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DICTA

FEATURED THIS ISSUE

HAVE YOU PAID YOUR DUES?

CONTENTS

Volume XXVII, Number 1, January, 1950

LIBERTY

"What then is the spirit of liberty? I cannot define it; I can only tell you of my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, nearly 2,000 years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a Kingdom where the least shall be heard and considered side by side with the greatest."

JUDGE LEARNED HAND in a speech given on May 21, 1944.

HAVE YOU PAID YOUR DUES?

DICTA

Volume XXVII January, 1950 Number 1

ADMISSIBILITY OF CONFESSIONS

ALLEN MOORE

Deputy Attorney General, State of Colorado

EDITOR'S NOTE: This article is a portion of a paper presented by Mr. Moore before the District Attorneys' Association at the Fifty-first Annual Convention of the Colorado Bar Association in Colorado Springs on October 13, 1949.

In Underhill's *Criminal Evidence* we find this pertinent introduction to the chapter on Confessions:

> Confession defined and distinguished from admission.—There is a vast amount of law on the subject of confessions of crime. This is due to the fact that police and prosecuting authorities invariably ask one accused of a crime if he did it. There is nothing inherently wrong in such a practice, as a voluntary confession saves everyone time and trouble, and the taxpayers' money. Quite frequently the accused, fresh from his crime, in a spirit of remorse, recklessness or boastfulness, tells all about it. Later, when his mind has cooled, he may repudiate his confession. Unfortunately, such issues are not easily determined, as police officials have been known to use the 'third degree' method of getting confessions, though the practice is not, and never was, as prevalent as the public was led to believe. Be that as it may, it is true the public today, and jurors, do not regard a confession obtained by police authorities in their line of duty as highly as they would one made to disinterested parties.[1]

Also, in considering confessions the courts face the problems of what is a confession and what is the difference between a confession and an admission. A confession is an acknowledgment of guilt of the crime charged or of the facts which constitute the crime. I shall not attempt to go into the ramifications of admissions, nor, shall I attempt to discuss any of the many phases of confessions other than the voluntary character of confessions.

The general principles involved are quite clear; if voluntary, a confession is admissible, if involuntary, the admission of a confession in a state court violates the due process clause of the Four-

[1] Ch. 22, §265 (4th ed. 1935).

teenth Amendment of the United States Constitution, the due process clause [2] of the State Constitution and perhaps other provisions thereof.

Generally, a confession is involuntary if induced by promise and hope of reward or benefit, or by judicial pressure, violence, threat or fear, or made when the defendant is mentally incapacitated. No general rule can be formulated on the admission of confessions to cover all cases. A new phase of the matter is now becoming important. This is the effect of long interrogations between the time of arrest and the time of the arraignment.

The Supreme Court of Colorado has considered the question of whether or not confessions of defendants were free and voluntary and therefore properly admitted in evidence. In the case of *Osborn v. People,*[3] the Court said:

> Whether or not a confession was voluntary is primarily a question for the trial court. Its admissibility is largely within the discretion of that court; and on review its ruling thereon will not be disturbed unless there has been a clear abuse of discretion, *Mitchell v. People,* 75 Colo. 346, 232 P. 685, 40 A.L.R. 566.

Each case must be decided under the particular facts involved. In *Reagan v. People,*[4] the Court said:

> In all cases where the question is material the inquiry must be, was the statement voluntary? For the purpose of ascertaining this fact no inflexible rule can be promulgated. It must be determined from the facts and circumstances relating to how the confession was made or obtained.

As a general principle continuous interrogation following arrest will not in itself, invalidate a confession.[5] It appears that the Colorado Supreme Court has on many occasions considered the admissibility of a confession, but in no case has it yet held a confession inadmissible merely because obtained by long interrogation following arrest.

In *Cahill v. People,*[6] the Supreme Court held that a confession was not rendered invalid although the defendant contended that he was interrogated daily and accused of various crimes, that he was not given permission to see a lawyer until ten days after arrest, nor any friends for fourteen days. Our court has held that when there is a doubt concerning the voluntary nature of the confession the issue should be left to the jury.[7] The ruling of the trial court

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[2] Colo. Const. Art. II, §25.

[3] 83 Colo. 4, 39, 262 Pac. 892, 905 (1927).

[4] 49 Colo. 316, 318, 112 Pac. 785, 786 (1911); see also Buschy v. People, 73 Colo. 472, 216 Pac. 519 (1923); Bruner v. People, 113 Colo. 194, 156 P. 2d 111 (1945); Cahill v. People, 111 Colo. 29, 137 P. 2d 673 (1943).

[5] 20 Am. Jur. P. 433. (The reason for and merit of this rule are discussed in 2 Wigmore, Evidence (2d ed. 1923) P. 196 ff.).

[6] Note 4, supra.

