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ADMISSIONS BY ACQUIESCENCE

SAMUEL L. HELLER*

A major exception to the rule of evidence which excludes hearsay declarations concerns those extra-judicial assertions of one not a party to an action, which are inconsistent with the claim or defense asserted therein.¹ It is well recognized that admissions of a party-opponent embrace not only the utterances and affirmative conduct of the party himself but may also take the form of statements made by other persons which, in effect, become those of the party and may therefore be offered in evidence against him.² These vicarious admissions³ may be relational in nature in that admissibility is founded upon the presence of some relationship between the declarant and the party; thus, the statements of one who is an agent⁴ of, or in privity⁵ with the party-opponent may operate as the latter's admission. But wholly apart from those admissions which are predicated on relationship, statements by another in the presence and hearing of a party⁶ may also be received in evidence to establish the latter's admission by words or conduct which manifest his *approval* or adoption of the hearsay statement or signify his *belief* in its truth.⁷ Since

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1. See generally 4 WIGMORE, EVIDENCE §§ 1052-68 (3d ed. 1940) Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355 (1921).

2. *People v. Mallon*, 103 Cal. 513, 37 Pac. 512 (1894); *Doherty v. Edwards*, 227 Iowa 1264, 290 N.W. 672 (1940); *Eaton v. Commonwealth*, 122 Ky. 7, 90 S.W. 972 (1906); *People v. Conrow*, 200 N.Y. 356, 93 N.E. 943 (1911); *In re Newman's Will*, 187 Ore. 641, 213 P.2d 137 (1950). Several jurisdictions have made explicit statutory provision for the admissibility of vicarious admissions. CAL. CODE CIV. PROC. § 1870(2); GA. CODE ANN. § 38-409 (1954); MONT. REV. CODE tit. 93, § 401-27 (1947); ORE. REV. STAT. § 41.900(3) (1959).

3. 4 WIGMORE, *op. cit. supra* note 1, § 1069; Morgan, *Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461 (1929).

4. *E.g.*, *Martin v. Savage Truck Line, Inc.*, 121 F. Supp. 417 (D.D.C. 1954); *Gordon v. Hotel Seville, Inc.*, 105 So.2d 175 (Fla. App. 1958); *Whitaker v. Keogh*, 144 Neb. 790, 14 N.W.2d 596 (1944); *Arenson v. Skouras Theatres Corp.*, 131 N.J.L. 303, 36 A.2d 761 (Errors & App. 1944).

5. *E.g.* *Smith v. Goethe*, 159 Cal. 628, 115 Pac. 233 (1911) (statements by former holders of note); *Howard v. Franklin Ins. Co.*, 226 S.W. 447 (Tex. Civ. App. 1920) (statements by mortgagor deemed admissions of mortgagee); *Johnson v. Tuttle*, 108 Vt. 291, 187 Atl. 515 (1954).

6. A party's admissions may also, under very limited circumstances, be inferred from a failure to reply to written communications such as letters and statements of account on much the same principles discussed herein. See generally 4 WIGMORE, *op. cit. supra* note 1, § 1073. However, such admissions have traditionally received less probative weight than admissions from silence in the face of oral statements and for this reason, evidence of a defendant's failure to reply to a letter accusing him of a crime is generally excluded in criminal trials; *e.g.*, *Poy Coon Tom v. United States*, 7 F.2d 109 (9th Cir. 1925); *Terrell v. State*, 88 Tex. Crim. 599, 228 S.W. 240 (1921).

7. Both forms of admission were conveniently expressed in the maxim *Qui tacet consentire videtur* (silence gives consent), from which there early developed a working rule of practice in English and American courts that virtually anything said in a party's presence was admissible in evidence; 4 WIGMORE, *op. cit. supra* note 1, § 1071. According to Professor Wigmore, it is only in recent times that the courts have begun to develop restraints on this practice; *ibid.* That the fundamental distinction between admissions which are founded on belief by a party and those based upon approval is incorporated in the

the statement is none the less hearsay, it is given no substantive weight as evidence; its reception is permitted for the limited contextual purpose of giving meaning and effect to the party's conduct or passiveness.⁸ While the term "adoptive admission" has been employed by no less an authority than Professor Wigmore to characterize both of the foregoing forms of admission,⁹ it more properly should be restricted to the former. It can well be argued that admissions based upon a party's silence or equivocal reply to a hearsay statement are acquiescent or tacit in nature¹⁰ and that their admissibility must necessarily rest upon something less than approval or adoption of the statement itself.¹¹ Where, for example, an accused remains silent in the face of damaging accusations by a police officer or an accomplice,¹² "his silence . . . may furnish ample ground for an inference of consciousness of its truth even though it would afford no sufficient basis for an inference of adoption."¹³

Before proceeding to an examination of the various requirements for the admissibility of acquiescent admissions, it is important to note the fact that the courts traditionally have regarded this form of admission with considerable caution.¹⁴ Since such evidence is circumstantial, its probative value is not great;¹⁵ moreover, its use will invariably require the introduction of the hearsay statement so that the danger is always present that a lay jury will not confine itself to the inference of the party's belief that is to be drawn but will give substantive weight to the hearsay

Model Code of Evidence and the Uniform Rules of Evidence is recent evidence of the restrictive trend; MODEL CODE OF EVIDENCE rule 507(b) (1942); UNIFORM RULE OF EVIDENCE 63(8).

8. *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847); *People v. Conrow*, 200 N.Y. 356, 93 N.E. 943 (1911).

9. Compare 4 WIGMORE, *op. cit. supra* note 1, § 1071, with McCORMICK, EVIDENCE §§ 246-47 (1954).

10. See *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847); *People v. Conrow*, 200 N.Y. 356, 93 N.E. 943 (1911); *Mudd v. Cline Ice Cream Co.*, 101 W. Va. 11, 13, 131 S.E. 865, 866 (1926) ("silent admissions").

