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ADMISSIBILITY OF DECLARATIONS MADE IN THE PRESENCE OF A LITIGANT

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A prisoner was being tried for the theft of a gander. The evidence was that while he was fleeing, the gander escaped from him and was recaptured and identified by the prosecutrix. The defense counsel severely cross-examined her as to how she could possibly identify the gander. She replied that when it fell from the prisoner's arms, it rushed back to her flock, and emphasized; "all the geese wagged their little tails with joy at the sight of um." At this point, the judge intervened, saying: "Madam and Gentlemen of the jury, I must tell ye that that is not evidence. This lady must not tell us anything that occurred between the gander and the geese unless it took place in the presence of the prisoner."

The above story is retold by Dean Wigmore [1] as apropos of the rule of evidence that a conversation between two persons about a crime is not admissible against the accused unless it took place in his presence. But whether the activities of the geese and gander would be admissible if the prisoner had been present presents a problem of evidence that admits of considerable judicial confusion.

Every student of evidence soon becomes familiar with the rule that excludes conversations implicating a party that took place out of his presence and hearing. An assumption that a party's presence at such a conversation will afford the ground for admissibility where his absence was the ground for exclusion is, therefore, easily, and more often than not, erroneously, drawn. It does not necessarily follow that evidence which is objectionable because of a party's absence becomes admissible because of his presence. A statement made in the presence of a party which is offered at the trial would be objectionable as hearsay testimony, being a statement made at some time other than at the present trial, offered to prove the truth of the matter therein asserted, and based entirely on the credibility of a declarer not then before the court. But the proponent of such a statement may avoid the hearsay objection by showing that it is not offered as substantive truth merely because the statement was uttered, but rather as a necessary predicate to the showing of substantive evidence; i.e., the reaction of the party thereto.

When an extrajudicial statement is made in the presence of

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[1] 4 Wigmore, Evidence, p. 73 (3rd ed. 1940).

a party, his reaction may find expression in one of several ways. He may directly deny the statement. In such a circumstance, then clearly neither the statement nor his denial should be received in evidence, although cases dealing with that precise point have held it to be a harmless error to admit the third party's statement if it is accompanied by the party's denial.[2] On the other hand, the party may expressly admit the truth of the statement, and if such is the case, both the statement and his admission of it may be received as a direct party-admission, for one may expressly adopt a statement of another as his own and be bound thereby. Thirdly, the party may neither expressly admit nor deny the statement made in his presence, but rather remain silent, or make an evasive response. If such is the case, then under certain circumstances presently to be developed, both the statement and the failure to deny may be received in evidence against the party. The statement, standing alone, would be hearsay; but when such a statement is offered in connection with the reaction of the party-auditor, then the hearsay objection might quite properly be deemed inapplicable.

Extrajudicial declarations made in the presence of a party may also be received if circumstances warrant a finding that they were made as part of the *res gestae,* as a dying declaration, as a statement indicating feeling or state of mind, or upon an occasion which admits of some other application of the generally recognized exceptions to the hearsay rule. The most commonly invoked theory of admissibility, however, is that the party by his silence or other significant reaction tacitly admits the veracity of the assertion made in his presence and hearing. We shall, therefore, confine ourselves, for present purposes, to a consideration of that specific theory.

Theory of Admissibility

The claim is generally advanced that a party cannot object to the admission of material statements or accusations made in his presence that he suffered to go uncontradicted. "The crystallization of the experience of men shows it to be contrary to their nature and habits to permit statements, tending to connect them with actions for which they may suffer punishment, to be made in their presence without objection or denial by them, unless they are repressed by the fact that the statement is true.[3]

A third party declaration directed to a party-litigant, or made in his presence, that imputes to him either criminal guilt or civil liability may become competent evidence at the trial if it be established that the party remained silent in the face of this accusation. By his actions the party has acquiesced, and it may be considered as if he adopted the statement as his own. It is the concurrence of two facts—the adverse nature of the declaration and the

[2] People v. Friedman, 205 N. Y. 161, 98 N. E. 471 (1912).
[3] See Note, 80 A.L.R. 1235.

failure to contradict it—that makes the evidence admissible against a party.