[7] Martz v. People, 114 Colo. 278, 162 P. 2d 408 (1945); Roper v. People, 116 Colo. 493, 179 P. 2d 232 (1947).

and the findings of the jury are accorded great weight. Such findings will not be set aside except upon a clear showing to the contrary.

THE SCHNEIDER APPEAL IN THIS CONNECTION

A case which has recently attracted widespread attention is that of *Schneider v. People*,[8] decided November 8, 1948. Schneider was charged with the murder of Ford, the operator of a filling station on Brighton Boulevard in Denver, under shocking circumstance. Schneider was arrested in Pikeville, Kentucky, on October 17, 1947, and on October 22, 1947, made a full and complete confession to an agent of the F.B.I. and local officers. Upon his return to Denver, on October 25, 1947, he repeated the confession in the presence of Denver officers. All of the officers testified that Schneider's confession was free and voluntary. The confession was admitted in evidence over objections for several reasons. Schneider was convicted of murder in the first degree and sentenced to death. The judgment was affirmed by the Supreme Court and it was ordered that it be executed during the week commencing December 12, 1948.

The decision was based on the assumption that Schneider's confession was free and voluntary so far as the record was concerned, and then proceeded on the question of whether or not the entire confession was properly submitted, including admissions of other crimes, or whether only the part directly pertaining to the Ford murder was properly admitted. As to that, the question was determined adversely to defendant's contention. A petition for rehearing was denied.

Thereafter, followed a series of dramatic events in the true Hollywood tradition. Schneider was represented by J. Corder Smith, appointed by the Court to defend him. Schneider's execution was set for the night of December 17, 1948. Smith, through a newspaper account, learned that on December 13, the United States Supreme Court had decided in *Upshaw v. U.S.*[9] that where "petitioner was illegally detained for at least thirty hours for the very purpose of securing these challenged confessions * * *", it is a violation of law, and confessions thus obtained are inadmissible, the ruling being based on Rule 5 (a) of the Federal Rules of Criminal Procedure.

Smith rushed to Denver from Fort Morgan, and searched frantically for a copy of the *Upshaw* case. I was then acting Director of the Legislature Reference Office. Smith had been told that the office might have the decision in the *United States Law Week*, the only available copy in the Capitol. I recall his rushing in and asking for the decision. We found it at once, whereupon Smith hurried to the Governor's office, presented the *Upshaw* decision to

[8] 118 Colo. 543, 199 P. 2d 873 (1948).
[9] 335 U. S. 410 (1948).

the Governor and the Governor granted the reprieve until the week of January 9, 1949.

On January 11, 1949, he moved the Colorado Supreme Court for a further stay of execution, which was granted and Smith was permitted to file a petition for rehearing. On January 12, 1949, the Court granted a stay of execution until April 10, 1949. On April 11, 1949 the court denied a motion by Smith that execution be stayed indefinitely, and set the date for the week beginning June 12, 1949, in order that Schneider might seek a review in the Supreme Court of the United States. Permission to petition for a Writ of Certiorari was thereafter granted so the *Schneider* case is now pending there on that petition.[10] In the meanwhile the U. S. Supreme Court has decided three important confession cases, as will be discussed hereinafter.

Still another important case in which the issue concerns the voluntary or involuntary nature of the confession admitted in evidence is that of *Downey v. People,* now pending decision in the Colorado Supreme Court. The defendant's wife died on July 18, 1947, near the Rampart Range road near Colorado Springs, under suspicious circumstances. Downey, the defendant, was taken first to a hospital and a day later to the County Jail. Beginning on the morning of July 20, and continuing intermittently until and including July 24, the defendant was questioned and finally confessed that he had killed his wife. On October 11, 1947, the jury returned a verdict of guilty of murder in the first degree and fixed the penalty at life imprisonment. The briefs of counsel in this case afford an excellent treatment of the conflicting views as to the admissibility of confessions. During this interchange of briefs, and noted in the reply brief of the plaintiff in error, three pertinent cases on that point were decided by the United States on June 27, 1949, which ably set forth the status of the problem and may well be decisive of the *Schneider* [11] and *Downey* cases, although each such case, of course, must be determined upon its own peculiar facts.

The Watts Case in the U. S. Supreme Court

In the case of *Watts v. Indiana,*[12] decided June 27, 1949, Watts was arrested Wednesday, November 12, 1947, and charged with murder for which he was later tried and convicted. He was held without being arraigned, until the following Tuesday, November 18, when he confessed. At no time was he advised of his right to remain silent, nor did he have the advice of family, friends or counsel during his confinement. He was not promptly arraigned as the Indiana law requires.

[10] Cert. denied, Oct. 24, 1949, 70 Sup. Ct. 96, after this paper was presented, and Schneider has since been executed.
[11] See Note 10, supra.
[12] 69 Sup. Ct. 1347 (1949).

