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# Hearsay, the Confrontation Guarantee and Related Problems

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the nature of the duty, amount of damages recoverable, assignability and seizure of the insured's cause of action. Ideally, law should be administered in a predictable manner providing certainty and stability. Louisiana courts need not become enmeshed in meaningless distinctions and nebulous standards when the Civil Code clearly provides a legal remedy for the insured who is adversely affected by an insurer's refusal to compromise a claim.

*Katherine L. Shaw*

## HEARSAY, THE CONFRONTATION GUARANTEE AND RELATED PROBLEMS

The hearsay rule excludes out of court assertions offered to prove the matter asserted[1] because they are not made under oath and their veracity cannot be tested by cross examination.[2] Of course, there are many exceptions to the rule based on the circumstantial guarantees of trustworthiness and necessity.[3]

The sixth amendment provides in part: "In all criminal prosecutions the accused shall enjoy the right . . . to confront the witnesses against him. . . ."[4] Presumably, the ratification of the sixth amendment in 1789 did not crystallize into immutable form the rules concerning admission of hearsay in criminal

1. The definition used is essentially that found in Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LA. L. REV. 611 (1954). Wigmore does not attempt to define hearsay in his treatise on evidence. 5 J. WIGMORE, EVIDENCE §§ 1360-1366 (3d ed. 1940) [hereinafter cited WIGMORE]. McCormick offers a slightly different definition from the one used in this Comment. C. MCCORMICK, EVIDENCE § 225 (1954) [hereinafter cited MCCORMICK], but warns that not too much should be expected from any definition. The word "assertion" is used instead of statement to emphasize that hearsay may be non verbal. MCCORMICK § 229.

2. As McCormick points out, the absence of an oath and lack of opportunity to cross examine are frequently mentioned together as justifications for the hearsay rule. MCCORMICK § 224 n.5. A third reason, perhaps implicit in the first two, frequently given is that the trier of fact has no chance to observe the demeanor of the declarant if hearsay evidence is used. Generally it is agreed that the absence of an opportunity to cross examine the declarant is the principle justification for the rule against hearsay. MCCORMICK § 2241; WIGMORE § 1365; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

For an examination of spurious reasons sometimes advanced to justify the rule, *see* WIGMORE § 1363.

3. MCCORMICK §§ 230-299; WIGMORE §§ 1420-1684.

4. U.S. CONST. amend. VI. With the exception of Idaho every state constitution has a similar provision. WIGMORE § 1397 n.1.

trials,[5] and the clause has never been interpreted literally to require actual face-to-face confrontation of all witnesses.[6] It is generally accepted that the essential element of the confrontation guarantee is cross examination,[7] and since cross examination has been a traditional common law right subject to certain exceptions, the confrontation guarantee is likewise subject to the same exceptions.[8] Wigmore contemplated that the establishment of appropriate new exceptions was permissible. In fact, he considered the confrontation clause to be merely a bar to total abolition by the legislature of the right of cross examination.[9] The broad freedom, implied by Wigmore, of the courts and legislature to alter the hearsay rule in criminal cases is questionable in view of a line of Supreme Court decisions based on confrontation beginning with *Pointer v. Texas*.[10] Moreover it seems possible that the confrontation guarantee may give rise to a constitutional exclusionary rule which, although related to the hearsay rule, is based on somewhat different principles.[11]

In *Pointer* the transcript of an absent witness' testimony which had been taken at a preliminary hearing was introduced as evidence at petitioner's robbery trial. Petitioner did not have counsel at the preliminary hearing. The Court reasoned that the absence of counsel denied the petitioner an opportunity to cross examine the witness effectively. The defendant's right of confrontation which in this decision was held obligatory on

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5. In Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 264 (1932), the Court said: "The judiciary clause of the Constitution . . . did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts." The same appears to be true of the hearsay rule and the confrontation clause.

6. WIGMORE § 1397.

7. *Id. See also* Salinger v. United States, 272 U.S. 542 (1926); Diaz v. United States, 223 U.S. 442 (1912); Dowdell v. United States, 221 U.S. 325 (1911); Motes v. United States, 178 U.S. 458 (1900); Kirby v. United States, 174 U.S. 41 (1898); Mattox v. United States, 156, 237 (1895); Reynolds v. United States, 98 U.S. 160 (1878).

8. *See* Kirby v. United States, 174 U.S. 41 (1898); Mattox v. United States, 156 U.S. 237 (1895).

What is apparently the only authoritative history of the sixth amendment agrees with Wigmore that the purpose of the clause was to preserve the opportunity to cross examine the witness. F. HELLER, THE SIXTH AMENDMENT 104 (1951).

9. WIGMORE § 1397.

10. 380 U.S. 400 (1965).

11. Comment, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741 (1965). This article is particularly interesting in that it seemed to have anticipated *Pointer* and *Douglas*.

the states by the fourteenth amendment[12] had been thereby violated, and hence his conviction was reversed. Justice Black writing for the majority commented, "[T]his Court has recognized the admissibility against an accused of dying declarations and of testimony of a deceased witness who has testified at a former trial. Nothing we hold here is to the contrary."[13] The opinion goes on to say that there may be other analogous situations which do not fall within the "scope of the constitutional rule requiring confrontation of witnesses."[14] Of course, dying declarations and prior testimony are both well-recognized exceptions to the hearsay rule,[15] and being grounded upon guarantees of truthworthiness and necessity, are analogous to most other exceptions.[16] Thus, the decision gingerly but undeniably suggested that some exceptions to the hearsay rule might run afoul of the confrontation clause. While no subsequent Supreme Court case has held that an exception violated the right of confrontation, in several cases it has apparently recognized that hearsay problems are to an extent constitutional problems.[17] The most important of these are *Douglas v. Alabama*[18] and *Bruton v. United States.*[19]

In *Douglas*, which was decided the same day as *Pointer*,

12. Apparently the federal standards of confrontation, whatever they may be, were made binding on the states by *Pointer*, since virtually every state constitution has its own confrontation clause. *See* note 4 *supra*.

13. Pointer v. Texas, 380 U.S. 400, 407 (1965) [citations omitted].

14. *Id.*

15. McCORMICK §§ 230-238, 258-264; WIGMORE §§ 1430-1452. Although Wigmore does not treat prior testimony as an exception to the hearsay rule, most courts and commentators do consider it an exception. McCORMICK § 230.