Early English trial practice, however, ignored the two-fold aspect of this theory of admissibility, and as Dean Wigmore explains:

> . . . the force of the brief maxim [*qui tacit consentire videtur*] has always been such that in practice . . . a sort of working rule grew up that *whatever was said in a party's presence* was receivable against him as an admission, because presumably assented to. This working rule became so firmly entrenched in practice that frequent judicial deliverances became necessary in order to dislodge it; for in this simple and comprehensive form it ignored the inherent qualifications of the principal.[4]

Whether the dislodging effect of these "frequent judicial deliverances" obtained the desired result is to be questioned in view of such cases as *Kinsey v. State,* wherein the Court dismissed the objection to certain statements read to the jury that were made extrajudicially by third persons by simply saying; ". . . we think it appears affirmatively, on the face of the record, that the defendant was present when these statements by third persons were made. Under such circumstances they were, of course, admissible if relevant and material."[5]

As pointed out above, it is not the mere fact of the party's presence that avoids the hearsay ban, but rather his reaction while present from which the jury may infer his assent to the statement. It is the fact of silence, the failure of denial under circumstances demanding denial, that is the relevant aspect of such testimony; consequently, the incriminatory statement unaccompanied by a showing of the party-auditor's response should not be received over the hearsay objection.

Incapacity of Declarer as a Witness

Since it is the fact of non-denial or other conduct which is the essential element, it is comparatively immaterial by whom the statement itself is made. Consequently, the testimonial incapacity of the declarant is not fatal to the reception of statements made in a party's presence. Thus, the fact that a wife may be an incompetent witness against her husband is generally held not to prevent the testimony of a third person who overheard a conversation in which the husband remained silent in face of his wife's accusations.[6] Similarly, the incapacity of an infant to testify is not sufficient to preclude the relating by a competent witness of a child's accusa-

[4] 4 Wigmore, Evidence, Sec. 1071 (3rd ed. 1940).
[5] ..... Ariz. ....., 65 P. (2d) 1141, 1151 (1937).
[6] State v. Laudise, 86 N.J.L. 230, 90 A, 1098 (1914).

tions or identification and the accused's failure to reply; providing, the circumstances were such as to demand a reply if the accusations were untrue.[7]

PROCEDURE IN GETTING DECLARATION ADMITTED

As previously indicated, extrajudicial statements made in a party's presence become competent evidence only when, by reason of the significant reaction of the party, his assent may be inferred. Clearly, acquiescence in such a statement may be manifested by silence; but there may also be other reasons for silence, such as, ignorance or a lack of necessity to make a reply. Thus, before an unanswered declaration may be regarded as an admission, a determination must be made that silence under the circumstances of the particular case would normally indicate assent.

The question of whether assent to such declarations may be reasonably drawn is one for the court in the first instance. Therefore, when acquiescence cannot fairly be found from the party's silence, or from his answer when one is made, the evidence is properly excluded.[8] Dean Wigmore states, on the other hand, that the evidence should be *prima facie* admissible; that the burden should be on the opponent to show that the circumstances negate assent. "It would seem" writes Dean Wigmore, "to be better to rule at least that any statement made in the party's presence and hearing is receivable, *unless* he can show that he lacked either the opportunity or the motive to deny its correctness; thus placing upon the opponent of the evidence the burden of showing to the judge its impropriety."[9]

A case indicative of an application of the rule suggested by Dean Wigmore is *Barr v. The People.*[10] In this case, the trial judge permitted the witness to be examined concerning certain statements made by one Haenalt in the presence of the defendant, Barr. Counsel for the defendant objected to the witness relating the statements made by Haenalt until after it was shown what response, if any, Barr made thereto. The objection was overruled, and the witness testified in substance that Haenalt had said that Barr was an active participant in the commission of the robbery and that Barr had possession of the plunder. The witness then testified that he asked Barr what he had to say regarding Haenalt's statement, and that Barr replied that he had nothing to say. The court, apparently persuaded that the reply did not indicate assent to the accusation, hereupon ruled that Haenalt's statement was not evidence against Barr, and directed the jury to disregard it.