11. McCORMICK, *op. cit. supra* note 9, § 247: "The justification for receiving such evidence is not based upon the assumption that the party has intended to express his assent and thus has adopted the statement as his own, nor upon the theory that a duty or obligation to speak has been cast upon him, but rather upon the *probable state of belief* to be inferred from his conduct." (Emphasis added.) *But see* 4 WIGMORE, *op. cit. supra* note 1, § 1071.

12. *Dickerson v. United States*, 65 F.2d 824 (D.C. Cir. 1933); *Edwards v. State*, 155 Fla. 550, 20 So.2d 916 (1945); *People v. Conrow*, 200 N.Y. 356, 93 N.E. 943 (1911); *State v. La Plant*, 149 Ore. 615, 42 P.2d 158 (1935).

13. MODEL CODE OF EVIDENCE rule 507, comment b at 247 (1942).

14. *People v. Mallon*, 103 Cal. 513, 37 Pac. 512 (1894); *Albano v. State*, 89 So.2d 342 (Fla. 1956); *Freidman v. Forest City*, 239 Iowa 112, 30 N.W.2d 752 (1948); *People v. Lewis*, 238 N.Y. 1, 143 N.E. 771 (1924); *State v. Sudduth*, 74 S.C. 498, 54 S.E. 1013 (1906); *Vail v. Strong*, 10 Vt. 457 (1838). In Massachusetts, recent decisions indicate an increasing reluctance to expand the adoptive-acquiescent admission concept. *Refrigeration Discount Corp. v. Catino*, 330 Mass. 230, 112 N.E.2d 790 (1953); *Trustees of Church of Disciples v. Benevolent Fraternity of Unitarian Churches*, 319 Mass. 38, 64 N.E.2d 623 (1946).

15. *State v. Kysilka*, 84 N.J.L. 6, 87 Atl. 79 (Sup. Ct. 1913); *State v. Sudduth*, 74 S.C. 498, 54 S.E. 1013 (1906); *Camper v. State*, 187 Tenn. 511, 216 S.W.2d 18 (1948).

In Florida, the accused in a criminal trial is entitled to have the jury instructed that "the probative weight of such evidence is not great and . . . it should be received with caution." *Albano v. State*, 89 So.2d 342, 344 (Fla. 1956).

itself.¹⁶ Suppose that in a criminal trial the prosecution seeks to introduce evidence of an accomplice's detailed and voluminous statement concerning the alleged crime, which was read to the accused from a transcript and to which he remained silent.¹⁷ Unquestionably, the point is reached at which jury discrimination between the hearsay statement and the defendant's belief therein becomes purely a matter of conjecture. A similar abuse once prompted Mr. Justice Cardozo to remark: "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. . . . When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."¹⁸

While reception of the tacit admission, particularly in criminal trials, nearly always will be attended by *some* risk that it will be improperly used to the prejudice of the party-opponent, the courts have found ample justification for its admissibility;¹⁹ "human experience has shown that generally, it is natural to deny an accusation if a party considers himself innocent of negligence or wrongdoing."²⁰ With what some writers maintain is an unrealistic and over-strict approach,²¹ the courts have formulated relatively rigid criteria for the admissibility of admissions based on silence or equivocal reply. Generally, before a jury in a civil or criminal trial is permitted to consider *any* evidence of the party's admission,²² it must

16. See *Greenberg v. Stanley*, 30 N.J. 485, 153 A.2d 833 (1959); *State v. McCullum*, 18 Wash. 394, 51 Pac. 1044 (1897).

17. The practice is forcefully condemned on both legal and ethical grounds in *People v. Simmons*, 28 Cal.2d 699, 720, 172 P.2d 18, 30 (1946).

18. *Shepard v. United States*, 290 U.S. 96, 104 (1933).

19. E.g., *Dickerson v. United States*, 65 F.2d 824 (D.C. Cir. 1933); *Weller v. Fish Transp. Co.*, 123 Conn. 49, 192 Atl. 317 (1937); *Edwards v. State*, 155 Fla. 550, 20 So.2d 916 (1945); *Muse v. McWilliams*, 295 S.W.2d 680 (Tex. Civ. App. 1956).

20. *Keller v. Key System Transit Lines*, 129 Cal. App.2d 593, 277 P.2d 869 (1954).

21. McCORMICK, *op. cit. supra* note 9, § 247 n.16; 4 WIGMORE, *op. cit. supra* note 1, § 1071: "The principal question is whether the specified conditions for implying assent should be required to appear . . . before receiving the . . . statement made in the party's presence. Such strictness was proper enough . . . when the party himself was disqualified as a witness and therefore could not by his own testimony protect himself against undue inferences drawn from his silence. But today there is ample opportunity thus to counteract the risk of misconstruction. . . . It would seem to be the better rule at least that any statement made in the party's presence and hearing is receivable . . . placing upon the opponent of the evidence the burden of showing to the judge its impropriety."

22. The various elements of the tacit admission are for the most part dependent on the existence of certain facts; notwithstanding the principle that issues of fact are ordinarily left to the jury, it is generally recognized that preliminary questions of fact incident to a determination of admissibility are exclusively the province of the trial judge. *Runels v. Lowell Sun Co.*, 318 Mass. 466, 62 N.E.2d 121 (1945); *State v. Proctor*, 269 S.W.2d 624 (Mo. 1954); 9 WIGMORE, *op. cit. supra* note 1, § 2550. As to each element, the judge must initially determine that a jury *could* find the necessary facts and inferences; otherwise, the evidence must be excluded. *Accord*, *Weightnovel v. State*, 46 Fla. 1, 35 So. 856 (1903); *Freidman v. Forest City*, 239 Iowa 112, 30 N.W.2d 752 (1948); *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847) (dictum); *Johnson v. Underwood*, 102 Ore. 680, 203 Pac. 879 (1922); *State v. Sudduth*, 74 S.C. 498, 54 S.E. 1013 (1906). *Contra*, *Byrd v. State*, 78 Ga. App. 824, 52 S.E.2d 330 (1949); *Belk v. Belk*, 175 N.C. 69, 94 S.E. 726 (1917) (*semble*).