During this confinement he was held in the county jail, the first two days in solitary confinement in a cell known as the "hole", where there was no place on which to sit or sleep except on the floor. Throughout the six days confinement, Watts was questioned each day except Sunday, for long periods by relays of small groups of officers, until he finally confessed about three o'clock in the morning after seven hours of interrogation.

The opinion by Mr. Justice Frankfurter is highly quotable and the temptation is to quote it at length, but this I shall refrain from doing; I do quote, however, pertinent parts as follows:

> Although the Constitution puts protection against crime predominately in the keeping of the States, the Fourteenth Amendment severely restricted the States in their administration of criminal justice. Thus, while the State courts have the responsibility for securing the rudimentary requirements of a civilized order, in discharging that responsibility there hangs over them the reviewing power of this Court. Power of such delicacy and import must, of course, be exercised with the greatest forbearance. When, however, appeal is made to it, there is no escape. And so this Court once again must meet the uncongenial duty of testing the validity of a conviction by a State court for a State crime by what is to be found in the Due Process Clause of the Fourteenth Amendment. * * *
>
> On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple. But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication. *Hooven & Allison Co. v. Evatt,* 324 U.S. 652, 659, and cases cited. Especially in cases arising under the Due Process Clause is it important to distinguish between isssues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits. See *Norris v. Alabama,* 204 U.S. 587, 589-90; *Marsh v. Alabama,* 336 U.S. 501, 510.
>
> In the application of so embracing a constitutional concept as 'due process,' it would be idle to except at all times unanimity of views. Nevertheless, in all the cases that have come here during the last decade from the courts of the var-

> ious States in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here. But if force has been applied, this Court does not leave to local determination whether or not the confession was voluntary. *There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men.* * * *.[13]

The Court thereupon reviews the facts as given above and points out that until the statement was secured, Watts was a prisoner in the exclusive control of the prosecuting authorities, although the law of Indiana required a prompt preliminary examination. The Court then said:

> Disregard of rudimentary needs of life-opportunities for sleep and a decent allowance of food—are also relevant, not as aggravating elements of petitioner's treatment, but as part of the total situation out of which his confessions came and which stamped their character.
>
> A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary. We would have to shut our minds to the plain significance of what here transpired to deny that this was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.[14]

[13] Id., at 1348, 9 (Italics mine).
[14] Id. at 1349, 50.

Thereafter the Court stated that this is so because it violates the underlying principles in our enforcement of the criminal law; that ours is the accusatorial as opposed to the inquisitorial system and has been characteristic of the Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent. To quote again:

> Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. "The law will not suffer a prisoner to be made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown, c. 46, sec. 34 (8th ed., 1824). The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands. Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system. It is the inquisitorial system without its safeguards. For while under that system the accused is subjected to judicial interrogation, he is protected by the disinterestedness of the judge in the presence of counsel. * * *
>
> In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken. We are deeply mindful of the anguishing problems which the incidence of crime presents to the States. But the history of the criminal law proves overwhelmingly that brutal methods of law enforcement are essentially self-defeating, whatever may be their effect in a particular case. * * * Law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilization has evolved for an administration of criminal justice at once rational and effective.[15]

The decision of the Indiana Supreme Court was reversed.

[15] Id. at 1350.

Mr. Justice Douglas concurring, places emphasis upon the unlawful detention between the time of arrest and the time of arraignment or preliminary examination saying:

> Detention without arraignment is a time-honored method for keeping an accused under the exclusive control of the police. They can then operate at their leisure. The accused is wholly at their mercy. He is without the aid of counsel or friends; and he is denied the protection of the magistrate. We should unequivocally condemn the procedure and stand ready to outlaw, as we did in *Malinski v. New York,* 324 U.S. 401, and *Haley v. Ohio,* 332 U.S. 596, any confession obtained during the period of the unlawful detention. The procedure breeds coerced confessions. It is the root of the evil. It is the procedure without which the inquisition could not flourish in the country.[16]

The Turner and Harris Cases Decided the Same Day

In *Turner v. Pennsylvania,*[17] decided June 27, 1949, the Pennsylvania Supreme Court was reversed, after affirming the conviction of Turner by the trial court which had admitted an involuntary confession, obtained after five days of questioning between the time of arrest and arraignment, without the aid of family, friends, or counsel. He was not informed of his constitutional rights at the beginning of his detention. Upon the authority of the *Watts* case, *supra,* Mr. Justice Frankfurter reversed the judgment and remanded the case. Mr. Justice Douglas again concurring specially stated that the case was but another illustration of the use of illegal detentions to exact confessions.