16. Dying declarations have traditionally been characterized as trustworthy. The need for the evidence is quite obvious. McCORMICK §§ 258-264; WIGMORE §§ 1431-1443.

The necessity element for prior testimony is generally satisfied by the requirement that the witness be unavailable although not necessarily deceased as the *Pointer* decision suggested. Subsequent Supreme Court decisions have to an extent clarified the unavailability requirement. *See* text at note 25 *infra*. The trustworthiness factor is satisfied by the prior opportunity to cross-examine the witness. See Comment, *Federal Confrontation: A Not Very Clear Say On Hearsay*, 13 U.C.L.A. L. REV. 366, 373 (1966).

17. In addition to Douglas v. Alabama, 380 U.S. 415 (1965) and Bruton v. United States, 391 U.S. 123 (1968), *see* Harrington v. California, 395 U.S. 250 (1969); Berger v. California, 393 U.S. 314 (1968); Roberts v. Russell, 392 U.S. 293 (1968); Barber v. Page, 390 U.S. 719 (1968); Parker v. Gladden, 385 U.S. 363 (1966); Brookhart v. Janis, 384 U.S. 1 (1965). *See also* Smith v. Illinois, 390 U.S. 129 (1968); Burgett v. Texas, 389 U.S. 109 (1967); United States v. Wade, 388 U.S. 218 (1967); *In re* Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967).

18. 380 U.S. 415 (1965).

19. 391 U.S. 123 (1968).

the prosecutor had put the defendant's alleged accomplice on the stand. Under the guise of refreshing that witness' memory the prosecuting attorney read aloud the accomplice's entire confession inserting occasional questions. The confession itself which was incriminating to the defendant was inadmissible hearsay. The reading of the confession by the prosecutor was not testimony and, therefore, was not violative of the hearsay rule. The Court, looking behind that technicality, reasoned that the substance of testimony which could not possibly be cross examined had been placed before the jury, and reversed the petitioner's conviction on confrontation grounds.

*Bruton* is a very similar case. There a co-defendant's confession which implicated Bruton was admitted into evidence at trial. Because the confession was inadmissible hearsay as to Bruton, the jury was instructed to consider it evidence only against the co-defendant. The Supreme Court reversed Bruton's conviction finding there was substantial risk that the jury had not been able to follow the instruction, thereby depriving petitioner of his right of confrontation.[20]

It seems clear that the purpose of *Pointer* and the subsequent confrontation decisions was not to exclude all hearsay from criminal trials. Nothing in *Pointer* necessarily implies any essential conflict between the right of confrontation and the exceptions to the hearsay rule as a whole.[21] Moreover, no subsequent case, state or federal, has condemned a hearsay exception in its entirety as being unconstitutional. Beyond this, little can be said about confrontation with any degree of certainty. Why the Court has departed from the traditional view of confrontation is by no means clear. It has been suggested that *Pointer* merely amounts to an effort to supplement the criminal defendant's right to counsel,[22] and that *Douglas* can be explained in terms of improper prosecution tactics.[23]

At least one writer suggests that the Court has attempted to use confrontation to effect a standardization of the hearsay

20. The rule in *Bruton* was held binding on the states in Roberts v. Russell, 392 U.S. 293 (1968).

21. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED RULES FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES 156 (1969) [hereinafter cited PROPOSED RULES].

22. *Id.*; Comment, 13 U.C.L.A. L. REV. 366 (1966). *See also* Note, 4 DUQUESNE L. REV. 165 (1966); Note, 3 HOUSTON L. REV. 244 (1965).

23. PROPOSED RULES 156.

rule throughout the states in criminal trials.[24] Certainly, to an extent *Pointer* and its progeny seem to reflect the Supreme Court's disapproval of the manner in which hearsay problems have been handled locally.[25] Obviously the federal constitutional right of confrontation could insure to criminal defendants minimum standards of treatment in the hearsay area. However, this standardization suggestion implies that the policy considerations involved in the confrontation cases are basically the same as those underlying the exceptions to the hearsay rule. In other words, the right to confrontation would be satisfied if the out of court statement were trustworthy and necessary. Thus the confrontation right should require the application of a generalized hearsay standard balancing in a constitutional perspective, probative value against necessity.[26] The suggestion is a sensible one which avoids the ritualistic approach inherent in the traditional hearsay exceptions and it is in line with modern proposals to streamline the hearsay operation.[27] Nonetheless, reliability and need probably are not in themselves determinative of the right of confrontation. Certainly it is even irrelevant to speak in terms of reliability where the out-of-court statement is offered nonassertively.[28] Moreover, the right to confront the "witness connotes an active participation by the defendant with the witness. . . ."[29] This notion of face to face participation with the witness seems to be implicit in a few of the cases.[30] For instance, in light of *Douglas* and *Bruton*

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24. Comment, 13 U.C.L.A. L. REV. 366 (1966). *See also* Notes, 30 ALBANY L. REV. 151 (1966), 19 U. MIAMI L. REV. 500 (1966).
25. Comment, 13 U.C.L.A. L. REV. 366 (1966).
26. *Id.* The comment suggests there were three possible theories behind *Pointer* and *Douglas*: (1) Confrontation was used in *Pointer* to merely supplement the right to counsel. (2) *Pointer* is only one more step towards the entire incorporation of the Bill of Rights into the fourteenth amendment due process clause. (3) The Confrontation guarantee was used in *Pointer* and *Douglas* to effectuate a standardization of the hearsay operation throughout the states. The latter is clearly favored by the comment.
27. *E.g.*, MODEL CODE OF EVIDENCE rule 503; PROPOSED RULES Rule 8-04(a); UNIFORM RULE OF EVIDENCE 64(4)(c), 45.
28. Comment, 13 U.C.L.A. L. REV. 366 (1966).
29. Comment, 113 U. PA. L. REV. 741, 743 (1965).
30. State v. Tims, 9 Ohio St.2d 136, 224 N.E.2d 348 (1967), is a particularly good illustration. There defendant was convicted of rape. At his trial a certificate entitled "Report for Examination for Alleged Rape" was admitted over objection. The physican who made the report did not appear at trial. The court found that the use of the document denied the defendant his right of confrontation because the physician in effect testified without being subject to cross examination. That is of course true whenever hearsay evidence is received. The point seems to be that regardless of the trustworthiness of the document its use in a rape trial should not be tolerated.

it is safe to say that the admission of a confession other than the defendant's own constitutes a denial of the right to confrontation. That result seemingly would not, and certainly should not, depend upon the circumstantial probability that the confession is reliable.[31] If these suppositions are correct, then the confrontation clause guarantees that some out of court testimony cannot be used against a criminal defendant notwithstanding the trustworthiness and necessity of the evidence.[32] In any case, the Supreme Court by requiring a more stringent exclusionary principle for evidence offered against a criminal defendant is running counter to much modern authority which would allow greater use of hearsay evidence and would depend on the trier of fact to evaluate the probative value of the evidence.[33]

Because the sanctions of the confrontation requirement are as drastic[34] as its substance is vague the lower courts face difficult problems in dealing with hearsay in criminal cases. The remainder of this article is devoted to an examination of decisions dealing with confrontation in various contexts.