The fact that the trial judge finds facts which support *admissibility* does not, of course, preclude the jury from thereafter giving the evidence little or no *weight* by

clearly and affirmatively appear to the trial judge that (1) a statement was made in the party's presence which (2) was heard by him and understood and which (3) related to facts within his knowledge; that (4) the party was physically able and at liberty to respond and that (5) the circumstances were such that his silence or equivocal reply make probable his belief in the truth of the statement.²³

Before any evidence of the party-opponent's conduct can be considered, the courts uniformly require the proponent of the evidence to establish that the hearsay statement was made in the immediate presence of the party.²⁴ If the declarant and the party were in adjacent rooms²⁵ or separated by an unreasonable distance,²⁶ the "presence" requirement has not been met and the admission fails.

A corollary consideration is that the statement must have been heard by the party. It is ordinarily assumed in trial courts that what is shown to have been said in a party's presence was in fact heard by him and the assumption is certainly plausible when the party responded with an equivocal reply.²⁷ But when the admission is based on silence, the courts generally have required more than a mere showing of the party's presence as evidence of his having heard the statement.²⁸ If the party was more than a short distance away from the declarant²⁹ or in an adjacent room,³⁰ the evidence must be excluded even though the party

finding that the facts do not exist or by refusing to draw the necessary inference therefrom. *State v. Proctor*, *supra*; *State v. Toohey*, 6 N.J. Super. 97, 70 A.2d 180 (1950); *Maguire & Epstein, Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101 (1927). *But cf.* *Thurmond v. State*, 212 Miss. 36, 53 So.2d 44 (1951).

23. See *Commonwealth v. Kenney*, *supra* note 22, at 237: "[W]here a . . . declaration is made in one's hearing and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts; first, whether he hears and understands the statement, and comprehends its bearing; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge, or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply. . . ."

24. *Weller v. Fish Transp. Co.*, 123 Conn. 49, 192 Atl. 317 (1937); *Weightnovel v. State*, 46 Fla. 1, 35 So. 856 (1903); *Quillin v. Colquhoun*, 42 Idaho 522, 247 Pac. 740 (1926); *Lanergan v. People*, 39 N.Y. 39 (1868); *Joseph v. Furnish*, 27 Ore. 260, 41 Pac. 424 (1895); *Dr. Sweet Root Beer, Inc. v. Kittanning Brewing Co.*, 83 Pa. Super. 349 (1924); *Eardley v. Eardley*, 253 S.W.2d 69 (Tex. Civ. App. 1952); *Kutchenmeister v. Los Angeles & S.L. Ry.*, 52 Utah 116, 172 Pac. 725 (1918).

25. *Weightnovel v. State*, 46 Fla. 1, 35 So. 856 (1903); *Lanergan v. People*, 39 N.Y. 39 (1868).

26. *Gila Valley Ry. v. Hall*, 232 U.S. 94 (1914) (20 yards); *Joseph v. Furnish*, 27 Ore. 260, 41 Pac. 424 (1895) (12 feet); *State v. Baruth*, 47 Wash. 283, 91 Pac. 977 (1907) (alternative holding).

27. *E.g.*, *People v. Mallon*, 103 Cal. 513, 37 Pac. 512 (1894) (admission upheld where defendant replied: "Do you suppose I was a . . . fool, to tell you I was there?").

28. *Roberts v. State*, 94 Fla. 149, 113 So. 726 (1927); *Quillin v. Colquhoun*, 42 Idaho 522, 247 Pac. 740 (1926); *Doherty v. Edwards*, 227 Iowa 1264, 290 N.W. 672 (1940); *Gerulis v. Viens*, 130 Me. 378, 156 Atl. 378 (1931); *Sanders v. Overaker*, 141 S.W.2d 451 (Tex. Civ. App. 1940); *Reall v. Deiriggi*, 127 W. Va. 662, 34 S.E.2d 253 (1945). *But see* 4 WIGMORE, EVIDENCE § 1072 (3d ed. 1940): "this seems too strict; the presence of a party may be assumed to indicate that he heard and understood."

29. See note 26 *supra*.

30. See note 25 *supra*.

might have heard the statement had he listened closely.³¹ Similarly, if it appears that the party was unfamiliar with the language spoken he cannot be held to have understood, and his silence cannot be given legal significance.³²

Assuming that a statement was made in the presence and hearing of a party, it must also appear to the trial judge that the hearsay statement then related to facts within the party's knowledge. While the courts which have imposed this requirement do not make a distinction, the requirement quite obviously applies only to those admissions based on silence.³³ It is at this point, however, that Professor Wigmore maintains the courts are in error;³⁴ according to his thesis, it is fallacious to exact an element of personal knowledge for a party's tacit admissions since generally, admissions are not dependent upon the party's first-hand knowledge.³⁵ The latter observation is correct and supported by the great weight of authority.³⁶ But the argument advanced and the myriad decisions upon which it rests relate to a party's own statements which constitute his admission, the principle being that a party's actual knowledge of matters *he* has related is not a prerequisite for admissibility. But when admission is founded not on the party's words but on his silence in response to another's statement, the practical and theoretical necessity of establishing his knowledge of the matter asserted is evident. If he lacks such knowledge, the statement is a meaningless communication of words to which his silence logically signifies nothing, let alone belief or assent. This principle was evident in *Dierks Lumber & Coal Co. v. Horne*,³⁷ an action for the conversion of a large number of plaintiff's lumber poles. Because of prior dealings and the quantity involved, the exact number was so inascertainable that plaintiff arrived at a figure derived wholly from its own data and formulas. Evidence that the defendant had remained silent when accused of misappropriating this quantity was held

31. *State v. Baruth*, 47 Wash. 283, 91 Pac. 977 (1907) (no duty to open door and denounce declarant).

32. *Weightnovel v. State*, 46 Fla. 1, 35 So. 856 (1903); *State v. Kysilka*, 84 N.J.L. 6, 87 Atl. 79 (Sup. Ct. 1913); *People v. Lewis*, 238 N.Y. 1, 143 N.E. 771 (1924).