The order in which this evidence was received was assigned

[7] State v. Claymonst 96 N.J.L. 1. 114 A. 155 (1921).
[8] Moore v. Smith, 14 S. & R. 388 (Pa. 1826).
[9] 4 Wigmore, Evidence, Sec. 1071 (3rd ed. 1940).
[10] 30 Colo. 522, 71, Pac. 382 (1903).

as error, but the Colorado Supreme Court affirmed the ruling, saying:

> The natural way in which to relate a conversation is in the order in which it occurred; and we do not think the court erred in permitting the witness to detail the conversation in the usual order rather than on the order suggested by counsel. The judge could not know whether the statement made by Haenalt was competent evidence against Barr until he had heard Barr's response to the statement, and not till then was he called upon to pass upon its admissibility. The ruling of the judge was correct. The response made by Barr was not an admission of the truthfulness of Haenalt's statement, and the testimony was properly rejected.[11]

It is doubtful whether this case may be cited as Colorado authority for Dean Wigmore's sweeping proposition that all statements in the presence of a party are admissible in the first instance. The weight of authority is to the contrary. It seems reasonable that the jury should not be allowed to hear evidence that avoids the ban of the hearsay rule without some showing that there was a tacit or implied adoption of the statement. It is submitted that the *prima facie* admission of statements of another made in the presence of a party, without first requiring a showing of circumstances that indicate assent, would result in a readoption of the much-criticized rule of thumb that admitted all statements made in conversation with a litigant because presumably assented to.

It is to be remembered that "nothing can be more dangerous than this kind of evidence";[12] especially, when we find, as in the more usual case, that the witness is repeating the words of the declarant; that the declarant often has no personal knowledge of the facts of which he speaks; and that there may be some other logical explanation for the silence on the part of the accused. Prevailing American practice, therefore, requires the proponent of a tacit admission to satisfy the court, in the first instance, that the party's assent to the assertion reasonably may be inferred.[13] As the Colorado Supreme court has pointed out:

> . . . the rule that silence gives consent is or is not applicable, according to all the surrounding circumstances and conditions under which the statement is made. If the circumstances are such as to show that the party did not intend to commit himself, then no inference of assent can be drawn from silence. Or, putting it another way, the circumstances ought to show that the party intended to commit himself by his silence.[14]

[11] 30 Colo. at 532, 71 Pac. at 395.
[12] Moore v. Smith, 14 S. & R. 388, 393 (Pa., 1826).
[13] Weightnovel v. State, 46 Fla. 1, 35 S. 856 (1903).
[14] Cook v. People, 56 Colo. 477, 487; 138 P. 756, 759 (1914).

Whatever procedure is adopted, the cases are uniform in declaring that, in the last analysis, neither the judge nor the jury should regard such third party accusations or declarations unless, from all the surrounding circumstances, it affirmatively appears that the party against whom such statements are offered unequivocally admitted, by his reactions, the truth of those statements.

LIMITATIONS ON ADMISSIBILITY

1. *Presence and Hearing*

Before a person may be deemed to have admitted through implication the statement of another, it must appear that he was present when the remark was made and that he actually heard it, for ignorance of what was said is certainly consistent with a failure to deny its truth. The courts have also indicated that the party must not only have heard, but also have understood the statement. Obviously, then, an accusation made in a language with which the party was not familiar does not bind him.

Whether it must also be made to appear that the party had personal knowledge of the facts stated admits of some difference of opinion. Expressive of the more strict rule is the following quotation:

> If the matter spoken of be not within the personal knowledge of the person addressed, his failure to contradict the statement cannot amount to an admission of its truth, . . . if such a remark should be made in reference to a matter which must necessarily be unknown to the party addressed, his apparent acquiescence would amount to nothing.[15]

Dean Wigmore argues, however, that since direct admissions by a party are admissible irrespective of his personal knowledge, the rule should not be different for admissions which are implied.[16] Which of the views will be applied often depends upon the circumstances of each case. If it appears that the party may have hesitated to contradict a statement or accusation made in his presence and hearing because he had no actual knowledge of the facts related, and if it further appears likely that a normal man would not have been called upon to make a reply in the absence of such personal knowledge, then such a situation would seem to call for rejection of the attempt to classify such a statement as an admission implied from the party's silence.