The third case decided June 27, 1949 was *Harris v. South Carolina.*[18] After reviewing the facts which indicated that Harris was arrested and interrogated from Friday through Wednesday, when he finally broke, and that threats, deceptions and perhaps force were used, Mr. Justice Frankfurther held in part as follows:

> The systematic persistence of interrogation, the length of the periods of questioning, the failure to advise the petitioner of his rights, the absence of friends or disinterested persons, and the character of the defendant constitute a complex of circumstances which invokes the same considerations which compelled our decisions in Watts v. State of Indiana, . . . and Turner v. Commonwealth of Pennsylvania, . . . The judgment is accordingly reversed.[19]

[16] Id. at 1351.
[17] 69 Sup. Ct. 1352 (1949).
[18] 69 Sup. Ct. 1354 (1949).
[19] Id. at 1356.

Mr. Justice Douglas in his concurring opinion said: "This is another illustration of the use by police of the custody of an accused to wring a confession from him. The confession so obtained from literate and illiterate alike should stand condemned." [20]

In a valuable note to the *Watts* case, *supra,* the Court said:

> The validity of a conviction because an allegedly coerced confession was used has been called into question in the following cases:
>
> (A) Confession was found to be procured under circumstances violative of the Due Process Clause in Haley v. Ohio, 332 U.S. 596; Malinski v. New York, 324 U.S. 401; Ashcraft v. Tennessee, 322 U.S. 143; Ward v. Texas, 316 U.S. 547; Lonax v. Texas, 313 U.S. 544; Vernon v. Alabama, 313 U.S. 547; White v. Texas, 310 U.S. 530; Canty v. Alabama, 309 U.S. 629; White v. Texas, 309 U.S. 631; Chambers v. Florida, 309 U.S. 227; Brown v. Mississippi, 297 U.S. 278; and see Ashcraft v. Tennessee, 327 U.S. 274.
>
> (B) Confession was found to have been procured under circumstances not violative of the Due Process Clause in Lyons v. Oklahoma, 322 U.S. 596, and Lisenba v. California, 314 U.S. 219.[21]

Mr. Justice Jackson concurring in the result in the *Watts* case, but dissenting in the *Turner* and *Harris* cases pointed out that these three cases present essentially the same problem but that its recurrence suggests that it has roots in some condition fundamental and general to our criminal system. He expressed the opinion that the seriousness of the Court's judgment in setting aside all three convictions is that no one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning; that the alternative was to close the books on the crime and forget it, with the suspect at large and that this is a grave choice for a society in which two-thirds of the murders already are closed out as insoluble.

He then states that one of the Douglas concurring opinions goes to the very limit and seems to declare for outlawing any confession, however freely given, if obtained during a period of custody between arrest and arraignment—which, in practice means all of them, and that others would strike down these confessions because of conditions which they say make them "involuntary". He feels that the Court should not pit its judgment against that of the trial judge and jury, or overrule state appellate courts. The fact that the suspects neither had nor were advised of their right to get counsel presents a real dilemma in a free society, a real peril to individual freedom, yet to bring in a lawyer means a real peril to solution of the crime because, under our adversary system

[20] Id. at 1357.
[21] 69 Sup. Ct. 1348, 9 (note 3).

he deems that his sole duty is to protect his client—guilty or innocent—and that he owes no duty to help society solve its crime problem. His first advice to his client will be for him to make no statement to the police under any circumstances.

Yet if the state may arrest on suspicion and interrogate without counsel, the constitutional guaranty of right to counsel is largely of no avail. Justice Jackson then says:

> I suppose the view one takes will turn on what one thinks should be the right of an accused person against the State. Is it his right to have the judgment on the facts? Or is it his right to have a judgment based on only such evidence as he cannot conceal from the authorities, who cannot compel him to testify in court and also cannot question him before? Our system comes close to the latter by any interpretation, for the defendant is shielded by such safeguards as no system of law except the Anglo-American concedes to him.
>
> Of course, no confession that has been obtained by any form of physical violence to the person is reliable and hence no conviction should rest upon one obtained in that manner. Such treatment not only breaks the will to conceal or lie, but may even break the will to stand by the truth. Nor is it questioned that the same result can sometimes be achieved by threats, promises, or inducements, which torture the mind but put no scar on the body. If the opinion of Mr. Justice Frankfurter in the Watts case were based solely on the State's admissions as to the treatment of Watts, I should not disagree. But if ultimate quest in a criminal trial is the truth and if the circumstances indicate no violence or threats of it, should society be deprived of the suspect's help in solving a crime merely because he was confined and questioned when uncounseled? [22]

Rule as to Admission of Confessions Still in Flux

Following this he points out that once a confession is obtained it supplies ways of verifying its trustworthiness and in the three cases there was no doubt that the admissions of guilt were genuine and truthful, that it is rare that a confession, if repudiated on the trial, standing alone will convict unless there is external proof of its verity, adding:

> In all such cases, along with other conditions criticized, the continuity and duration of the questioning is invoked and it is called an "inquiry," "inquest" or "inquisition," depending mainly on the emotional state of the writer. But

[22] 69 Sup. Ct. at 1358.

