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Declarations by Third Persons in Presence of a Party - Hearsay Aspects, Past, Present and Future

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DECLARATIONS BY THIRD PERSONS IN PRESENCE OF A PARTY. HEARSAY ASPECTS, PAST, PRESENT AND FUTURE.

Williams (W), Atkinson (A) and Davies (D), all employees of the First National Bank of Brandon, were entertaining a small group of visitors from Canada. During a discussion of the recent Labor Day disappearance from the bank of a large sum in currency, A, who like the rest had a few Martinis, but who was apparently sober, turned to W and in the hearing of all present, including D, declared:

"Well, D was doing a spot of overtime at the bank that evening, and one assumes he never saw or heard anything unusual." Then, turning to D: "That's right, isn't it?"

This hypothetical situation might evoke any one of a progeny of reactions from D:

(a) He blushes scarlet, but remains silent.
(b) He shows no apparent reaction at all.
(c) He nods an affirmative, but says nothing.
(d) He shakes his head in dissent, but says nothing.
(e) He says: "Yes, I was there. Everything was normal."
(f) He says: "No, I wasn't there. You must be mistaken."
(g) He says: "Let's change the subject."
(h) He pokes A on the nose, and leaves without explanation.

More possible rections could be conjured up, but these should suffice. Specifically, (a) and (b) constitute what the prosecution might allege to be "implied assertions" (sometimes referred to as "non-assertive conduct"), (c) and (d) non-verbal conduct, (e) and (f) verbal conduct and (g) and (h) evasive or equivocal conduct.

Suppose that shortly thereafter D is charged with embezzlement of the currency, and at the trial, neither A nor the Canadians being available as witnesses, and D's counsel having produced evidence of D being in Larkville on that particular evening, the question arises as to whether W's testimony on A's declaration, and D's reaction thereto, are admissible as proof of the truth of the matter asserted, that is to say, D's presence in the bank at a material time. A's declaration, standing alone, is obviously hearsay.[1] Since D's reactions are significant only in terms of words, spoken or implied, such reactions might, or might not, be admissible under an exception to the hearsay rule.

The object of this article is to show how the courts have dealt with this kind of proffered testimony, and to suggest that the qualified admissibility allowed in the twentieth century might and should now give way to the almost automatic admissibility of the nineteenth.

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1. "Evidence of a statement which is made other than by a witness testifying at the hearing offered to prove the truth of the matter asserted"—Uniform Rules of Evidence, Rule 63.

EARLY DOCTRINE

In *Bailey v. Wood*[2] the court held that a conversation conducted by a stranger to a case, at which neither party to the case was present, was not admissible in evidence. In *Taylor v. Stockwell*[3] we find the holding that:

> Stockwell and Mrs. White (plaintiffs) were both permitted to testify, over objection that the evidence was hearsay, to statements made not in the presence of the defendant. The rulings of the Court in these respects constituted error. . .

Neither the Georgia nor the Wyoming Courts explained the reasons for their rulings.

The logical inference is that if the conversation (or statements) *had* been in the presence of a party, they would have been, so to speak, automatically admissible.

One would think that the rationale behind this "automatic admissibility" should have been that, since the party liable to be injured by the hearsay was in court, he had the opportunity of denying it or explaining it away. But this could not have been so, because when the doctrine was most widely followed, before the turn of the century, defendants were not *allowed* to testify.[4] Nevertheless, the doctrine did exist. Wigmore, in discussing one of the aspects of this subject, namely, a third person's statements being assented to by a party's silence, wrote:

> The force of the brief maxim (que tacet consentire videtur) has always been such that in practice (and especially in the original English tradition) 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 qualification of the principle.[5]

The working rule is not yet dead. As recently as 1937, in *Kinsey v. State*[6] we find:

> . . . 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.

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2. 24 Ga. 164, 165 (1858).
3. 22 Wyo. 492, 511, 145 PAC. 743, 747 (1915).
4. II Wigmore, Evidence, Sec. 579, (1940)..
5. IV Wigmore, Evidence, Sec. 1071, (1940).
6. 49 Ariz. 201, 65 PAC.2d 1141, 1151 (1937).

We see it again, indirectly, in 1962, in *Dennis v. U.S.*[7]

> ... The statements which he (a witness) attributed to Stein were not made in the presence of any of the appellants, and, having been introduced . . . as proof of the matter asserted . . . they were clearly hearsay . . . And, unless they came within some exception to the hearsay rule, they were inadmissible.
>
> * * * * * *

Under this early doctrine, A's declaration in the hypothetical case posed above would have been admissible in every situation except in the case of D's denials, (d) and (f).