*Prior Inconsistent Statements*

The credibility of a witness may be impeached by introducing his prior statements which are inconsistent with his present testimony.[35] A prior inconsistent statement is not an exception to the hearsay rule because the statement is offered for a nonassertive use and hence for the purposes of the rule is not considered hearsay.[36] The use of prior inconsistent statements places in evidence testimony not subject to cross examination

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*See also* United States v. Johns-Manville Corp., 231 F. Supp. 690 (E.D. Pa. 1963). *But see* United States v. Holmes, 387 F.2d 781 (7th Cir. 1968); Kay v. United States, 255 F.2d 476 (4th Cir. 1958), *cert. denied*, 358 U.S. 825 (1958).

31. The guarantee of reliability primarily insures the sincerity of the out of court statement. It does not protect against defects in the memory or perception of the declarant as presumably does cross examination. E. MORGAN, MODEL CODE OF EVIDENCE—*Foreword*, 36-50 (1942). Comment, 75 YALE L.J. 1434 (1966). Possibly federal confrontation protects against these dangers as well. *See generally* Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

32. Comment, 113 U. PA. L. REV. 741 (1965).

33. *See* note 26 *supra*; *see also* MCCORMICK § 305.

34. Where defendant's right of confrontation has been violated, apparently he must be given a new trial, unless the violation amounts to harmless error. *See* cases cited note 17 *supra*. On harmless error, *see* Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1966).

35. MCCORMICK §§ 33-50; WIGMORE §§ 1017-1046.

36. *See* note 35 *supra*.

and devoid of any guarantee of trustworthiness. Generally certain traditional safeguards attend the admission of prior statements. The statement must be actually inconsistent with the witness's testimony, it may not relate to collateral matters,[37] and the witness must be given an opportunity to explain or deny.[38] Finally, in virtually all jurisdictions the prior statement may not be used for its substantive value and a party may have the jury given instructions to that effect.[39] In Louisiana if the statement relates to the question of guilt or innocence the instruction must be given at the time the statement is offered whether requested or not.[40] Furthermore, McCormick contends that a prior statement may not be admitted where it is the only evidence of a material fact.[41]

The rule that prior inconsistent statements may not be used substantively has been criticized.[42] The witness who made the statement is, of course, on the stand and many authorities consider the opportunity to examine that witness adequate protection for the defendant.[43] Moreover, it is doubtful that a jury can follow an instruction which requires it to ignore the assertive content of a statement.[44] However, if the impeaching statement is offered by the prosecution against a defense witness, the defendant may not have an opportunity to cross examine the witness but will be limited to a redirect examination.[45] Without the opportunity to ask leading questions the examination into the prior statement may prove frustrating.[46] Of course, where the prosecution has been permitted to impeach its own witness the defendant does have an opportunity to cross examine that witness.[47]

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37. *See* note 35 *supra*.

38. *See* note 35 *supra*. This is known as laying the foundation for the prior inconsistent statement.

39. McCORMICK § 39; WIGMORE § 1018.

40. State v. Barbar, 250 La. 509, 197 So.2d 69 (1967); State v. Reed, 49 La. Ann. 704, 21 So. 732 (1897).

41. McCORMICK § 39.

42. McCORMICK § 39; WIGMORE § 1018. *See also* Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

43. *See* note 42 *supra*.

44. *See* note 42 *supra*. *See also* cases listed note 31 *supra*.

45. *See* McCORMICK § 6.

46. McCORMICK § 20; WIGMORE § 773.

47. Generally one may not impeach his own witness, but where the party is surprised by the witness' testimony in court or where the witness proves hostile, the party for whom the witness is testifying may offer prior inconsistent statements to impeach that witness. According to McCormick many courts require that the witness' testimony be harmful and not merely a refusal to speak. McCORMICK § 38; WIGMORE § 904.

Even a genuine opportunity to cross examine the witness against whom a prior inconsistent statement is offered would seem inadequate in itself fully to protect defendant from possible misuse of the out of court statement. A prior statement generally is not made under oath. It is, therefore, possible that a resulting conviction will be based at least in part on unsworn testimony which has, of course, no perjury sanction.[48] To depend entirely on cross examination to cure that defect may not be practical. The defendant would not wish to destroy the credibility of a witness whose testimony in court proves favorable to him. Moreover, disproving the veracity of the earlier statement probably would be extremely difficult. These considerations lend support to advocates of the orthodox position who maintain that cross examination is not effective unless the opportunity is had immediately after the statement is made.[49]

The only court which has faced the problem agreed that the opportunity for cross examination is not adequate to protect the defendant from prejudicial use of prior statements. California had enacted a statute permitting prior inconsistent statements to be used as substantive evidence.[50] In *People v. Johnson*[51] the Supreme Court of California held that statute unconstitutional in criminal cases because it denied defendant his right of confrontation. The court reasoned that to be effective for the purpose of confrontation the opportunity for cross examination should be contemporaneous with the offering of the prior statement.[52] Although the *Johnson* decision seemed practically to foreclose the use of prior inconsistent statements by the prosecution, subse-

48. State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939), cited in McCORMICK § 39 n.30.

49. *Id. See also* People v. Johnson, 68 Cal.2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968).

50. Section 1235 of the California Evidence Code provides:

"Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with section 770." CAL. EVID. CODE § 1235 (West 1967).

*Id.* § 770 reads: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

"(a) The witness was so examined while testifying as to give an opportunity to explain or to deny the statement; or

"(b) The witness has not been excused from giving further testimony in the action."