33. *Parulo v. Philadelphia & R. Ry.*, 145 Fed. 664 (C.C.S.D. N.Y. 1906); *Dierks Lumber & Coal Co. v. Horne*, 216 Ark. 155, 224 S.W.2d 540 (1949); *Roberts v. State*, 94 Fla. 149, 113 So. 726 (1927) (dictum); *Burwell v. First Nat'l Bank*, 86 Ind. App. 581, 159 N.E. 15 (1928) (*semble*); *Refrigeration Discount Corp. v. Catino*, 330 Mass. 230, 112 N.E.2d 790 (1953); *Hill v. Aetna Life Ins. Co.*, 150 N.C. 1, 63 S.E. 124 (1908); *Reall v. Deiriggi*, 127 W. Va. 662, 34 S.E.2d 253 (1945). In *Freidman v. Forest City*, 239 Iowa 112, 30 N.W.2d 752 (1948), plaintiff attempted to establish a councilman's admission that the city's generators had caused extensive cracks in plaintiff's building; the member had seen the cracks prior to 1937 but remained silent during a 1941 hearing at which the complaint was made. The court held that no admission arose, the member having no present knowledge of the conditions complained of in 1941.

34. 4 WIGMORE, *op. cit. supra* note 28, § 1072.

35. *Id.* at p. 79.

36. See McCORMICK, EVIDENCE § 241 n.9 (1954).

37. 216 Ark. 155, 224 S.W.2d 540 (1949).

properly excluded since the number was derived from information unavailable to the defendant.³⁸

Factors relating to a party's physical condition at the time the statement was made may also bear upon the admissibility of the offered admission. Obviously, a party's silence should have no legal significance when the evidence discloses that his ability to hear, comprehend or respond to the hearsay statement was substantially impaired. Thus, the courts generally have excluded the evidence when the party was asleep, deaf,³⁹ unconscious⁴⁰ or in a state of shock⁴¹ when the statement was made. Very often in accidents involving serious personal injury, the participants exchange accusations of fault which are later sought to be used against the party addressed as an admission of liability. Apart from the excitement and confusion,⁴² the fact that the party was in pain⁴³ or a state of hysteria⁴⁴ is generally recognized by the courts as a basis for excluding the evidence. Similarly, it would seem that when the party was intoxicated at the time the statement was made in his presence, the inference of acquiescence from his passiveness is too improbable to be permitted. While some courts have rejected the admission on this basis,⁴⁵ others unfortunately have favored admissibility, finding no difficulty in imposing a duty to reply on the inebriate.⁴⁶ The rationality of permitting the inference of acquiescence when one's physical and mental faculties are so obviously impaired is open to question.

38. *Ibid.*

39. See *People v. Koerner*, 154 N.Y. 355, 48 N.E. 730 (1897).

40. *Gowen v. Bush*, 76 Fed. 349 (8th Cir. 1896) (alternative holding); *Hines v. Patterson*, 146 Ark. 367, 225 S.W. 642 (1920); *Wheeler v. Le Roy*, 296 Ill. 579, 130 N.E. 330 (1921). In *People v. Koerner*, 154 N.Y. 355, 48 N.E. 730 (1897), where there was some evidence that the party was feigning unconsciousness, the court indicated that even if that were the case, no admission could be inferred from the party's silence since "naturally, neither he nor any other person similarly situated would have replied." *Id.* at 377, 48 N.E. at 737.

41. *Schilling v. Union Ry.* 78 N.Y. Supp. 1015 (Sup. Ct. 1902).

42. These circumstances alone may justify exclusion of the evidence. *Accord*, *Whaley v. Crutchfield*, 226 Ark. 921, 294 S.W.2d 775 (1956); *Gerulis v. Viens*, 130 Me. 378, 156 Atl. 378 (1931); *Klever v. Elliott*, 212 Ore. 490, 320 P.2d 263 (1958); *Beck v. Dye*, 200 Wash. 1, 92 P.2d 1113 (1939). *But cf.* *Willhite v. Freed*, 137 Ore. 1, 299 Pac. 691 (1931).

43. *Gowen v. Bush*, 76 Fed. 349 (8th Cir. 1896); *Hines v. Patterson*, 146 Ark. 367, 225 S.W. 642 (1920); *Mumford v. State*, 70 Fla. 424, 70 So. 399 ("blinded by blood and screaming lustily"); *Wheeler v. Le Roy*, 296 Ill. 579, 130 N.E. 330 (1921) (alternative holding); *Doherty v. Edwards*, 227 Iowa 1264, 290 N.W. 672 (1940); *Lichtenstein v. Cascio*, 83 N.Y.S.2d 195 (App. Div. 1948); *McCord v. Seattle Elec. Co.*, 46 Wash. 145, 89 Pac. 491 (1907). *Contra*, *Holston v. Southern Ry.*, 116 Ga. 656, 43 S.E. 29 (1902); *Givens v. Louisville & N. Ry.*, 24 Ky. L. Rep. 1796, 72 S.W. 320 (1903).

44. *Schilling v. Union Ry.*, 78 N.Y. Supp. 1015 (Sup. Ct. 1902); *McCord v. Seattle Elec. Co.*, 46 Wash. 145, 89 Pac. 491 (1907).

45. *Bloomer v. State*, 75 Ark. 297, 87 S.W. 438 (1905); *State v. Kissinger*, 343 Mo. 781, 123 S.W.2d 81 (1938); *People v. Allen*, 300 N.Y. 222, 90 N.E.2d 48 (1949).

46. *State v. Sawyer*, 230 N.C. 713, 55 S.E.2d 464 (1949); *Traders & Gen. Ins. Co. v. Russell*, 99 S.W.2d 1079 (Tex. Civ. App. 1936): "The statements . . . naturally called for [a] reply by him, and there is nothing to suggest . . . he was [unable] . . . to reply." *Id.* at 1082.

