of a crime by the declarant. Since the 1844 decision by the House of Lords in the *Sussex Peerage Case*,[1] the general rule has been that to qualify as a declaration against interest the statement must be adverse to the declarant's pecuniary or proprietary interests.[2]

In the recent South Carolina case of *McClain v. Anderson Free*

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[29]The court apparently made this assumption by asking the following question: "How, then can a Florida court enforce an order to appear before a court of another state when the operation of the order clearly extends beyond state limits?" In re O'Neill, 100 So. 2d 149, 155 (Fla. 1958).

[30]Modern Barber Colleges, Inc. v. California Employment Stabilization Comm'n, 31 Cal. 2d 720, 192 P.2d 916 (1948); Bohrer v. Toberman, 360 Mo. 244, 227 S.W.2d 719 (1950). See generally Ware v. Hylton, 1 U.S. (3 Dall.) 164 (1796).

[31]Mana Transp. Co. v. Shipman, 54 F.2d 313 (1931), cert. denied, 286 U.S. 543 (1932) Smith v. Brogan, 207 Ga. 642, 63 S.E.2d 647 (1951); 16 C.J.S. Constitutional Law § 96 (1956).

[1]11 Cl. & Fin. 85, 8 Eng. Rep. 1034 (H.L. 1844).

[2]Id. at 113, 8 Eng. Rep. at 1045. In the Sussex Peerage Case, Lord Campbell stated: "I think it would lead to most inconvenient consequences, both to individuals and to the public, if we were to say that the apprehension of a criminal prosecution was an interest which ought to let in such declarations in evidence." See also Wigmore, Evidence § 1476 (3d ed. 1940).

Press,[3] evidence tending to show that the declarant had committed a criminal offense was excluded as hearsay. Plaintiff, a former sheriff, sued defendant for the publication of allegedly libelous statements in the latter's newspaper, which was claimed to have led readers to believe that plaintiff had accepted bribes, furnished protection, and granted immunity from arrest to a person engaged in an illegal liquor business. In trying to establish truth as a defense to plaintiff's claim of libel, defendant sought to introduce testimony of witnesses who had been told by declarant, deceased at the time of trial, that he was paying the plaintiff sums of money for protection from arrest. The evidence was admitted in the trial court and the jury returned a verdict for the defendant. Plaintiff moved for and was granted a new trial on the ground that the trial court had erred in admitting the hearsay testimony. On appeal, the ruling of the trial court that the testimony had been erroneously admitted was affirmed.

The majority of the Supreme Court of South Carolina was divided in its reasons for holding the declarant's testimony inadmissible. Judges Moss and Taylor reasoned that the testimony of the witnesses that the declarant had admitted offering protection money to the plaintiff was hearsay and as such was inadmissible. In reaching the same result, Judges Oxner and Stukes stated that, although declarations tending to expose the declarant to criminal prosecution are admissible in South Carolina, the circumstances surrounding declarant's statement rendered it inadmissible. Judge Legge, in a dissenting opinion, expressed the view that the trial court was correct in admitting the hearsay evidence in the first instance and that the trial court's decision for defendant should be affirmed.

The South Carolina court was faced with the question of whether declarations by a person exposing himself to criminal prosecution are admissible in evidence under the against-interest exception to the hearsay rule. An earlier case in South Carolina, *Coleman & Lipscomb v. Frazier*,[4] was directly on point. In the *Coleman* case a postmaster was sued for the negligent loss of a letter containing money. A storekeeper who had been allowed access to the mails admitted in the presence of defendant that he had stolen the money. The storekeeper was dead at the time of the trial. In this case, the court permitted the storekeeper's admission to go in evidence on two grounds: "1st, that the defendant was present, heard it, and received it as true; and 2d, that it was the admission of an act, committed by the party

[3]232 S.C. 448, 102 S.E.2d 750 (1958).
[4]38 S.C.L. 146 (1850).

making it, against his interest, and subjecting him to infamy and heavy penal consequences, and who was dead at the trial. In either or both of these points of view ... the evidence was admissible ...."[5] This is a case in which the court had two independent grounds for admitting the declarant's hearsay statement. As to the first ground, the court had no difficulty finding that the silence of defendant in failing to deny declarant's statement amounted to an admission. In determining that the evidence was admissible on the second ground, the court referred to *Wright ex dem. Clymer v. Littler*[6] in which Lord Mansfield stated that a statement exposing the declarant to criminal liability was admissible. There is little doubt that in *Coleman* the court was recognizing declarations against penal interest as an exception to the hearsay rule.[7] In *Coleman,* the court apparently was not handicapped with knowledge of the *Sussex Peerage* decision, but if it was aware of the decision it was not followed.[8] *Coleman* has been recognized as the law of South Carolina ever since 1850.[9]

The opinion by Judge Moss in *McClain* gives two reasons for not adhering to the rule laid down in *Coleman:* (1) plaintiff, the party against whom the testimony was offered, was not in the presence of the declarant when the declarant said that he had paid plaintiff for immunity from arrest while the declarant continued to operate an

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[5]Id. at 152.