51. 68 Cal.2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968).

52. For a note criticizing the case on this point especially, *see* Note, 15 WAYNE L. REV. 874 (1969).

quent decisions have permitted, as has been the traditional rule, the admission of prior statements into evidence for impeachment purposes only.[53] Thus, California has returned to the common law rule requiring instructions limiting the use which may be made of prior inconsistent statements.

The common law position, however, is not without its difficulties. In light of *Bruton* the use of limiting instructions in criminal cases is generally questionable.[54] Instructions seem inadequate to remove the possibility that the jury will consider the assertive value of the prior inconsistent statement. Consequently it is not sensible to depend upon the instructions alone to protect the defendant's right of confrontation. However, it would be unfortunate if the confrontation guarantee operated to to exclude virtually any prior inconsistent statements offered by the prosecution, for the state would be at the mercy of unscrupulous defendants or defense witnesses. Perhaps to resolve this dilemma the courts should, in addition to the traditional safeguards[55] (including limiting instructions), exclude any prior inconsistent statements which are likely to unfairly surprise or prejudice the defendant.[56]

*Other Non-Assertive Uses of Out of Court Statements*

In addition to prior inconsistent statements, many other out of court statements are received for their non-assertive value.[57] Virtually all such statements are relevant to prove the simple fact that the words were spoken or the state of mind of the

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53. In People v. Pierce, 75 Cal. Rptr. 256, 263 (1969), the court of appeal commented: "Unless the prosecution is to be deprived of the ability to prove prior inconsistent statements for impeachment . . . the Johnson rule compels resorting to limiting instructions, however questionable their efficacy." *See also* People v. Odom, 456 P.2d 145, 78 Cal. Rptr. 873 (1969); People v. Alvarez, 73 Cal. Rptr. 753 (1969).

54. *E.g.*, Bruton v. United States, 380 U.S. 415 (1965); People v. Aranda, 63 Cal.2d 18, 407 P.2d 265, 47 Cal. Rptr. 353 (1965); Note, 82 HARV. L. REV. 472 (1968).

55. Note, 82 HARV. L. REV. 472 (1968). This article considers it particularly important not to permit the prosecution to impeach its own witness unless his testimony is actually harmful and not a mere refusal to answer. *See* MCCORMICK § 20; WIGMORE § 773.

56. UNIFORM RULES OF EVIDENCE 45 is similarly phrased. It is interesting that the California provision held unconstitutional in the *Johnson* case seemed to provide for the exclusion of prejudicial evidence even if it were inconsistent with the witness' testimony in court and otherwise admissible. *See* note 44 *supra*. *See also* the proposal in Comment, 47 TEXAS L. REV. 250 (1969).

57. MCCORMICK §§ 39, 228; WIGMORE §§ 1018, 1770.

hearer or speaker.[58] An out of court statement which has a non-assertive relevance is not automatically admissible. The risk of the statement's misuse by the jury must be balanced against its non-assertive relevance. Typically where the statement is deemed too prejudicial, it is labeled hearsay and excluded on that account.[59] The defendant's protection against misuse of the statement offered nonassertively is generally somewhat arbitrary. Instructions limiting the use the jury is to make of the statement should be given if requested. However, the traditional safeguards which accompany the use of prior inconsistent statements are not present where the statement is offered for some other non-assertive purpose, nor is the witness who made the statement generally available to testify.[60] Furthermore, the ability to use prior inconsistent statements tends to protect the prosecution from unscrupulous defense witnesses, but as a rule statements offered non-assertively do not serve so compelling a state interest.[61] Consequently one may ask whether the confrontation guarantee generally excludes statements offered nonassertively. Some support for the proposition that confrontation precludes the use of out of court statements offered nonassertively is found in the harmless error rule announced in *Chapman v. California*.[62] It is arguable at least that the harmless error rule represents the general principle that evidence which may prejudice the criminal defendant cannot be admitted unless it is harmless beyond a reasonable doubt. However, a result which prohibits the use of virtually all out of court statements except those encompassed in the traditional exceptions

58. Comment, 14 La. L. Rev. 611, 615 (1954). *See also* McCormick § 228; Wigmore § 1790.

59. Comment, 14 La. L. Rev. 611, 620 (1954).

60. By contrast the very nature of prior inconsistent statements insure that the witness will be on the stand to testify.

61. The state has a legitimate interest in preventing criminal defendants from raising spurious defenses and offering fabricated evidence which cannot be effectively rebutted without hearing out of court statements. In Commonwealth v. DelValle, 351 Mass. 489, 221 N.E.2d 922 (1966), defendants had pleaded not guilty to murder and claimed that the alleged victim had committed suicide. The prosecution offered a witness who testified that the deceased had said a few days before his death that the defendants had threatened his life. The testimony was offered to rebut a state of mind consistent with suicide. Certainly in this instance the state had a vital interest in using out of court testimony to show the state of mind of the deceased. Nonetheless, the conviction was reversed because the testimony did not, in fact, show a state of mind inconsistent with suicide but formed part of the state's case in chief. Although the case was not decided on constitutional grounds, it is illustrative that the first consideration in admitting out of court statements nonassertively is the possibility that they will be used assertively against the criminal defendant.

62. 386 U.S. 18 (1967).

to the hearsay rule, does not seem very practical even in terms of protecting the criminal defendant. In addition, it is not likely that the Supreme Court intended in *Pointer* and the subsequent confrontation cases to overturn the practice of admitting out of court statements for their non-assertive relevance. As with prior inconsistent statements it would probably be impossible to formulate a precise test to determine whether an out of court statement offered nonassertively violates confrontation. Perhaps again we are left with a rule that requires the court to exclude those statements which are likely to surprise or prejudice the defendant. Of course, the court should be aware that the dangers to the defendant are greater than with prior inconsistent statements. Or an example, in *Commonwealth v. McGrath*[63] a police lieutenant was permitted to testify that in the presence of the defendant a witness who was absent from the trial accused defendant of having said: "Get her to a hospital. I just shot her."[64] Defendant was convicted of assault and battery by means of a dangerous weapon and assault with intent to murder. The Supreme Court of Massachusetts overruled the defendant's exception that the testimony denied him opportunity to confront the witness because the testimony was offered merely to give meaning to the defendant's subsequent equivocal statements[65] and not to prove the truth of the accusation. The analysis seems artificial. Beyond doubt the accusation removed all ambiguity from the defendant's equivocal statements. However, it is impossible to distinguish the non-assertive use for which the statement was admitted from the assertion itself. It would appear, therefore, that the danger to defendant that the jury will misuse the evidence is considerable and constitutes a violation of confrontation.