The courts have also excluded the offered admission by silence when the party-opponent was restrained from speaking; convictions based in part on silence during police interrogations have been reversed when the defendant was denied the opportunity to speak,⁴⁷ or forcibly admonished to keep quiet.⁴⁸ To a lesser degree, if the party's silence stemmed from his own fear of making any reply, the courts have indicated the evidence should be excluded.⁴⁹

The circumstance of arrest itself is regarded as controlling by many jurisdictions which refuse to draw any inferences from an accused's silence to accusatory statements made after his arrest. These courts have adopted the liberal policy of categorically excluding *all* evidence of silence after arrest on the premise that an innocent person will rely more often than not upon the familiar admonition that anything he says may be used against him.⁵⁰ Other courts have adopted the more flexible and yet conservative view that arrest, *per se*, does not preclude admissibility but is merely one of many circumstances that affect admissibility.⁵¹

In addition to the foregoing requirements for the reception of tacit admissions but actually encompassing them is the fundamental consideration that "under all of the circumstances appearing, the party's conduct

47. *State v. Kysilka*, 84 N.J.L. 6, 87 Atl. 79 (Sup. Ct. 1913).

48. *People v. Kozlowski*, 368 Ill. 124, 13 N.E.2d 174 (1938); *People v. Kennedy*, 164 N.Y. 449, 58 N.E. 652 (1900).

49. *Autrey v. State*, 94 Fla. 229, 114 So. 244 (1927) (dictum); *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847); *Muse v. McWilliams*, 295 S.W.2d 680 (Tex. Civ. App. 1956). In *Smith v. American Stores Co.*, 156 Pa. Super. 375, 40 A.2d 696 (1945), an action for injuries sustained in the defendant's store, liability depended upon the negligence of a stock boy; when defendant's manager saw the injured plaintiff and the cuttings she had slipped on, he angrily accused the boy of throwing them on the floor. The trial court permitted the jury to infer the boy's admission of negligence by his having remained silent; on appeal, the court reversed, noting that the boy's fear of his superior was evident and that "it was only natural . . . to postpone his answer to a calmer occasion." *Id.* at 380, 40 A.2d at 698.

50. *United States v. LoBiondo*, 135 F.2d 130 (2d Cir. 1943); *Yep v. United States*, 83 F.2d 41 (10th Cir. 1936); *McCarthy v. United States*, 25 F.2d 298 (6th Cir. 1928); *State v. Ferrone*, 97 Conn. 258, 116 Atl. 336 (1922); *Territory v. Corum*, 34 Hawaii 167 (1937); *State v. Poynter*, 34 Idaho 504, 205 Pac. 561 (1922); *Rickman v. State*, 230 Ind. 262, 103 N.E.2d 207 (1952); *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847); *People v. Rutigliano*, 261 N.Y. 103, 184 N.E. 689 (1933); *Zeller v. State*, 123 Ohio 519, 176 N.E. 81 (1931); *Crabb v. State*, 86 Okla. Crim. 323, 192 P.2d 1018 (1948); *State v. Marcello*, 72 R.I. 382, 51 A.2d 828 (1947); *Redding v. State*, 149 Tex. Crim. 576, 197 S.W.2d 357 (1946).

It has even been advanced that silence under arrest should be regarded as an implied claim of the privilege against self-incrimination; *Ellis v. State*, 8 Okla. Crim. 522, 128 Pac. 1095 (1913).

51. *Muse v. State*, 29 Ala. App. 271, 196 So. 148 (1940); *Hawthorn v. State*, 206 Ark. 1009, 178 S.W.2d 490 (1944); *Cawthon v. State*, 71 Ga. App. 497, 31 S.E.2d 64 (1944); *State v. Kobylarz*, 44 N.J. Super. 250, 130 A.2d 80 (1957); *Commonwealth v. Vallone*, 347 Pa. 419, 32 A.2d 889 (1943); *State v. Sudduth*, 74 S.C. 498, 54 S.E. 1013 (1906). In Florida, admissions by silence after arrest are admissible and it has been held that the accused cannot ignore the accusations made in his presence; *Edwards v. State*, 155 Fla. 550, 20 So.2d 916 (1945) (without reference to other circumstances that might affect admissibility).

makes it probable that he believed the statement to be true."⁵² As to all of the myriad "circumstances" developed by the courts into workable standards of admissibility, including those heretofore discussed, the controlling principle is, of course, that of *relevancy*. Consequently, the circumstances surrounding the offered admission should be given judicial recognition only to the extent such recognition facilitates exclusion of evidence which does not tend sufficiently to establish the fact of admission by the party-opponent.⁵³ It is from such basic considerations of relevancy that Professor Wigmore concludes that "the inference of assent may safely be made only when there is no other explanation equally consistent with silence. . . ." ⁵⁴

Notwithstanding the fact that the hearsay statement is of secondary significance compared to the party's response or passiveness thereto,⁵⁵ certain distinctions based on relevancy have been made with regard to the type of statement and by whom it is made. Thus, it has been held that a party need not reply to the unintelligible remarks of one who is intoxicated,⁵⁶ statements broadcast over a radio,⁵⁷ or the statements of unknown bystanders which are not addressed to the party.⁵⁸ However, the fact that the declarant would be incompetent to testify as a witness does not itself preclude the use of the declaration to show a party's admission by silence, and it is on this basis that the silence of an accused to a child's accusations is admissible.⁵⁹ Similarly, many courts have indicated that the hearsay statement must have been one of fact based on the

52. McCORMICK, EVIDENCE § 247 (1954).

53. In *Burton v. Horn & Hardart Baking Co.*, 371 Pa. 60, 88 A.2d 873 (1952), the court held that it was proper to exclude evidence that shortly after plaintiff slipped on the defendant's floor, the store manager remained silent to statements by plaintiff's daughter concerning the floor's slippery condition; the "manager's silence may well have been motivated by a desire to avoid a dispute with the customer whose mother had just been injured. . . ." *Id.* at 664, 88 A.2d at 875. For a penetrating analysis of the various judicial definitions of relevancy and their application, see Trautman, *Logical or Legal Relevancy—a Conflict in Theory*, 5 VAND. L. REV. 385 (1952).