> as in some of the cases here, if interrogation is permissible at all, there are sound reasons for prolonging it—which the opinions here ignore. The suspect at first perhaps makes an effort to exculpate himself by alibis or other statements. These are verified, found false, and he is then confronted with his falsehood. Sometimes (though such cases do not reach us) verification proves them true or credible and the suspect is released. Sometimes, as here, more than one crime is involved. The duration of an interrogation may well depend on the temperament, shrewdness and cunning of the accused and the competence of the examiner. But assuming a right to examine at all, the right must include what is made reasonably necessary by the facts of the particular case.[23]

Mr. Justice Jackson believes that, if the right of interrogation be admitted, we must leave it to trial judges and juries and state appellate courts to decide individual cases, unless they show some want of proper standards of decision. He concludes his opinion as follows:

> * * * I find nothing to indicate that any of the courts below in these cases did not have a correct understanding of the Fourteenth Amendment, unless this Court thinks it means absolute prohibition of interrogation while in custody before arraignment.
>
> I suppose no one would doubt that our Constitution and Bill of Rights, grounded in revolt against the arbitrary measures of George III and in the philosophy of the French Revolution, represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself. They were so intended and should be so interpreted. It cannot be denied that, even if construed as these provisions traditionally have been, they contain an aggregate of restrictions which seriously limit the power of society to solve such crimes as confront us in these cases. Those restrictions we should not for that reason cast aside, but that is good reason for indulging in no unnecessary expansion of them.
>
> I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as "due process of law"? And if not a necessary one, should it be demanded by this Court?

[23] Id. at 1358, 9.

> I do not know the ultimate answer to these questions; but for the present, I should not increase the handicap on society.[24]

It should be noted that Mr. Justice Murphy and Rutledge, now deceased, joined in Mr. Justice Frankfurter's opinions, that Mr. Justice Douglas concurred separately, that Mr. Justice Black concurred on the authority of *Chambers v. Florida*[25] and *Ashcroft v. Tennessee*,[26] while Mr. Justice Jackson concurred in the result in the *Watts* case and dissented in the other two cases, and the Chief Justice, Mr. Justice Reed and Mr. Justice Burton believed that the judgments should be affirmed in all three cases. This division would seem to indicate that the admission of confessions is still in a state of flux. It will be interesting to learn whether or not the Court will grant certiorari in the *Schneider case*[27]—if so, the decision may give an indication of the new trend as to the problem.

As to the situation in Colorado it behooves all peace officers to examine the statutes carefully and adhere to them both as to their letter and their spirit.

ANNUAL MEETING OF 13TH DISTRICT BAR ASSOCIATION

At their annual meeting in Brush on December 17, the members of the Thirteenth Judicial District Bar Association selected the following new officers: George E. Hendricks of Julesburg, president; Joseph A. Davis of Sterling, vice-president; and Charles Sandhouse of Sterling, secretary-treasurer. Wm. B. Paynter will continue for another year as representative on the Board of Governors of the state association.

Glenn Thompson of Yuma and Richard B. Paynter of Ft. Morgan, retiring president and secretary, presided. In the afternoon session, Berton T. Gobble, former Inheritance Tax Commissioner now practicing in Brush, discussed some of the pitfalls in reporting inheritance taxes, and Edward G. Knowles, president-elect of the Colorado Bar Association, reported on the recent discussions concerning abolition of the Rules of Civil Procedure. The association voted that individual members should submit their opinions by letter to the Supreme Court as to the relative merits of the Rules v. the Code. Chief Justice Benjamin C. Hilliard of the Supreme Court of Colorado was the principal speaker at the evening banquet.

THE BOOK TRADER'S CORNER

John A. Carruthers of Colorado Springs is in the market for Volumes 80, 81 and 82 of the Colorado reports.

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[24] Id. at 1359.
[25] 309 U. S. 227 (1940).
[26] 322 U. S. 143 (1944).
[27] See note 10, supra.

TOWARD A MORE LIBERAL CONSTRUCTION OF THE FOURTH AMENDMENT

NICHOLAS H. MAGILL*

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States provides in part that "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

The law of searches and seizures is the product of the interplay of these two constitutional provisions. Both amendments relate to the personal security of the citizen. The former protects his privacy and preserves inviolate his right to be let alone; the latter protects the individual against compulsory production of evidence to be used against him. They almost imperceptibly blend and mutually throw light upon each other.[1]

The purpose of this article is to inquire into the federal exclusionary rule concerning evidence obtained in violation of the Fourth Amendment. The rule is simple. Such evidence is inadmissible. But the application of the rule to a given factual situation is fraught with difficulty and uncertainty in determining whether, under the particular circumstances, the evidence was obtained in violation of the Fourth Amendment.