### *Limitation of Cross Examination*

The confrontation guarantee requires that the criminal defendant have an opportunity to cross examine the witness ef-

63. 351 Mass. 534, 222 N.E.2d 774 (1967).
64. *Id.* at 537, 222 N.E.2d at 776.
65. Using accusations to remove ambiguity from defendant's subsequent admissions is very similar to the use of tacit admissions. However, the latter have been condemned for all practical purposes as a violation of the fifth amendment privilege against self incrimination. *See* note 93 *infra*. The right against self incrimination does not necessarily apply where the defendant speaks but it is not clear what he has said.

fectively.[66] The effectiveness of the cross examination may be affected if the court limits its scope. *Alford v. United States*,[67] held that the defendant must be allowed to inquire at least into the name and address of the witness against him. Recently, in *Smith v. Illinois*,[68] the Supreme Court held that the *Alford* standard was binding through the confrontation clause upon the states. Quoting at length from *Alford* the Court in *Smith* said:

> "The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted.... But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him. . . . But no such case is presented here. . . .[69]

Possibly under *Smith* more detailed standards relating to the limitation of cross examination could be established by the federal courts. However, almost every subsequent federal case has upheld the exercise of judicial discretion in limiting cross examination.[70] The cases make emphatically clear that the defendant does not have the absolute right to know the identity of the witness on the stand if the prosecution can demonstrate that revelation of

66. Bruton v. United States, 391 U.S. 123, 127 (1968); Douglas v. Alabama, 380 U.S. 415, 420 (1965); Pointer v. Texas, 380 U.S. 400, 403, 407 (1965).

67. 282 U.S. 687 (1931).

68. 390 U.S. 129 (1968).

69. *Id.* at 132-33.

70. Agius v. United States, 413 F.2d 915 (7th Cir. 1969); United States v. Lawler, 413 F.2d 622 (7th Cir. 1969); United States v. Teller, 412 F.2d 374 (7th Cir. 1969); United States v. Palermo, 410 F.2d 468 (7th Cir. 1969); United States v. Varelli, 407 F.2d 735 (7th Cir. 1969); United States v. Amabile, 395 F.2d 47 (7th Cir. 1968). *But see* United States v. Lyon, 397 F.2d 505 (7th Cir. 1968), holding that the trial court erred in holding that a witness did not waive his right to self incrimination to questions related to his testimony on direct. Of course, in the *Lyon* case the witness, not the judge, restricted the cross examination.

Of the American jurisdictions Arizona seems the most willing to find that the trial judge abused his discretion to limit cross examinations. *See also* State v. Reynolds, 104 Ariz. 149, 449 P.2d 614 (1969); State v. Taylor, 9 Ariz. App. 290, 451 P.2d 648 (1969); State v. Butler, 9 Ariz. App. 162, 450 P.2d 128 (1969).

his true identity would endanger the witness.[71] However, the cases do seem to require that the defendant have an opportunity to impeach the witness. In every case in which cross examination was properly limited the record already contained considerable evidence relating to witness's credibility.[72]

Of course, the defendant may find that the effectiveness of his cross examination is impaired where the witness invokes a privilege not to testify. In virtually every case in the criminal area the privilege invoked is the fifth amendment right against self-incrimination. The first inquiry is whether the privilege has been validly invoked.[73] Where the witness has given testimony on direct examination he may not invoke the privilege as to matters related to his testimony on cross.[74] This means practically that he may not claim the privilege with respect to those matters raised by his direct testimony. It has recently been held that a failure to find waiver of the privilege in such a case amounts to a denial of confrontation.[75] On the other hand, where the privilege was claimed as to matters not related to the witness' direct testimony, the courts have distinguished between invoking the privilege as to direct matters and collateral matters.[76] Where the privilege was invoked as to collateral matters only the testimony of the witness on direct was not disturbed.[77] If, however, the invocation of the privilege was deemed related to matters on direct then the proper remedy has been to strike so much of the witness' direct testimony as could not be tested on cross.[78] The distinction between collateral and direct matters is not very helpful. The court in *Fountain v. United States*[79] noted: "[T]he question in each case must finally be whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness's direct

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71. Agius v. United States, 413 F.2d 915 (7th Cir. 1969); United States v. Lawler, 413 F.2d 622 (7th Cir. 1969); United States v. Teller, 412 F.2d 374 (7th Cir. 1969); United States v. Palermo, 410 F.2d 468 (7th Cir. 1969); United States v. Varelli, 407 F.2d 735 (7th Cir. 1969).

72. *See* cases cited note 71 *supra*.

73. *See* text accompanying note 67 *supra*.

74. Rogers v. United States, 340 U.S. 367 (1951); *see* McCORMICK § 130; WIGMORE § 2276.

75. United States v. Lyon, 397 F.2d 505 (7th Cir. 1968).

76. Fountain v. United States, 384 F.2d 624 (5th Cir. 1967); *see* McCORMICK § 19; WIGMORE § 1391.

77. *See* note 76 *supra*.

78. *See* note 76 *supra*.

79. 384 F.2d 624 (5th Cir. 1967).

testimony."[80] Furthermore, although the court in *Fountain* did not express doubt as to the efficacy of striking the testimony, it is certainly questionable that striking is an effective remedy. In light of *Bruton* it appears that defendant is entitled to a new trial where he cannot adequately test the credibility of the witness on the stand.

A Nevada case, *Walker v. Fogliani*,[81] raised the intriguing possibility that the right of confrontation might serve as the basis of compulsory disclosure or even pretrial discovery of prosecution evidence in favor of the defendant. In *Walker* the trial court refused to grant defendant's motion for the production of a police investigation report. The motion was made immediately after the investigating officer testified on cross that he had made such a report. The Supreme Court of Nevada held that the refusal to grant the motion denied defendant the right to impeach by cross-examination which amounted to a denial of the right of confrontation. Four years prior to *Walker* the United States Supreme Court in deciding *Brady v. Maryland*[82] said:

> "We now hold that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution."[83]

Some courts and commentators interpreted *Brady* as granting a broad constitutional right to disclosure of evidence in the prosecution's possession.[84] Others viewed the case as merely an extension of the cases which held that the prosecution could not deliberately suppress evidence favorable to the accused.[85] Apparently, however, the case has become the basis for motions made at the close of state's case to inspect virtually all the evidence in the hands of the prosecution.[86] If *Walker* is given

80. *Id.* at 628.