54. 4 WIGMORE, *op. cit. supra* note 28, § 1071.

55. See note 8 *supra*.

56. *Francis v. Edwards*, 77 N.C. 271 (1877).

57. *State v. La Plant*, 149 Ore. 615, 42 P.2d 158 (1935) (by implication).

58. *Whaley v. Crutchfield*, 226 Ark. 921, 294 S.W.2d 775 (1956); *Gerulis v. Viens*, 130 Me. 378, 156 Atl. 378 (1931); *Greenberg v. Stanley*, 30 N.J. 485, 153 A.2d 833 (1959); *Hersey v. Barton*, 23 Vt. 457, 463 (1851) (dictum). For a common sense approach to bystanders' remarks at automobile collisions, see *Beck v. Dye*, 200 Wash. 1, 92 P.2d 1113 (1939), wherein the court recognized a moral as well as statutory duty to render aid to the injured and avoid verbal combat with bystanders. *Contra*, *Wilhite v. Freed*, 137 Ore. 1, 299 Pac. 691 (1931).

Nor will admission be inferred if the hearsay statement identifies or refers to some person other than the party in whose presence it is made; in *Robinson v. State*, 235 Miss. 100, 108 So.2d 583 (1959), the trial court erroneously admitted evidence of the defendant's silence to his stepson's statement "Daddy shot mother dear," since it had been shown the child referred to his natural father as "Daddy" and to the defendant as "Henry."

59. *State v. Claymonst*, 96 N.J.L. 1, 114 Atl. 155 (Sup. Ct. 1921); *Hardy v. State*, 150 Wis. 176, 136 N.W. 639 (1912).

declarant's personal knowledge, excluding evidence of a party's silence to mere opinions⁶⁰ and statements based on second-hand knowledge.⁶¹

Other circumstances surrounding the offered admission may preclude its reception. Since it would be "indecorous"⁶² for a party to interrupt a judicial proceeding⁶³ with a denial of statements made therein, it has been held that his silence to statements by witnesses or even his own attorney thereafter cannot be used to establish his admission.⁶⁴ It has been held likewise that a party need not reply to his spouse's narration of family intimacies in the presence of others.⁶⁵

No response a party can make to a hearsay statement more effectively precludes his admission than an immediate and unequivocal denial and the courts have consistently rejected all evidence of admission when the party's words or conduct could reasonably be deemed a denial.⁶⁶ Perhaps because the very slightest evidence of a denial so thoroughly negatives any inference of assent or acquiescence, it has been held that a denial once made need not be repeated to a stream of accusations to be effective⁶⁷ and that if the party silently nods in apparent agreement while hearing the statement but ultimately denies it, the evidence must be excluded.⁶⁸ However, a denial followed by actual admissions of some of the accusations

60. *Pulver v. Union Inv. Co.*, 279 Fed. 699 (8th Cir. 1922) ("You did not live up to your contract"); *Whaley v. Crutchfield*, 226 Ark. 921, 294 S.W.2d 775 (1956); *Oliver v. Louisville & N. Ry.*, 43 La. Ann. 804, 9 So. 431 (1891); *Wolfe v. State*, 173 Md. 103, 194 Atl. 832 (1937); *Refrigeration Discount Corp. v. Catino*, 330 Mass. 230, 112 N.E.2d 790 (1953); *Jasmin v. Parker*, 102 Vt. 405, 148 Atl. 874 (1930). *Contra*, *Granberg v. Turnham*, 166 Cal. App.2d 390, 333 P.2d 423 (1958) ("It was all his fault"); *Willhite v. Freed*, 137 Ore. 1, 299 Pac. 691 (1931). In *Wolfe v. State*, *supra* at 111, 194 Atl. at 836, the court applied the rule against opinion declarations to exclude "the mere opinion of a third person as to the weight and significance of facts previously admitted by the [party]."

61. *Whaley v. Crutchfield*, 226 Ark. 921, 294 S.W.2d 775 (1956) (by implication); *Kelly v. Waterbury*, 96 Conn. 494, 114 Atl. 530 (1921); *Keim v. Blackburn*, 280 S.W. 1046 (Mo. 1926); *Jasmin v. Parker*, 102 Vt. 405, 148 Atl. 874 (1930).

The declaration is not objectionable because it takes the form of an inferred insinuation addressed to the party so long as it is based on the declarant's knowledge and otherwise has significance to the party. *Belk v. Belk*, 175 N.C. 69, 94 S.E. 726 (1917) ("I never forged a deed" insinuated that plaintiff had done so); *In re Newman's Will*, 187 Ore. 641, 213 P.2d 137 (1950).

62. *In re Thorp's Will*, 150 N.C. 487, 489, 64 S.E. 379, 380 (1909).

63. *State v. Mullins*, 101 Mo. 514, 14 S.W. 625 (1890) (coroner's inquest); *In re Thorp's Will*, 150 N.C. 487, 64 S.E. 379 (1909) (former trial); *Blackwell Tobacco Co. v. McElwel*, 96 N.C. 71, 1 S.E. 676 (1887) (preliminary hearing).

64. *People v. Willett*, 92 N.Y. 29 (1883); *In re Thorp's Will*, 150 N.C. 487, 64 S.E. 379 (1909); *Jones v. State*, 184 Tenn. 128, 196 S.W.2d 491 (1946). *Contra*, *Secor v. Brown*, 221 Md. 119, 156 A.2d 225 (1959).

65. *Zink v. Zink*, 215 Md. 197, 137 A.2d 139 (1957).