CURRENT LAW

Later decisional law, recognizing Wigmore's "inherent qualifications", has acknowledged that the criterion of admissibility of A's declaration should be, not simply whether it was made in D's presence, but whether D's reactions to it might reasonably be taken as an acquiescence in its truth.[8] Thus Blume J. in *Crago v. State*[9] inserted, without defining, a qualification that is lacking in the earlier Wyoming case of *Taylor v. Stockwells*[10]

> . . . it must be borne in mind that a statement made out of court, not in the presence or hearing of an adverse party, *and not made under such circumstances as to bind him,* is but hearsay. Such statements should not, therefore, be used in such manner as to make them substantive evidence of fact. . . (emphasis supplied)

In the hypothetical case, A's hearsay statement would be admitted in evidence as a foundation for and explanation of D's admissions (c) and (e), but would be excluded for D's denials (d) and (f):

> Statements accusing or incriminating accused made in his presence, but unequivocally denied by him in toto, are not admissible against him. They do not show an admission, and are not admissible merely because made in his presence. The defendant's denial of the third person's statement destroys entirely the ground for using it.[11]

But it is in D's reactions (a), (b), (g) and (h) where the early doctrine of almost automatic admissibility has been changed. On silence as an implied admission the general rule is perhaps best stated from C.J.S., both with regard to civil and to criminal actions:

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7. 302 F.2d 5, 10 (10th Cir. 1952).
8. Acquiescence would constitute an implied admission, hence an exception to the hearsay rule.
9. 28 Wyo. 215, 202 PAC. 1099, 1102 (1922).
10. Bailey v. Wood, *supra* note 2.
11. State v. Evans, 202 S.C. 463, 25 S.E.2d 492, 494 (1943).

> In order that evidence of a failure to reply to a statement of fact may be admissible as an admission, a reply must be natural and proper and the party must have had knowledge and an opportunity sufficient to enable him to reply.[12]
>
> Where on being accused of a crime, with full liberty to speak, one remains silent, his failure to reply or to deny is admissible in evidence as an admission by silence.[13]
>
> Statements by third persons in accused's presence, under such circumstances as to show his acquiescence therein, are generally admissible.[14]

This is an easy doctrine to state, but it can be difficult to apply. In our hypothetical case, suppose D were innocent, that A was mistaken in saying that D was in the bank that evening, and that D regarded A as a habitually imaginative windbag. Was a straight denial by D "natural and proper"? A's declaration was not intended to be accusatory. There might have been numerous reasons for D's blush in reaction (a), including mere indigestion, and in reactions (a) and (b) D's failure to correct A as to his facts might have been due to pure disinterest. Reaction (g) might have been due to a natural disinclination on D's part to admit that he was, in fact, in Larkville in quiet pursuit of W's girl-friend, and reaction (h) to his Martini-induced irritation at a suspected but totally unjustified insinuation. It is not always easy for a judge to decide whether pure hearsay is to be allowed in as a foundation for introducing D's conduct, or non-conduct, as an admission. Judges will always be confronted with borderline situations. Here (it is submitted) a denial by D *would* have been natural and proper.

Wigmore, despite his remarks as to the old working rule "ignoring the inherent qualifications of the principle", argues for putting the burden of exclusion on the opponent of the evidence,[15] apparently on the grounds that since the turn of the century the defendant has had ample opportunity "to protect himself against undue inferences drawn from his silence." But he confesses that most courts hold otherwise and put the burden on the proponent to satisfy the judge that the conditions requisite to admissibility exist. Could it be that the majority acknowledge that in many criminal actions only the defendant himself could refute undue inferences being made from his conduct or non-conduct, and that the defendant's privilege not to take the witness stand should not be undermined on grounds that may be only tenuously probative?

This is an area of the law where nothing is absolutely settled, and where there are wide differences of detail and emphasis as between one court and another and one authority and another. For example, although *C.J.S.* states

12. 31A C.J.S. Evidence Sec. 295a, (1942).
13. 22A C.J.S. Criminal Law Sec. 734(1)a (1961).
14. 22A C.J.S., Criminal Law Sec. 746 (1961).
15. IV Wigmore, Evidence, Sec. 1071 (1940).

that the admissions-by-silence doctrine may, subject to its other qualifications, be applied to third-party statements "affecting a party or his rights",[16] *American Jurisprudence* appears to confine it statements "affecting his rights":

> . . . if a statement is made in the presence of a person, in regard to facts affecting his rights, and he makes no reply, his silence may be construed as a tacit admission of the facts stated . . . [17]

It then goes on to list the other qualifications—whether the party hears and understands, whether the truth of the statement is within his knowledge, whether he is free to speak freely, whether the statement is one naturally calling for a reply, and so on.