THE GENESIS AND DEVELOPMENT OF THE RULE

In 1886, the Supreme Court of the United States held that the Fifth Amendment protected every person from incrimination by the use of evidence obtained through a search and seizure made in violation of his rights under the Fourth Amendment.[2] Not until 1914, however, did the Court lay down the rule excluding evidence obtained in violation of the Fourth Amendment, and permit the victim of an unreasonable search to suppress the evidence so obtained.[3]

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* Student at the University of Denver College of Law.

[1] Boyd v. United States, 116 U.S. 616 (1886); Weeks v. United States, 232 U.S. 383 (1914); Davis v. United States, 328 U.S. 582 (1946).

[2] Boyd v. United States, 116 U.S. 616 (1886).

[3] Weeks v. United States, 232 U.S. 383 (1914).

Since then, the rule has been frequently invoked. In most cases it has been rigidly adhered to whenever the circumstances justified its application. Of course, where the evidence sought to be suppressed was obtained under the sanction of a valid search warrant, the rule has no application. But the presence or absence of a valid search warrant is not the sole criterion to determine the legality of a search or seizure. During the period from 1914-1946, which for convenience will be called the formative period, special circumstances were found to justify the admission of evidence, although obtained in a search conducted without a search warrant. Some of these extenuating circumstances were recognized in the pronouncements of the Court which gave birth to the rule.

As an incident to a lawful arrest, the Court had upheld searches of premises within the immediate control of the person arrested.[4] It was well settled that there could be a seizure of articles and papers found on the person arrested. Arresting officers were also permitted to seize the fruits and evidence of crime which were in plain sight and in their immediate and discernible presence.[5] General exploratory searches as an incident to a lawful arrest, however, had been emphatically denounced as unconstitutional.[6]

It was early held that a federal prosecutor might make such use as he pleased of documents or other information acquired from a trespasser if persons other than federal officers had committed the trespass.[7] If a federal officer had a hand in the illegal search, the evidence must be excluded; but evidence secured by state officers and turned over to a federal prosecutor was admissible in a federal proscution.[8] Passive co-operation, as well as active participation, by federal officers in an illegal search must result in the exclusion of the evidence.[9]

Another variation of the rule is that evidence obtained in violation of one person's constitutional rights does not render such evidence inadmissible against another person.[10] In order to complain of an unlawful search and seizure, one must claim ownership in or a right to possession of the premises searched or in the property seized.[11]

While the Court has held that offices, as well as homes, were within the protection of the Fourth Amendment,[12] a distinction

[4] Angello v. United States, 269 U.S. 20 (1925); Marron v. United States, 275 U.S. 192 (1927).
[5] Weeks v. United States, 232 U.S. 383 (1914); Agnello v. United States, 209 U.S. 20 (1925).
[6] Go-Bart Importing Co. v. United States, 282 U.S. 482 (1931); United States v. Leftkowitz, 285 U. S. 452 (1932).
[7] Burdeau v. McDowell, 256 U.S. 465 (1921).
[8] Byars v. United States, 273 U.S. 28 (1927).
[9] Gambino v. United States, 275 U.S. 310 (1927).
[10] Holt v. United States, 42 F. 2d 103 (C.C.A. 6th 1930); Kelley v. United States, 61 F. 2d 843 (C.C.A. 8th 1932); Lewis v. United States, 92 F. 2d 952 (C.C.A. 10th 1937); See Agnello v. United States, 269 U.S. 20, 35 (1925); But Cf. McDonald v. United States, 69 S. Ct. 191 (1948).
[11] Cases cited note 10, supra; O'Kelley v. United States, 149 F. 2d 381 (App. D.C. 1945), cert. denied 326 U.S. 724 (1945); Grainger v. United States, 158 F. 2d 236 (C.C.A. 4th 1946).
[12] Gouled v. United States, 255 U.S. 298 (1921).

has been made between a search and seizure in a house and a search and seizure in the fields.[13] The Court has upheld the search of a moving vehicle without a warrant where the officers had probable cause to believe it was being used to violate the National Prohibition Act.[14] On the basis of this pronouncement, lower federal courts have held that officers may stop and search a vehicle without a warrant where they have probable cause to believe it is being used to commit a crime, if it would not be reasonably practicable to secure a warrant.[15] The requirement that a warrant must be obtained whenever reasonably practicable has been repeatedly emphasized by the courts.[16]

Thus, in 1946, the rule enunciated in the *Weeks* case emerged from its formative period clothed with the interpretive pronouncements of the federal courts. For the most part the rule had been liberally applied in favor of the citizen; the courts scrupulously guarding his right to be let alone.

THE CONCEPT OF "REASONABLE SEARCH" EXPANDED

1. *Davis v. United States*

In 1946, beginning with the case of *Davis v. United States*,[17] continuing through *Zap v. United States*,[18] and culminating in mid-1947 with *Harris v. United States*,[19] the Supreme Court, in holding the federal exclusionary rule inapplicable, constructively expanded the concept of "reasonable search", and extended the legitimate scope of a search incidental to a lawful arrest.