2. *Ability, Motive, and Opportunity To Reply*

Of course, it must be made to appear from the circumstances that the party was physically able to contradict an assertion con-

[15] Edwards v. Williams, 2 How. (Miss.) 846, 849 (1838).
[16] 4 Wigmore, Evidence. Sec. 1071 (3rd ed. 1940).

trary to his present interests. Statements directed to a party who was at the time asleep, unconscious, intoxicated, or suffering under some physical disability precluding a denial should not be received.[17]

If a litigant had plainly no motive for responding, his silence permits no inference. A defendant may overhear a conversation wherein statements adverse to his interests are made, but unless the motive to defend his reputation was very strong, he might quite properly hesitate to interrupt a conversation to which he was not a party in order to make his denial. The courts have drawn fine distinctions, also, where the statement is made by a stranger to the controversy, for then it may have been considered by the person addressed as lacking in materiality or pertinence.[18] As stated in *Vail v. Strong:*

> . . . we know of no obligation upon the party to answer every idle or impertinent inquiry. He has the right to be silent, unless there be good occasion for speaking. We cannot admit that he is bound to disclose his private affairs, at the suggestion of idle curiosity, whenever such curiosity is indulged, at the hazard of being concluded by every suggestion, which may be suffered to pass unanswered.[19]

Whether a particular declaration will call for a denial will depend on the particular circumstances under which it was made. No general rule can be formulated to cover all situations that might arise. Since testimony as to a party's failure to deny certain incriminatory statements uttered in his presence is only some evidence from which the jury may infer guilt or liability, the solution to whether the particular circumstances warrant the drawing of that inference lies in the answer to this question: "Would men similarly situated have felt themselves at liberty to, and called on to, deny such statements in the event that they did not intend to express acquiescence by their failure to do so?"[20]

3. *Effect of Arrest*

Although the possible circumstances under which a denial to an accusation would naturally be expected are unlimited, there are certain situations which furnish a positive motive for silence without regard to the truth or falsity of the statement. Accordingly, the courts uniformly hold that silence at a judicial proceeding cannot be treated as assent.

Whether the fact of arrest prevents the admission of undenied accusations is a proposition that admits of a wide divergence of judicial opinion. Perhaps the numerical majority of states have

[17] Cook v. People, note 14, supra.
[18] Larry v. Sherburn, 84 Mass. 34 (1851); cf Briel v. Exchange Nat'l Bank, 172 Ala. 475, 55 S. 808 (1911) and Weim v. Blackburn, ... Mo., ..., 280 S.W. 1046 (1926).
[19] 10 Vt. 455, 457 (1838).
[20] 80 A.L.R. (Note) 1235, 1250.

adopted the rule that the mere fact of arrest, alone, is sufficient to render inadmissible testimony relating to the accused's failure to deny incriminatory statements made in his presence. It is the common knowledge and belief of men generally that silence while under arrest is the better policy, regardless of guilt or innocence.[21] Similarly, the fear that *anything* that is said may be evidence against one held in custody would seem to prevent logically the drawing of an inference of assent from the failure to deny.

One state supporting this view has found that the constitutional guarantee against self-incrimination operates in favor of rejecting such evidence. "If it be admitted that, while a person is under arrest, his failure to reply to statements made in his presence can be construed as an admission of the truthfulness of such statements, then the state would be able to do indirectly what the Constitution expressly provided it shall not do directly."[22] The United States Circuit Court of Appeals adopted this rule of exclusion on an appeal from a conviction in the Colorado federal district court. Speaking through Judge Phillips in *Yep v. United States,* the court declared: "When one is under arrest or in custody, charged with crime, he is under no duty to make any statement concerning the crime with which he stands charged; and statements tending to implicate him, made in his presence and hearing by others, when he is under arrest or in custody, although not denied by him, are not admissible against him."[23]

On the other side of the fence are the cases holding that the mere fact of arrest is not sufficient to deny admissibility to admissions by silence, but is only a circumstance to be considered by the jury in determining whether the accused was afforded an opportunity to deny, and whether he naturally was called on to do so under the circumstances. Adherence to this view has permitted prosecutors to read into evidence long and often complicated statements which were either gathered by investigators from the evidence, or were taken from an alleged accomplice, simply because they were read to the accused while he was in custody without his specifically denying the accusations therein contained. True, this procedure may be deemed a legitimate application of the tacit admissions doctrine, but there is also the danger that this practice might result in a handy method of "manufacturing" evidence.