81. 83 Nev. 154, 425 P.2d 794 (1967).

82. 373 U.S. 83 (1963).

83. *Id.* at 87.

84. *E.g.*, United States *ex rel.* Meers v. Wilkins, 326 F.2d 135 (2d. Cir. 1964); United States *ex rel.* Butler v. Maroney, 319 F.2d 633 (3d Cir. 1963); Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963); Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964). *See* Moore, *Criminal Discovery*, 19 *Hast.* L.J. 865, 893-99 (1968).

85. *E.g.*, United States v. Manhattan Brush Co., 38 F.R.D. 4 (S.D.N.Y. 1965); Moore, *Criminal Discovery*, 19 HAST. L.J. 865, 893-99 (1968).

86. Carter, *Suppression of Evidence Favorable to an Accused*, 34 F.R.D. 87 (1964). Apparently the prosecution at the close of its case must make

credence then the denial of a *Brady* motion would certainly amount to a denial of confrontation. The argument is that without timely disclosure of evidence which possibly can be used to impeach prosecution witnesses, the opportunity to cross-examine those witnesses is ineffective. Of course the argument is equally valid to compel pretrial discovery of the prosecutions evidence as well. There are, however, a number of cases which squarely hold that the right of confrontation does not require that the prosecution produce all witnesses or informers at trial.[87] Perhaps these cases can be distinguished since none of them involved a motion made before or during trial to disclose evidence. In each the defendant complained only on appeal or habeas corpus that his right of confrontation had been denied because the informer was not produced at trial.

*Confessions and Admissions*

It is clear from *Bruton* that limiting instructions alone will not satisfy the confrontation right of a defendant who has not confessed but who is implicated by his codefendant's confession. The effectiveness of other remedies short of severance was not considered in *Bruton*. Surely "striking" the confession is no more effective than limiting instructions to the jury. The only alternative is editing the confession so that it does not incriminate the defendant who has not confessed. Although the practice of editing the confession has not itself been held unconstitutional, several cases have properly reversed convictions on confrontation grounds where the edited confession either implicitly or directly implicated the other defendant in the crime.[88] For example the insertion of the work "blank" in defendant Y's confession every time defendant X was named has been held to violate X's right of confrontation.[89] Likewise, the use of defendant's separate confessions against each other in a joint trial appears prohibited by

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available all evidence in its possession to the defense counsel. However, the prosecution is still under a duty not to deliberately suppress favorable evidence and in good faith disclose such evidence before trial. *See* United States v. Harris, 409 F.2d 77 (4th Cir. 1969); Hensley v. United States, 406 F.2d 481 (10th Cir. 1968); Williams v. Dutton, 400 F.2d 797 (5th Cir. 1968), *cert denied*, 393 U.S. 1105 (1969).

87. McCray v. Illinois, 386 U.S. 300 (1966); Curtis v. Rives, 123 F.2d 936 (D.D.C. 1941); People v. Twiggs, 223 Cal. App.2d 455, 35 Cal. Rptr. 859 (1963); State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

88. United States v. Bozza, 365 F.2d 206 (2d Cir. 1966); United States *ex rel.* Hill v. Deegan, 268 F. Supp. 580 (S.D.N.Y. 1967). *See also* United States *ex rel.* Floyd v. Wilkins, 367 F.2d 990 (2d Cir. 1966).

89. United States v. Bozza, 365 F.2d 206 (2d Cir. 1966).

*Bruton*. However, the rule of *Bruton* has been limited in its effect by the harmless error doctrine.

In *Harrington v. California*[90] the Supreme Court upheld appellant's conviction even though his right of confrontation according to the rule announced in *Bruton* had been violated because the evidence against the appellant "was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt. . . ."[91] Although the majority in *Harrington* relied on *Chapman v. California*[92] the test actually applied seemed to be, as the dissent pointed out,[93] substantially less onerous to the prosecution than the *Chapman* rule.[94] Both cases required that the error be harmless beyond a reasonable doubt. However, *Chapman* seemed to define harmless error as one which made no contribution to the conviction,[95] whereas *Harrington* requires merely that the other evidence against the defendant be overwhelming. The extent to which *Harrington* has watered down the *Bruton* rule remains to be seen. There is some indication that its effect may be substantial.[96]

*Tacit Admission Rule*

Formerly under the tacit admission rule an accusation which normally would call for a denial, and to which the defendant made no reply, was admissible to prove the truth of the accusation.[97] At this date it seems clear that the tacit admissions rule applied to custodial interrogations violates the defendant's privilege against self incrimination.[98] In his dissent to *Commonwealth v. Cavell*[99] Judge Hoffman claimed that the use of tacit admissions

90. 395 U.S. 250 (1969).
91. *Id.* at 254.
92. *See* note 68 *supra*.
93. Harrington v. California, 395 U.S. 250, 255 (1969) (dissent).
94. *See* Barton v. United States, 263 F.2d 894 (5th Cir. 1959), decided nine years prior to *Bruton*, which held admonitions to a jury that it may use a confession only against the defendant who made the statements was an abuse of discretion under Rule 14 of the *Federal Rules of Criminal Procedure*. To the government's argument that there was no prejudice because of the overwhelming evidence, the court replied: "We cannot . . . substitute ourselves for the jury. . . . " 263 F.2d at 898.
95. Chapman v. California, 386 U.S. 18, 26 (1967).
96. *Compare Harrington with* the dissent in State v. Hopper, 253 La. 439, 466, 218 So.2d 551, 560 (1969), *rehearing denied*, Feb. 24, 1969, U.S. *appeal pending*.
97. *E.g.*, *Commonwealth v. Vallone*, 347 Pa. 419, 32 A.2d 889 (1943); WIGMORE § 1271.
98. Malloy v. Hogan, 378 U.S. 1, 8 (1964); Commonwealth v. Dravecz, 424 Pa. 582, 227 A.2d 904 (1967).
99. 207 Pa. Super. 274, 217 A.2d 824 (1966).