In the *Davis* case, investigators for the Office of Price Administration, without a warrant of any kind, arrested the defendant after the investigators had procured an illegal purchase of gasoline from a service station, a corporation, operated and managed by the defendant. The arrest was for the misdemeanors of selling gasoline over ceiling price and without obtaining ration coupons therefor.[20] The investigators, suspecting that the defendant had an illegal supply of ration coupons, demanded access to the latter's office, the repository of the coupons. At first the defendant refused to unlock the door; whereupon, he was told that he would have to unlock it. Noticing one of the investigators shining a flashlight

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[13] Hester v. United States, 265 U.S. 57 (1924).
[14] Carroll v. United States, 267 U.S. 132 (1925); Husty v. United States, 282 U.S. 694 (1931).
[15] Morgan v. United States, 159 F. 2d 85 (C.C.A. 10th 1947); Cannon v. United States, 158 F. 2d 952 (C.C.A. 5th 1946), cert. denied 330 U.S. 839 (1947), rehearing denied, 431 U.S. 863 (1947); United States v. One 1941 Oldsmobile Sedan, 158 F. 2d 818 (C.C.A. 10th 1946). But cf. Hart v. United States, 162 F. 2d 74 (C.C.A. 10th 1947).
[16] Carroll v. United States, 267 U.S. 132 (1925); Taylor v. United States, 286 U.S. 1 (1932); Hart v. United States, 162 F. 2d 74 (C.C.A. 10th 1947).
[17] 328 U.S. 582 (1946).
[18] 328 U. S. 624 (1946).
[19] 331 U.S. 145 (1947).
[20] 54 Stat. 676, as amended, 55 Stat. 236, 56 Stat. 177, 50 U.S.C. App. §633 (Supp. IV).

beam through a rear window, and apparently attempting to raise the window, the defendant submitted to the officers' demands. The defendant obtained from his office an envelope containing ration coupons, which he surrendered to the officers. The coupons were found to be in excess of the lawful number which defendant was permitted to have in his possession. He was subsequently indicted and convicted, not for the misdemeanors for which he was initially arrested, but for the illegal possession of the coupons, another misdemeanor.[21]

The Supreme Court affirmed the conviction. Although the Court felt that the seizure was reasonable as an incident to a lawful arrest, the decision rested mainly on another ground. Relying on *Wilson v. United States,* [22] the Court held that the defendant, being a custodian of the ration coupons which were government property, was not protected against the production of the incriminating coupons. Emphasizing a distinction between public and private papers, the Court said that the strict test of consent, designed to protect an accused against production of incriminating documents, has no application where public papers are sought. Since the coupons were obtained from a place of business, at a reasonable hour, in response to a demand of authority rightly made,[23] the defendant's constitutional rights had not been violated.

Mr. Justice Frankfurter, joined by the late Mr. Justice Murphy, dissenting, pointed out that *Wilson v. United States,* invoked by the Court, was not in point. The *Wilson* case dealt, not with an unreasonable search under the Fourth Amendment, but with the question of self-incrimination under the Fifth Amendment, in which it was held that the immunity against self-incrimination did not extend to a corporation, even though the evidence tended to incriminate an individual officer of the corporation. The *Wilson* case dealt with the distinction between public and private papers concerning testimonial compulsion, not search and seizure. Merely because there may be a duty to make public documents available for litigation in response to lawful process does not mean that police officers may forcibly or coercively obtain them. The right to be let alone, except under judicial compulsion, is precisely what the Fourth Amendment meant to express and safeguard.

The authorization of search warrants, under the circumstances of this case, was withheld by Congressional Act.[24] Hence, the search and seizure would not be legal had they been conducted under a magistrate's warrant. Mr. Justice Frankfurter, on the basis of this reasoning, thought that the Court's holding the search

[21] Note 20, supra.
[22] 221 U.S. 361 (1911).
[23] The right to inspect books and make investigations is reserved to the government by virtue of the Act cited, Note 20, supra.
[24] The Espionage Act limits the issuance of search warrants to those cases in which the property sought was stolen or embezzled, used to commit a felony, or to illegally aid a foreign nation. 40 Stat. 217, 228, 18 U.S.C.A. §612.

in this case legal was tantamount to holding that a search which could not be justified under a warrant was lawful without a warrant.