[6]3 Burr. 1244, 97 Eng. Rep. 812 (K.B. 1761). Declarant, deceased at time of trial, confessed forging a will. The court held the confession admissible.

[7]38 S. C. L. at 152. The court in Coleman said: "[O]n the second ground ... a declaration, made by the party who does the act, as in this case stealing the letter containing the money, is admissible .... [W]hen it is remembered that this is not a matter of business ... but was a criminal act, of which none could be so cognizant as the party, I think a reason will be found for its admission .... The admission of such testimony arises from necessity, and the certainty that it is true, from the want of motive to falsify. Both of these are apparent here. So here we have every guaranty of its trustfulness—the grave consequences of infamy, and, at least ten years' imprisonment, would certainly insure the truth of the speaker."

[8]The Coleman case came before the South Carolina court six years after the famous Sussex Peerage Case had been decided. There is no mention of that case in the court's opinion in Coleman, but it is submitted that the language in Coleman is such as to indicate that the doctrine of Sussex would not have been followed even though the Court had knowledge of Sussex.

[9]Fonville v. Atlanta & C. Air Line Ry., 93 S.C. 287, 75 S.E. 172, 173 (1912). The court sought to distinguish this case from Coleman and decided to exclude a statement exposing the declarant to criminal prosecution. However, the court recognized Coleman as being the law and intimated that the decision would have been followed had the case been a proper one. Whaley, 1957 Handbook on South Carolina Evidence, 9 S.C.L.Q. No. 4A 1, 130 (1957). Judge Whaley says that a statement will qualify as a declaration against interest if the statement is "against either his pecuniary or his incriminatory interest."

illegal business;[10] and (2) the declarant's statement that he had paid plaintiff for protection not only incriminated himself but also served to incriminate plaintiff, who received the money.[11]

The first reason given by Judge Moss for excluding the declarant's hearsay more properly applies to a different exception to the hearsay rule, namely the exception dealing with admissions of parties. If a statement is made against a party in his presence and it is not denied by him, under circumstances in which a party would ordinarily deny it if untrue, then such a statement is admissible as evidence against that party.[12] In other words, if the declarant in the principal case had stated in the presence of plaintiff that he was paying plaintiff to furnish police protection, and plaintiff did not deny the statement, then the statement would be admissible as an adoptive admission. The exception involving admissions of parties by its very nature requires that the party against whom the evidence is offered be present at the time the extrajudicial statement was made.[13] However, there is no such requirement of a party's presence in order to qualify as a declaration against interest.[14]

The second reason given in the opinion rendered by Judge Moss for excluding the declarant's hearsay statement, namely, that it not only served to incriminate the declarant but also tended to incriminate plaintiff, is unconvincing when the rationale of admitting *any* hearsay is considered. The practice of admitting hearsay evidence was developed on the theory that some extrajudicial statements are surrounded by adequate safeguards that serve to insure their trustworthiness and are sufficiently reliable to be used as evidence, notwithstanding the absence of the customary safeguards of the courtroom at the time the statement was made. This reasoning would appear to support admitting the declarant's statement in the principal

[10]102 S.E.2d at 757.

[11]Id. at 758.

[12]McCormick, Evidence § 247 (1954); 5 Wigmore, Evidence § 1071 (3d ed. 1940).

[13]Ibid.

[14]Smith v. Moore, 142 N.C. 277, 55 S.E. 275, 278 (1906). In this case, Judge Walker sets forth the requirements of a declaration against interest as follows: (1) that the declarant is dead; (2) that the declaration was against his pecuniary or proprietary interest; (3) that he had competent knowledge of the fact declared; (4) and that he did not have any probable motive to falsify the fact declared. Since the date of this decision minor qualifications have been added to the four requirements, but it is to be noted that the basic requirements have remained. No authority has been found that supports the view that in order for the declaration to be admissible it be uttered in the presence of the party against whom the evidence is offered.

case even though it tends to incriminate plaintiff by raising a suspicion that he has been guilty of accepting money in return for protecting declarant's illegal activities. The statement's being against declarant's interest insures its reliability, the tendency to incriminate plaintiff not detracting from its reliability.[15] It should be admissible as a declaration against interest. The reasons given by Judge Moss indicate a reluctance to extend the *Coleman* case beyond its facts.[16]