is prohibited as well by the confrontation clause. Judge Hoffman claimed that the accusation was admissible to show only those charges to which the defendant made no reply and not to prove the truth of the accusation.[100] Since the jury could not possibly distinguish between the assertive and non-assertive use of the statement the defendant could not cross-examine the witness against him. Consequently his right of confrontation was violated. Usually, however, the defendant's silence in the face of an accusation is treated as if it were an affirmative adoption of the accusation.[101] Consequently, just as adopted admissions are received as if they were the defendant's own words, the accusation is admissible to prove that it is true.[102] Thus Judge Hoffman's reasoning is not supported by most of the authority. Nonetheless, it seems that tacit admissions violate the right of confrontation. The accusations leveled at the defendant are in no real sense his own admission, nor is it very sensible to claim that he has adopted the accusation as his own. It should be recognized that the rule is highly artificial and, as Wigmore points out,[103] exists principally on the basis of ancient precedents. These considerations are not academic for it appears that the privilege of self incrimination does not at this time apply to statements made before the defendant is in police custody.[104] Consequently the fifth amendment privilege would not prohibit the use of accusations to which defendant made no reply if the accusations were made by private individuals while defendant was not in police custody.

*Business Records and Reports of Public Agencies*

Most American jurisdictions have long recognized business records to be an exception to the hearsay rule.[105] A myriad of statutes provide for the admission of business records and the records of public officials and agencies into evidence.[106] For the most part the exceptions seem designed for use in civil litigation but frequently are relied upon for the admission of records into criminal proceedings. The exceptions are distinct but in

100. *Id.* at 291, 217 A.2d at 832.
101. *See* note 97 *supra*.
102. *See* note 97 *supra*.
103. WIGMORE § 1271.
104. *See* Miranda v. Arizona, 384 U.S. 436 (1966).
105. MCCORMICK §§ 281-290; WIGMORE § 1517; MODEL CODE OF EVIDENCE rule 514; UNIFORM RULES OF EVIDENCE 63(13), 63(15).
106. *See* note 105 *supra*.

many respects have been treated much the same, and the confrontation problems encountered are identical.

Properly administered the business and public records exceptions would seem to be among the safest of the hearsay exceptions as the danger of inaccurate memory or narration on the part of the witness is virtually removed.[107] However, in the confrontation area the treatment accorded business records and the like has been anything but uniform.[108] As an unfortunate example, in one case the defendant's conviction for failing to report under Selective Service orders for conscientious objector civilian work was based upon a note to the effect that the defendant had not reported as ordered.[109] The note which apparently was sent the Selective Service Board by the civilian employer was not dated or signed and there was no indication who wrote and mailed it. It seems clear that the defendant had no opportunity to cross examine the witness against him and indeed did not even know who the witness was. It is equally clear that the circumstances surrounding the note do not protect the defendant's right of confrontation. Perhaps to prevent such abuse the courts should start with the proposition that as a general rule confrontation prohibits the use of business or agency records in criminal trials. However, there are cases in which the records have very high probative value and should be used. Certainly, before considering the evidence the Court

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107. Generally the reliability guarantee is aimed at insuring the sincerity of the hearsay statement and does not guarantee against defects in memory, perception, and narration. It seems that business records guard against weakness in memory and narration and to an extent perception as well. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177 (1949); E. Morgan, Model Code of Evidence—*Foreword*, 36-50 (1942).

108. *E.g.*, United States v. Holmes, 387 F.2d 781 (7th Cir. 1968), *cert. denied*, 391 U.S. 936 (1968) (unsigned and undated note admitted to prove that defendant failed to report for civilian work under the orders of Selective Service Board); McDaniel v. United States, 343 F.2d 785 (5th Cir. 1965) (admission of business records is largely discretionary with the trial court); Kay v. United States, 255 F.2d 476 (4th Cir. 1958), *cert. denied*, 358 U.S. 825 (1958) (admission of certificate showing alcoholic content in blood sample did not violate the right to confrontation); Morales v. Superior Court, 49 Cal. Rptr. 173 (1966) (reliance on clerk's reports of tardiness in contempt proceedings possibly denied contemnor the right to confrontation); People v. Ziebell, 82 Ill. App. 2d 350, 227 N.E. 127 (1967) (weightmaster's certificate used in trial for violation of trucking regulation did not violate confrontation); State v. Tims, 9 Ohio St.2d 136, 224 N.E.2d 348 (1967) (document labelled "Report of Examination for Alleged Rape" was admitted at statutory rape trial, confrontation violated).

109. United States v. Holmes, 387 F.2d 781 (7th Cir. 1968), *cert. denied*, 391 U.S. 936 (1968).

should require a showing that the witness who made the record is absent and that a good faith effort to procure his attendance has been made.[110] Then weighing the probable reliability of the records, their significance in proving the charge against the defendant, and the seriousness of the charge the evidence could be admitted at the court's discretion.

*Prior Recorded Testimony*

Prior recorded testimony is sometimes considered an exception to the rule against hearsay depending on the definition of hearsay used.[111] Traditionally prior recorded testimony has been treated as not admissible unless there existed substantial identity of issues and parties at the earlier and later proceedings.[112] In addition the witness must be unavailable before his prior testimony can be used. Originally it was required that the witness actually be deceased before his prior testimony could be admitted.[113] The *Pointer* decision contained language that suggested a return to the old position that the witness must be dead.[114] However, *Barber v. Page*,[115] a 1968 Supreme Court case, made it clear that the witness need only be unavailable. *Barber* did require that the prosecution prove it had made a good faith diligent effort to obtain the witness before his prior testimony might be admitted into evidence. Specifically the Court called for the use of the writ of habeas corpus ad testificandum where the witness is imprisoned out of the jurisdiction. The Court required that the writ be used even where there was no statutory basis for it. Furthermore, the prosecution must resort to the Uniform Act for the Procurement of Witnesses where enacted.[116]

In light of *Pointer* and *Barber* one might assume that where

110. Palmer v. Hoffman, 318 U.S. 109 (1943); United States v. Johns-Manville Corp., 225 F. Supp. 61 (E.D. Pa. 1963).

111. According to Wigmore prior testimony is not an exception because there has been an opportunity to cross examine the witness. WIGMORE § 1370. However, most courts and commentators apparently treat prior testimony as an exception to hearsay rule. MCCORMICK § 230.