Does the phrase "affecting his rights" refer to the statement when made, or the effect of the statement at the time of the trial? The context suggests the former. In our hypothetical case, can A's declaration—if it is a non-incriminating statement of fact—be treated as one affecting D's "rights"?

Another example of the complications involved in this sort of evidence is: Who is to decide whether the various elements for admissibility are present? *C.J.S.* states that the "preliminary" questions, such as whether a reply by the party was reasonably required, are for the court to decide, whereas questions as to whether he heard and understood are for the jury;[18] but here again, courts differ.

State v. Gulbrandsen[19] illustrates even more variables and imponderables:

> The statements themselves are not admissible as proof of their substance. They are admissible only to show the circumstances under which the accused remained silent or was evasive, from which a jury may infer that such conduct is an implied admission of the truth of the statements. Furthermore, in view of the fact that defendant was under arrest and apparently under advice of counsel, and that the statements were not directed at defendant, there appears to be considerable doubt as to whether such statements would be admissible even if the silence of defendant was shown. . . Testimony should be admitted under this theory with great caution, since it would be possible for an over-zealous prosecution to build a complete case on hearsay by merely examining witnesses in the presence of defendant.

As to the authorities, Wigmore has already been quoted. Now note some brief summaries from Falknor, Morgan and McCormick:

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16. 31 C.J.S., Evidence, Sec. 294, (1942).
17. 20 Am. Jur. Sec. 567, (1962).
18. 31 C.J.S., Evidence, Sec. 296, (1942).
19. 238 Minn. 508, 57 N.W.2d 419, 423 (1953).

Falknor:

> . . . while hearsay should be defined so as to include not only utterances but also non-assertive conduct, where relevancy depends upon inferences from the conduct to the belief of the actor to the fact believed, evidence of such non-assertive conduct should be exceptionally admitted if, but only if, the trial judge first finds that (a) the actor had personal knowledge of the fact (*i.e.* the occurrence of the event or the existence of the condition) to the proof of which the evidence is offered; more precisely that it fairly appears that the actor observed or had the opportunity to observe such event or condition and that nothing appears to cast substantial doubt upon the quality of his recollection at the time of the conduct; and (b) that the conduct was important or significant to the actor in his affairs and so vouched his belief "as to give reasonable assurance of trustworthiness"; and (c) in the case of negative conduct (*i.e.* inaction) or silence, that such negative conduct or silence was a detriment to the actor.[20]

Morgan:

> . . . when a court analyzes non-assertory, non-verbal conduct as hearsay, it ought then to examine all the recognized exceptions to the hearsay rule to ascertain whether the hearsay in question does not fall within one of them. If no apt exception is found, it ought then to ascertain whether the dangers of error in perception and memory which might be eliminated by cross-examination are so substantial as to call for its exclusion. If not, the evidence should be received, for, by hypothesis, neither veracity nor narration is involved.[21]

McCormick:

> It would seem sensible to conclude that conduct (other than assertions) when offered to show the actor's beliefs and hence the truth of the facts so believed, being merely analogous to and not identical with typical hearsay, ought to be admissible when ever the trial judge in his discreion finds that the action so vouched the belief as to give reasonable assurance of trustworthiness.[22]

Under these authorities, would the trial judge exclude or admit A's declaration to explain D's reactions (a), (b), (g) and (h)? Whatever the answer may be, one fact is clear—that during the 1900's a great deal of hearsay, declared in the presence of a party to an action, has been excluded which under the early doctrine would have been admitted. Is this as it should be?

THE MODERN TREND

Wigmore, referring in 1940 to exclusionary rules generally, wrote that they:

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20. Falknor, *Silence as Hearsay*, 89 U.Pa.L.Rev.192, 216 (1940).
21. Morgan, *The Hearsay Rule*, 12 Wash.L.Rev. 1, 10. (1937).
22. McCormick, *The Borderline of Hearsay*, 39 Yale L.J. 489, 504 (1930).

> . . . to a large extent fail of their professed purpose. They serve, not as needful tools for helping the truth at trials, but as game-rules, afterwards, for setting aside the verdict.[23]

McCormick wrote in 1954:

> That part of the law of procedure known as evidence law has not responded in recent decades to the need for simplification and rationalization as rapidly as other parts of procedural law.[24]

And, later in the same treatise:

> Still further beyond the horizon, we may anticipate that, like other exclusionary rules, the rule excluding hearsay will eventually disappear, and we shall adopt the practice which, subject to variations, prevails in the leading countries of Europe, that is, the system of receiving hearsay and evaluating it.[25]

Nor is the evidence we are talking about confined to jury trials. In *Builders Steel Company v. Commissioner*[26] we can see one reason why a reversion to the early doctrine would not be altogether impracticable, even today;

> In the trial of a non-jury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a non-jury case because of the admission of incompetent evidence unless all of the competent evidence is insufficient to support the judgment or it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made. . .