Judge Oxner's concurring opinion agreed that the declarant's statement in the principal case was inadmissible but for entirely different reasons. The concurring judges recognized that the rule laid down in *Coleman* is the South Carolina rule on the subject of declarations tending to show the commission of crimes. They were unable, however, to find sufficient evidence of trustworthiness under the circumstances to allow the jury to determine the truth of declarant's statement. This conclusion was reached after considering the other testimony about the declarant's habits. This testimony tended to show that the declarant was a person prone to brag about his accomplishments, and his conduct indicated that he had no apprehension of being prosecuted.

The dissenting judge agreed with the concurring judges that *Coleman* represented the South Carolina law on admitting declarations against penal interest. However, he thought that the question of whether the declarant did or did not have a motive to falsify his statement that he had given bribes to plaintiff was a question for the jury and as such should have been left to that body for determination.[17]

The exclusionary rule as to declarations against penal interest was laid down in 1884 for the first time in the *Sussex Peerage Case*.[18] The

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[15]If it is determined that the declarant in the principal case had a motive to falsify the fact asserted, then the statement would be inadmissible. Jefferson, Declarations Against Interest: An Exception to the Hearsay Rule, 58 Harv. L. Rev. 1, 52 (1944), fully discusses such self-serving statements.

[16]The opinion by Judge Moss repeats several times that the majority of the American courts require that the declaration be against the pecuniary or proprietary interest of the declarant in order to be admissible under the against-interest exception, but does not cite a single case relied on by the court in Coleman.

[17]The distinction between Judge Oxner's concurring opinion and the dissenting opinion lies in a dispute on the court's function in ruling on preliminary questions of fact. The substance of this dispute lies outside the scope of this comment. For a complete discussion see Maguire and Epstein, Preliminary Questions of Fact In Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392 (1927); Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 1 (1929).

[18]The facts of the Sussex Peerage Case reveal that an Act of Parliament forbade any descendant of George II from getting married without the previous consent of the king. One question to be determined was whether a valid marriage

decision was contrary to prior decisions at the time[19] and was also contrary to the historical development of the declaration-against-interest exception to the hearsay rule.[20] Nevertheless, the majority of American decisions have elected to follow the case,[21] and it was more than a half century before the rule received any serious judicial challenge.[22]

The rationale of admitting declarations against interest is based on an assumption that a person will not utter a statement adverse

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had been performed. Testimony of a witness who had heard a clergyman, now deceased, admit that he had performed the marriage was offered in evidence. The testimony was rejected even though the clergyman could have been prosecuted for violation of the Act.

[19]5 Wigmore, Evidence § 1476, n.8 (3d ed. 1940), cites three cases not considered by the court in the Sussex Peerage Case in which third persons' confessions of crime were admitted in evidence. In Hulet's Trial, 5 How. St. 1185, 1192 (1660), Hulet was charged with compassing and imagining the death of Charles I. Hulet tried to prove that Brandon did the deed. A witness testified that he heard Lord Capell ask the common-hangman, Brandon, "Did you cut off your master's head?" Brandon was heard to answer, "Yes." The testimony was admitted. In Standen v. Standen, Peake 32, 170 Eng. Rep. 73 (1791), the issue to be decided was whether or not a legal marriage had been performed. The marriage register showed the publication of banns three times, as was required. A witness testified that the clergyman told him that banns had been published only twice. The testimony was received. In Powell v. Harper, 5 C. & P. 590, 172 Eng. Rep. 1112 (1883), in an action in libel charging plaintiff with receiving goods known to be stolen, the declaration of the person who had stolen the goods was admitted in evidence.

[20]5 Wigmore, Evidence § 1476 (3d ed. 1940).

[21]Donnelly v. United States, 228 U.S. 243 (1913); People v. Bailey, 66 Cal. App. 1, 225 Pac. 752 (1924); State v. Mosca, 90 Conn. 381, 97 Atl. 340 (1916); Miller v. State, 165 Ind. 566, 76 N.E. 245 (1905); Baehr v. State, 136 Md. 128, 110 Atl. 103 (1920); Commonwealth v. Sacco, 259 Mass. 128, 156 N.E. 57 (1927); State v. English, 201 N.C. 295, 159 S.E. 318 (1931).