112. MCCORMICK §§ 232, 233; WIGMORE § 1370.

113. MCCORMICK § 231.

114. Pointer v. Texas, 380 U.S. 400, 407 (1964): "This Court has recognized the admissibility against an accused . . . of testimony of a deceased who has testified at a formal trial."

115. 390 U.S. 719 (1968).

116. For a more detailed discussion of the availability requirement and the *Barber* decision, *see* Comment, *Confrontation: Prior Testimony, Confessions, and the Sixth Amendment*, 36 TENN. L. REV. 382 (1969).

the defendant was given the opportunity to cross examine the witness at the preliminary hearing and the witness was genuinely unavailable for trial, that the use of his prior testimony would not raise any confrontation problems. Even this assumption has been challenged by the California case, *People v. Gibbs*.[117] Generally the issues at the preliminary hearing and the subsequent trial will be the same. However, at a preliminary hearing the prosecution merely must show probable cause and need not prove its case beyond reasonable doubt. The problem raised in *Gibbs* is whether this difference in burden of proof adversely affects a defendant's right of confrontation where testimony from the preliminary hearing is used at trial. As a practical matter, it is easy to understand why defense counsel would be reluctant to fully cross examine prosecution witnesses at the preliminary hearing. For one thing he may feel that it would be useless in view of the burden of proof. Furthermore, he may be reluctant to show the prosecution his plan of attack against the state witnesses. *Gibbs* recognized these problems[118] and held that upon its particular facts the use of the prior testimony even where the defendant strictly speaking had an opportunity to cross-examine and where the witness was genuinely unavailable amounted to a denial of confrontation. The facts of *Gibbs* were somewhat extreme. The absent witness was a police informer, counsel for the defendant was appointed only five minutes before the preliminary proceeding began, and the absent witness was the only prosecution witness who could establish the basic elements of the narcotics charge by observation. The decision seems very sensible, but it is almost impossible to generalize any rule from it. If *Gibbs* is to be taken as authority then apparently each case must be decided on its facts with special consideration to the surprise caused defense counsel, the relationship of the absent witness to the prosecution, and the significance of his testimony in establishing the guilt or innocence of the defendant.

*Interrogatories and Depositions*

The use of interrogatories and cross-interrogatories has been condemned as a violation of the defendant's right of confron-

117. 63 Cal. Rptr. 471 (1967).
118. *Id.* at 475.

tation.[119] This seems clearly correct. Not only is much of the effect of cross examination lost if the witness has a great length of time in which to frame his answers but neither the defendant nor his counsel are present at the taking of the interrogatory. There is some question as to the use of depositions.[120] If defendant and his counsel be present at the taking and the witness were unavailable at trial, under the *Barber* standards there would seem no objection to the use of depositions. However, the possibility of abuse and inconvenience to the defense counsel and defendant both should be taken into account before authorizing the taking of the depositions. Finally, the fact that the jury has not had the opportunity to see the witness and to be present at the confrontation between the defendant and the witness may have some bearing on the determination of the validity of the use of depositions.

*Conclusion*

In the area of the exceptions to the hearsay rule, the confrontation clause makes possible a constitutional standard which includes but is not limited to the tests of reliability and need. It is possible that some of the traditional exceptions will be excluded under confrontation because they are no longer considered reliable. The reliability of dying declarations for example, has been questioned.[121] In addition the right to confrontation includes an element of active participation with the witness. This element may work to exclude some out of court evidence regardless of its reliability. It is certainly possible that some evidence which has been admitted under a business records or similar exception may be excluded for this reason.

Where the statement is offered nonassertively there is no precise test for confrontation. At best, unless all out of court statements are to be excluded, the courts must balance the danger that the statement will be used assertively by the jury against the nonassertive value of the statement. Of course, the constitutional right of confrontation seems to weigh heavily in favor of the defendant so that in some cases no matter how

119. United States v. Parker, 390 F.2d 360 (3d Cir. 1968).

120. The use of depositions has been upheld against a challenge that they violate defendant's right to confrontation in at least two state cases. Noe v. Commonwealth, 396 S.W.2d 808 (Ky. 1965); Coffman v. State, 81 Nev. 634, 407 P.2d 168 (1965).

121. McCORMICK § 258; Comment, 75 YALE L.J. 1434 (1966).

great the nonassertive value of the statement the danger of misuse requires it to be excluded. Among statements offered nonassertively, prior inconsistent statements are peculiar. Because they are clothed with many safeguards including the opportunity to question the witness on the stand and because they serve a vital state interest, prior inconsistent statements are more readily admissible than most other statements offered nonassertively. Even with prior inconsistent statements it would appear that any substantial danger of misuse by the jury would bring the statement within the prohibition of the confrontation clause.

*J. Broocks Greer, III*

## INCOME TAX EFFECTS ON PERSONAL INJURY RECOVERIES

In spite of their obvious importance, the income tax effects on personal injury recoveries have caused considerable confusion for more than fifty years.[1] In the midst of this confusion the attorney is called upon to advise his client in such a manner that the latter can pay the proper tax required of him, if any. The purpose of this Comment is to examine the income tax effects on personal injury recoveries in four areas. Specifically, this Comment will examine the successful plaintiff's income tax liability, the deductibility of defendant's personal injury payment, income tax as a factor in measuring damages, and instructions to the jury as to income tax consequences.

### *Plaintiff's Income Tax Liability*

As to income taxability, injury awards are divided into two classes, personal and non-personal; each is accorded a different tax treatment. The rule for non-personal compensatory injury awards is that damages and other recoveries follow the tax treatment which would have been accorded the underlying claim.[2] Thus, in all non-personal injuries, the question is "[i]n

1. The exemption of personal injury awards from gross income was first found in the INT. REV. CODE of 1918, § 213(6).

2. This principle was first recognized in Farmers' and Merchants' Bank v. Commissioner, 59 F.2d 912 (6th Cir. 1932). It is now well established. *See* United States v. Safety Car Heating Co., 297 U.S. 88 (1936); Durkee v. Commissioner, 162 F.2d 184 (6th Cir. 1947); Raytheon Prod. Corp. v. Commissioner, 144 F.2d 110 (1st Cir. 1944); Swastika Oil & Gas Co. v. Com-