In the *Cook* case,[24] the Colorado Supreme Court ruled that accusations of an accomplice were inadmissible against the accused even though the state claimed that he remained silent when the statement was read to him. In that case, Cook and one Seiwald were jointly indicted and tried for murder committed in the course of a robbery. Cook was suffering from a severe gun wound, and

[21] See 22 C.J.S. Sec. 734 (4).
[22] Ellis v. State, 8 Okla. Crim. Rep. 522, 128 Pac. 1095, 1096 (1913).
[23] 83 F. 2d 41, 48 (C.C.A. 10th 1936).
[24] Cook v. People, note 14, supra.

upon apprehension was removed to a hospital. In his absence, Seiwald made a nineteen page statement implicating Cook and exonerating himself. This statement was read to Cook while in the hospital under custody. The court, after briefly discussing the rules applicable to silent admissions, continued: "It can hardly be said under the circumstances of this case, that this long statement read to Cook when he was consigned to his cot in the hospital suffering from a severe gun shot wound, and in the custody of the law, comes within this rule." Although the Colorado court did not flatly declare that arrest alone is a circumstance requiring exclusion, they did enforce a strict application of the rule that the admissibility of such evidence must be determined in the light of all the surrounding circumstances.

Evasive Answers May Indicate Assent

We have attempted to limit our consideration to the effect of oral statements made in the presence of a party. When discussing the theory upon which such statements were admitted in evidence, we indicated that, although the theory of tacit admissions most readily applies to cases where a party remains silent in the fact of accusation, yet the principles are equally applicable to those cases where a party's failure to contradict or deny such statements take the form of an evasive or non-responsive answer. Thus, if the reaction of the party may be construed to indicate assent, then the statement may still be considered as an implied admission. A striking example of this point is brought out in *Kingsbury v. People*.[25] There the defendant was charged with cohabitation and incest with his sister of the whole blood. He denied that the girl was his sister, but when confronted with letters from neighbors declaring that she was a sister of the accused, he made no denial of the statements in the letters, but evasively replied: "You wait and see. My people are Mormons and you don't understand about this." The court admitted both the letters and the evasive answer, instructing the jury, however, to regard the letters not as substantive evidence, but only for the purpose of throwing light upon the accused's failure to deny the statements therein contained.

We may note, in conclusion, that the courts have taken pains to dispel the practice that once admitted all statements and conversations had in the presence of a party-litigant. They have further indicated that such hearsay statements may only be received when, from all the surrounding circumstances, the party's assent thereto reasonably may be inferred. As our Colorado court has declared; "The general rule, 'He who is silent appears to consent,' undoubtedly has many exceptions and qualifications, and is always to be considered with more or less caution according to the circumstances

[25] 44 Colo. 403, 99 P. 61 (1908).

of the case."[26] No one collection of formulae could be devised to fit all the possible circumstances that might arise. Each application of the doctrine we have here considered must, in the final analysis, rest in the sound judicial discretion of the court. It may be well to remember that such admissions are likely to have an effect upon the jury out of proportion to their probative value. When an attempt is made to show facts from which such an admission is to be inferred, he rule which is most reasonably calculated to promote the ends of justice should be the one to be applied.

CERTIFICATION OF LEGAL INSTRUMENTS URGED

Certification of legal instruments by attorneys recently received the sanction of the Board of Trustees of the Denver Bar Association, acting upon the recommendation of its Unauthorized Practice committee headed by Wm. Rann Newcomb. This action was taken in order to discourage the preparation of such documents by laymen, encourage careful draftsmanship and make authorship apparent on the face of the instrument for future consultation or correction.

The board recommended that this certification be done by means of a stamp reading: "I certify that I drafted
this instrument.

.....
Attorney at Law"

In order to encourage the use, and pass on savings in the purchase of certification stamps, a quantity lot has been procured. These are now available to all attorneys at a cost of $1.00 each.

The association took this step only after consultation with other bar groups which have adopted the practice, and after securing a favorable opinion from the American Bar Association's Committee on Professional Ethics and Grievances. It is contemplated primarily that such certification be placed on deeds, trust deeds, releases, mortgages, notes, contracts of sale and other instruments dealing with the transfer of real estate. However, it is also recommended for wills, contracts and all other legal documents which an attorney may prepare for his client. In cases of complicated contracts, which may be the product of two or more attorneys, there would be no necessity for its use, nor should an attorney feel required to use it in any situation where he believes that its use may be a disservice to his client.

If used extensively by the attorneys of the state in connection with conveyancing, however, it could be a very important first step

[26] Lothrop v. Union Bank, 16 Colo. 257, 261, 27 Pac. 696, 698 (1891).