[22]Donnelly v. United States, 228 U.S. 243, 277 (1913). Mr. Justice Holmes made a frontal attack on the majority rule, saying: "The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a court of justice believe that Donnelly did not commit the crime. I say this, of course, on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick.—The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man ... and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at greater length." Justices Lurton and Hughes concurred with Justice Holmes.

to his own interest unless the statement is true.[23] It is submitted that declarations made by the declarant exposing himself to criminal liability qualify under this rationale as readily as do statements which expose the declarant to liability for a sum of money.

The treatment given to statements against penal interest by the courts varies widely. A great many courts fail to analyze these statements in terms of the rationale applied to declarations against pecuniary interest. These courts find the disposition of the statement an easy task either by referring to it as simply hearsay[24] or by stating that to admit the testimony would create a danger of receiving perjured evidence.[25] The objection to perjured evidence, however, is not peculiar to statements against penal interest.[26] On the other hand, a number of courts have considered statements exposing the declarant to criminal liability in the light of the rationale applied to declarations against pecuniary interest, and have concluded that such statements do not qualify as "against interest." However, as one highly respected authority has stated, the realization of the consequence of imprisonment stemming from a statement against penal interest is an even more powerful influence upon conduct than the mere realization of legal responsibility for a sum of money.[27] In cases involving statements subjecting the declarant to both civil and criminal liability, the fact that the statement is also against penal interest does not render it inadmissible.[28] Instead, it has been said there is "all the more reason for admitting the statement."[29]

A minority of courts have adopted the more rational view that declarations against penal interest are just as reliable as statements against pecuniary interest and are admissible under the against-

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[23] 5 Wigmore, Evidence § 1457 (3d ed. 1940).

[24] Wells v. State, 21 Ala. App. 217, 107 So. 31 (1920); People v. Luce, 135 Cal. App. 1, 26 P.2d 501 (1933); State v. Mosca, 90 Conn. 381, 97 Atl. 340 (1916); Commonwealth v. Sacco, 259 Mass. 128, 156 N.E. 57 (1927).

[25] Baehr v. State, 136 Md. 128, 110 Atl. 103 (1920); Brown v. State, 99 Miss. 719, 55 So. 961 (1911); Davis v. State, 80 Okla. Crim. 515, 128 Pac. 1097 (1913).

[26] 5 Wigmore, Evidence § 1477 (3d ed. 1940). "This would be a good argument against admitting any witnesses at all, for it is notorious that some witnesses will lie and that it is difficult to avoid being deceived by their lies." Dean Wigmore goes further and states in summation: "[A]ny rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent."

[27] Morgan, Declarations Against Interest, 5 Vand. L. Rev. 451 475 (1952).

[28] Citizen Nat. Bank v. Santa Rita Hotel Co., 22 F.2d 524 (9th Cir. 1927); Schaffner v. Equitable Life Assur. Soc., 290 Ill. App. 174, 8 N.E.2d 212 (1937); Weber v. Chicago, R.I. & P. Ry., 175 Iowa 358, 151 N.W. 852 (1915).

[29] County of Mahaska v. Ingalls, 16 Iowa 81 (1864).

interest exception.[30] The Model Code of Evidence has also adopted the view admitting declarations against penal interest.[31]

In conclusion, it is submitted that the opinion by Judge Moss in the principal case excluding the declarant's statement on the grounds of hearsay is in direct conflict with *Coleman,* and will not prevail in future cases before the South Carolina court. This can be stated with some certainty since a majority of the court, the three judges that delivered the concurring and dissenting opinions, were in full accord that *Coleman* was declarative of the South Carolina law on the subject. The two opinions reached opposite results on the question of admitting the hearsay testimony because they took different views of the application of the *Coleman* rule to the facts of the case. The South Carolina rule is in accord with the view which admits any declaration against interest, whether the statement be against the declarant's pecuniary or penal interests.

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[30]Brennan v. State, 151 Md. 265, 134 Atl. 148 (1926); Thomas v. State, 186 Md. 447, 47 A.2d 43 (1946); State v. Voges, 197 Minn. 85, 266 N.W. 265 (1936); Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945); Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923); Newberry v. Commonwealth, 191 Va. 445, 61 S.E.2d 318 (1950). Texas has limited the admissibility of declarations against penal interest to those cases in which the state is relying wholly on circumstantial evidence, and the motive and opportunity for the declarant to commit the crime are present. Ballew v. State, 139 Tex. Crim. 636, 141 S.W.2d 654 (1940); Proctor v. State, 114 Tex. Crim. 383, 25 S.W.2d 350 (1930).

[31]Rule 509(1) is in harmony with the more reasoned authority which states that a statement is against interest "if the judge finds that the facts asserted in the declaration ... so far subjected him [declarant] to civil or criminal liability ... 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."