Rule 4 of the Uniform Rules of Evidence provides much the same thing, for both jury and non-jury trials.

Mr. Justice Jackson of the U. S. Supreme Court in *On Lee v. U. S.*,[27] a criminal case, wrote:

> The trend of the law in recent years has been to turn away from rigid rules of incompetence, in favor of admitting testimony and allowing the trier of fact to judge the weight to be given to it.
> This trend appears to be a sensible one, especially where, as in the subject under discussion, rules of exclusion can be so complicated and difficult to apply.

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23. I Wigmore, Evidence, Sec. 8c (1940).
24. McCormick, Evidence XI (1954).
25. *Id.* at 634.
26. 179 F.2d 377, 379 (8th Cir. 1950).
27. 343 U.S. 747, 757.

The Uniform Rules of Evidence have not been adopted by any State, but they, too, reflect a trend of thought, if not yet of practice. It would be interesting to see how our hypothetical case would fare under these Rules:

As far as implied assertions, non-verbal and equivocal conduct are concerned, the Uniform Rules of Evidence introduce a very new emphasis. As a test for admissibility they substitute a subjective "intent to express" for the objective "reasonableness to infer" of current law, but the net result of the Rules, because of their definitions, is wider admissibility, and not, as one might imagine, narrower. This follows from the removal of certain conduct from the defined category of "statements", thereby removing it from the defined category of "hearsay", thereby, *a priori*, making it admissible. This is what would happen to our hypothetical reactions (a), (b) and (h). Rule 63 defines hearsay as "evidence of a *statement* which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated", and Rule 62 defines "statement" as "not only an oral or written expression but also non-verbal conduct of a person *intended* by him as a substitute for words in expressing the matter stated," (emphasis supplied). Since (i) reactions (a), (b) and (h) were clearly neither "oral" nor "written", and since (ii) even if they can be elastically classed as "non-verbal conduct" they can scarcely be labelled as *intended* substitutes for "Yes I was there" (whatever *anyone else* might infer), it follows that they were not "statements", and if they were not "statements" they cannot be "hearsay".

Admissibility of evasive reaction (g)—"Let's change the subject"—is more arguable. Being an oral expression, "intent", as such, is not specifically applicable, and therefore the "no-statement-therefore-no-hearsay" argument cannot be used. It must be brought in, if at all, under an exception to the hearsay rule. Rule 63(8) defines an adoptive admission (as against a party) as "a statement . . . of which the party with knowledge of the context thereof has by words or other conduct manifested his adoption or his belief in its truth." It might be held that "Let's change the subject" by its very evasiveness did, in fact, manifest D's belief in the truth of A's statement. More generally, it might also be held that, as a "previous statement" of a "person present and subject to cross-examination", it comes under the 63(1) exception.

Of the remaining reactions, the affirmative nod (c) and the dissenting shake of the head (d) are hearsay, being non-verbal conduct "intended" by D as a substitute for words, and these "statements" are exceptionally admissible under Rule 63(1)—as are D's oral statements (e) and (f). Rule 63(1) abolishes the orthodox rule, and allows prior inconsistent statements to be admitted, not only for impeachment, but also as substantive evidence of their truth.[28]

Despite all these arguments for admissibility under the Uniform Rules, the traditional overall "discretion of the Judge to exclude admissible evi-

28. Comment, under Rule 63(1).

dence" is preserved in Rule 45, and might be argued in the hypothetical case on the basis of clause (b) of that rule, namely, that evidence of some of the reactions might "create substantial danger of undue prejudice or of confusing the issues or of misleading the jury." However, such discretionary exclusion is still subject to the qualifying proviso of the rule, "except as in these rules otherwise provided . . . ", and it is by no means certain that admissibility of all the reactions is *not* otherwise provided for, either directly in the exceptions to the hearsay rule, Rule 63 et seq., or, if they are not classifiable as hearsay, then in clause (f) of Rule 7—"all relevant evidence is admissible". The Judge's discretion is limited, and the probability is that, if in doubt, he would remember Rule 4, and avoid exclusion.

In conclusion, in this narrow field of the law of evidence, as in all fields, a reversion to the early doctrine of the widest possible admissibility should be pressed by all those who would help to simplify and rationalize procedural law and move it away from the realms of professional "black art". We may well subscribe to what was said nearly twenty years ago by the Court, per curiam, in *Samuel H. Moss, Inc. v. F.T.C.*:[29]

> Even in criminal trials to a jury it is better, nine times out of ten, to admit than exclude evidence, and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by bickering about irrelevancy and incompetence. . .

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29. 148 F.2d 378, 380 (2nd Cir. 1945).