66. *Albano v. State*, 89 So.2d 342 (Fla. 1956) (dictum); *Miller v. State*, 158 Ga. 697, 124 S.E. 195 (1924); *Carroll v. Guffey*, 20 Ill. App.2d 470, 156 N.E.2d 267 (1959); *Muirhead v. Challis*, 213 Iowa 1108, 240 N.W. 912 (1923); *People v. Wysocki*, 267 Mich. 52, 255 N.W. 160 (1934); *People v. Allen*, 300 N.Y. 222, 90 N.E.2d 48 (1949); *Commonwealth v. Mazarrella*, 279 Pa. 465, 124 Atl. 163 (1924).

67. *Refrigeration Discount Corp. v. Catino*, 330 Mass. 230, 112 N.E.2d 790 (1953); *Anderson v. State*, 171 Miss. 41, 156 So. 645 (1934) (*semble*).

68. *Skiskowski v. United States*, 158 F.2d 177 (D.C. Cir. 1946), *cert. denied*, 330 U.S. 822 (1947).

made renders the entire accusation and the party's total response thereto admissible.⁶⁹

If all of the foregoing "requirements" have been met and it is assumed, for example, that a party's silence to a statement imputing fault or the commission of a crime is probative of his belief in the imputation, it can well be argued that his equivocal response is equally if not more probative of such belief.⁷⁰ From a practical viewpoint and in retrospect, the fact of *any* response by a party obviates concern as to whether he heard or understood the statement as these conditions may be safely assumed.⁷¹ In *Snowden v. United States*,⁷² the trial court admitted evidence that shortly after the alleged occurrence, the defendant was accused of raping the declarant's niece and replied: "You did not see it; you have got to prove it." On appeal, the court held the evidence properly received since the defendant's "evasive and defiant answer"⁷³ was highly probative of guilt and clearly indicated his cognizance and comprehension of the accusation.⁷⁴ Responses to accusations such as laughter⁷⁵ or "I don't remember"⁷⁶ also have been held equivocal and hence admissible. It is reasonable to assume that virtually any direct response short of a denial⁷⁷ of the statement will be receivable as a party's tacit admission.⁷⁸ If, however, the party denounces the speaker as a liar or otherwise casts doubt on his veracity, it would seem that the evidence of admission should be excluded since the reply is so clearly akin to an express denial that it can hardly be regarded as "equivocal."⁷⁹

69. *People v. Close*, 154 Cal. App.2d 545, 316 P.2d 1019 (1957); *Commonwealth v. Grieco*, 323 Mass. 629, 83 N.E.2d 873 (1949).

70. See McCORMICK, *op. cit. supra* note 52, § 247.

71. This seems to be one of the unconscious distinctions developed by the courts between silence and equivocation. Professor Wigmore, however, would assume in all instances, including those of a party's silence, that he heard and understood the statement made in his presence, placing upon the party the burden of showing the absence of these conditions. See note 21 *supra*.

72. 2 App. D.C. 89 (1893).

73. *Id.* at 93.

74. *Ibid.*

75. *State v. Hill*, 134 Mo. 663, 36 S.W. 223 (1896).

76. *Jones v. State*, 228 Miss. 296, 87 So.2d 573 (1956).

77. See note 66 *supra*.

78. *E.g.*, *People v. Mallon*, 103 Cal. 513, 37 Pac. 512 (1894) ("Do you suppose I was a . . . fool, to tell you I was there?"); *Sanders v. Newsome*, 179 W. Va. 582, 19 S.E.2d 883(1942) ("If he hit the old man he didn't know nothing about it"). *But cf.* *Kelly v. Waterbury*, 96 Conn. 494, 114 Atl. 530 (1921). The equivocal response of an agent may, as in the case of admissions generally, give rise to an admission by his principal. *Keller v. Key System Transit Lines*, 129 Cal. App.2d 593, 277 P.2d 869 (1954) (railway motorman's response to police officer: "You are putting me in an awful spot. I have given you all the information I have been instructed to give by my employers").

79. See *People v. Harrison*, 26 Ill. 517, 104 N.E. 259 (1914). *Contra*, *Belk v. Belk*, 175 N.C. 69, 94 S.E. 726 (1917) (*semble*). For an unrealistic rejection of evidence based on reproval by the party, see *Gibbons v. Territory*, 5 Okla. Crim. 212, 115 Pac. 129 (1911) (to threats by accomplice in presence of victim's wife, party admonished: "Hush! Don't pay any attention to her. She in [sic] only half-witted anyway").

It has likewise been held that when, in response to police interrogations, an accused refuses to answer any questions on advice of counsel⁸⁰ or repeatedly insists on his right to see his attorney before making comment,⁸¹ the evidence should be excluded since the circumstances, apart from that of arrest,⁸² "are reinforced by an explicit rebuttal of any inference that the accused was admitting the truth of the accusations. . . ."⁸³

In addition to the traditional requirements for admissibility and as further evidence of the cautious regard by the courts for tacit admissions generally,⁸⁴ other limitations and safeguards on the use of such admissions should be noted. While there are ill-considered statements by some courts to the effect that a party's silence creates a "presumption" of admission,⁸⁵ it is unquestionably the prevailing and sounder view that only an inference of acquiescence or assent arises,⁸⁶ *i.e.*, the party-opponent may refrain from introducing any evidence to dispel the fact of his admission without the risk of suffering a peremptory ruling by the court.⁸⁷ The requirements themselves indicate that an imposing evidentiary burden is cast on one who would establish his opponent's admission by silence; absent an "affirmative showing"⁸⁸ that all of the elements of admission exist, the evidence must be excluded.⁸⁹ In *Anderson v. State*,⁹⁰ the defendants were charged with assault and battery with intent to murder. Over objection, the trial court admitted testimony by police officers that shortly after their arrest, the defendants were confronted with a witness who identified them as the assailants. Both defendants admitted the meeting in their testimony but denied any connection with the crime. The appellate court reversed the conviction, holding that the state had clearly failed to meet its

80. *Autrey v. State*, 94 Fla. 229, 114 So. 244 (1927) (dictum); *People v. Conrow*, 200 N.Y. 356, 93 N.E. 943 (1911). *Contra*, *People v. Graney*, 48 Cal. App. 773, 192 Pac. 460 (1920). *Compare* *People v. Wilson*, 61 Cal. App. 611, 215 Pac. 565 (1923), with *People v. Hanley*, 317 Ill. 39, 147 N.E. 400 (1925) ("It will take twelve men to try me" — excluded).

81. *Kelley v. United States*, 236 F.2d 746 (D.C. Cir. 1956).

82. See note 50 *supra*.

83. *Kelley v. United States*, 236 F.2d 746, 749 (D.C. Cir. 1956).

84. See note 14 *supra*.

85. *E.g.*, *Anderson v. State*, 171 Miss. 41, 43, 156 So. 645, 646 (1934) (dictum); *People v. Koerner*, 154 N.Y. 355, 374, 48 N.E. 730, 736 (1897).

86. *Albano v. State*, 89 So.2d 342 (Fla. 1956); *Rude v. Seibert*, 22 Ill. App.2d 477, 161 N.E.2d 39 (1959); *People v. Conrow*, 200 N.Y. 356, 93 N.E. 943 (1911); *Camper v. State*, 187 Tenn. 511, 216 S.W.2d 18 (1948) (error to charge that presumption of guilt arises from silence to accusations).

87. For a discussion of the problems raised by careless use of the terms and a recent Florida experience with the problem, see Note, 13 U. MIAMI L. REV. 236, 237 (1958).

88. *Quillin v. Colquhoun*, 42 Idaho 522, 247 Pac. 740 (1926); *Sanders v. Overaker*, 141 S.W.2d 451 (Tex. Civ. App. 1940); *Reall v. Deiriggi*, 127 W. Va. 662, 34 S.E.2d 253 (1945).

89. *Weller v. Fish Transport Co.*, 123 Conn. 49, 192 Atl. 317 (1937); *State v. Jackson*, 150 N.C. 831, 64 S.E. 376 (1909).

90. 171 Miss. 41, 156 So. 645 (1934).

burden of proof in not eliciting testimony from the officers or the defendants as to what response if any was made to the witness.⁹¹

As is the case with hearsay exceptions generally,⁹² the party whose admission is sought to be established is entitled to have the jury members instructed as to the limited purpose for which they may consider the evidence and that they may not give weight to the hearsay statement itself.⁹³ However, the party-opponent's right to such a cautionary instruction is waived if the instruction is not seasonably requested.⁹⁴

But even favorable jury instructions may often be grossly inadequate to protect the party-opponent against the practical danger of suffering a jury defeat on hearsay evidence.⁹⁵ For any number of reasons that have been discussed, his adversary may fail to establish the offered admission at trial and yet succeed in exposing the jury to the hearsay statement. Once the jury has *heard* the statement, particularly where it is accusatory in nature, the damage has been done and it matters not that the party-opponent's objections have been sustained and the jury is later cautioned to disregard the evidence. More effective measures were employed in *People v. Conrow*,⁹⁶ a prosecution for murder. During the defendant's cross examination, the state was permitted to show that an alleged accomplice had seen the defendant in jail in the presence of police officers and had then narrated in great detail the defendant's part in the crime, although it was also established at the very onset of the examination that the defendant had indicated to the officers at the meeting he would not answer any questions on instructions of counsel. Notwithstanding the state's deliberate and meticulous references to the accomplice's statement, the trial court repeatedly denied the defendant's motions to strike. However, at the very end of the trial, defendant's motion to strike was granted and the jury admonished that the defendant's silence could not be used against him. The conviction was reversed, the court holding that a new trial was necessary. The court noted the trial judge's vacillation and that his final ruling was made as clear to the jury as it was possible to do, but realistically granted a new trial since it could not be said

91. *Accord*, *People v. Mallon*, 103 Cal. 513, 37 Pac. 512 (1894); *Miller v. State*, 158 Ga. 697, 124 S.E. 195 (1924).

92. See 6 WIGMORE, EVIDENCE § 1730 (3d ed. 1940).

93. See *People v. Mallon*, 103 Cal. 513, 37 Pac. 512 (1894); *Doherty v. Edwards*, 227 Iowa 1264, 290 N.W. 672 (1940). *Compare* *Albano v. State*, 89 So.2d 342 (Fla. 1956), with *Roberts v. State*, 94 Fla. 149, 113 So. 726 (1927). It is significant to note that the most thorough exposition of the Florida position with regard to acquiescent admissions appears in a trial court's charge to the jury which was approved "as a correct statement of the law" in the *Roberts* case. *Id.* at 156, 113 So. at 729.

94. *Doherty v. Edwards*, 227 Iowa 1264, 290 N.W. 672 (1940); *State v. Kysilka*, 84 N.J.L. 6, 87 Atl. 79 (Sup. Ct. 1913).

95. See text accompanying note 16 *supra*.

96. 200 N.Y. 356, 93 N.E. 943 (1911).

"that the statements and charges of [the accomplice] . . . erroneously received, although stricken out, did not affect the result."⁹⁷

While it is quite apparent that the once prevalent practice⁹⁸ of freely admitting anything said in a party's presence has been greatly curtailed, it is equally clear that effective protective measures must continuously be utilized by the courts if this form of hearsay evidence is deemed worth receiving. If the underlying considerations of relevancy are given their due, it may well become evident in some situations that the evidentiary value of the offered admission is slight compared to the undue prejudice and confusion resulting from its reception and that therefore it should be excluded.⁹⁹ Only by a realistic evaluative approach to this often vexing problem can the courts intelligently utilize the tacit admission and yet do justice to the rights of the party-opponent.

97. *Id.* at 369, 93 N.E. at 948. *Accord*, *Greenberg v. Stanley*, 30 N.J. 485, 153 A.2d 833 (1959), *modifying* 51 N.J. Super. 90, 143 A.2d 588 (1958).

98. See note 7 *supra*.

99. At least in criminal trials, it would certainly be consonant with the lay conception of the law's protections to exclude all evidence of silence to accusatory statements after arrest. See 2 WHARTON, CRIMINAL EVIDENCE § 410, at 166 (12th ed. 1955).