The paramount factor in the opinion of the Court was that the officers, pursuant to Congressional authority, had the right to demand inspection of defendant's coupons and conduct an examination relative thereto.[25] It was in this connection that the distinction between public and private papers was made. In applying the doctrine of the *Wilson* case, it would seem, at first blush, that the Court did not clearly distinguish between self-incrimination under the Fifth Amendment and unreasonable search and seizure under the Fourth Amendment. Being an officer of a corporation, the defendant could not have refused to produce the coupons in response to a subpoena *duces tecum*. But it seems a tremendous hurdle from this to the conclusion that the defendant could not object to the seizure of the coupons without judicial process. Be that as it may, does not the case illustrate the interplay of the Fourth and Fifth Amendments? [26]

2. *Zap v. United States*

A case decided by the Court at approximately the same time as the *Davis* case, also involving the right of federal agents to inspect books pursuant to Congressional authority, is *Zap v. United States*.[27] In this case, the defendant was convicted of presenting false claims against the United States, a felony.[28] The defendant, an aeronautical engineer, had a contract with the Navy Department to perform experimental work on aircraft and to carry out test flights to determine the success of his experiments. The test flights were to be paid for on a cost-plus-a-fixed-fee basis. He estimated the cost at four thousand dollars, but made arrangements, however, for the tests at twenty-five hundred dollars. The defendant induced the test pilot to indorse a blank check on the pretense that the check was needed for his records. The defendant, through his auditor and clerks, then caused the check to be filled in for four thousand dollars and deposited in his account. The check was entered in the books as payment to the test pilot, although in fact the pilot had received only twenty-five hundred dollars. In presenting his claims to the government, the defendant represented the cost of the tests at four thousand dollars. Pursuant to Congressional authority and the contract, the United States had the right to inspect and audit the books and records of contractors such as the defendant.[29] During the course of an audit, federal officials

[25] Note 23, supra.
[26] Note 1, supra.
[27] Note 18, supra.
[28] Criminal Code, §35(A), 18 U.S.C.A. §80.
[29] 44 Stat. 787, 10 U.S.C. §310(1) and 56 Stat. 185, 50 U.S.C. App. §643 (Supp. IV).

discovered the check. Under defective process, the federal officers seized the check. On the basis of this evidence the defendant was convicted.

The Supreme Court affirmed the conviction, holding that the check, having been obtained during the course of lawful examination of the defendant's books, was legally seized irrespective of the defective warrant for its seizure.

Mr. Justice Frankfurter, joined by the late Mr. Justice Murphy and Mr. Justice Rutledge, dissenting, pointed out that, although the search be lawful, it does not necessarily follow that the seizure is lawful. The dissent found support in previous rulings of the Court that "the requirement that warrants shall particularly describe the things to be seized . . . prevents the seizure of one thing under a warrant describing another." [30] If a search with a warrant does not permit seizure of articles other than those specified, statutory and contractual authority merely to search cannot be considered sufficient to grant that power.

3. *Harris v. United States*

Both the *Davis* and *Zap* cases were 4-3 decisions. They were decided soon after the passing of Mr. Chief Justice Stone and at the time Mr. Justice Jackson was in Nuremberg. The three Justices dissenting in these cases also dissented in *Harris v. United States*,[31] where they were joined by Justice Jackson.

In the *Harris* case, federal agents, acting under the authority of an arrest warrant charging violation of the Mail Fraud Statute [32] and the National Stolen Property Act,[33] gained access to the defendant's apartment. After placing the defendant under arrest, the agents conducted a search of his four-room apartment. The search was made for the purpose of finding cancelled checks believed to have been stolen by the defendant and used to perpetrate a forgery. After a meticulous, five-hour search, the agents discovered in a bedroom bureau drawer an envelope marked "George Harris, Personal papers." Therein the agents found Selective Service Classification Cards and Registration Certificates. Harris was convicted, not for the crimes for which he was initially arrested, but for the unlawful possession, concealment and alteration of the classification cards and certificates,[34] his motion to suppress the evidence having been overruled.

The Supreme Court sustained the admission of the evidence on the ground that the search and seizure, although concededly without the authority of a search warrant, were incidental to a lawful arrest. Confronted with their earlier decisions in which

[30] Marron v. United States, 275 U.S. 192, 196 (1927).
[31] Note 19, supra.
[32] 35 Stat. 1130, 1131, 18 U.S.C. §338.
[33] 53 Stat. 1178, 1179, 18 U.S.C. §413 *et seq.*
[34] 54 Stat. 885, 894-895, 50 U.S.C. App. §311; and 35 Stat. 1098, 18 U.S.C. §101.

general exploratory searches had been denounced,[35] the Court found it necessary to distinguish the *Harris* case. The Court based its distinction on the ground that the agents in the *Harris* case had conducted the search for the purpose of discovering the instrumentalities by which the crimes charged in the arrest warrant had been committed, which the agents had reason to believe were in the defendant's apartment. Hence, the Court reasoned, the entry upon the premises being authorized and the search which followed being valid, there is nothing in the Fourth Amendment which prohibits the seizure of government property, the possession of which is a crime, discovered in the course of the search, even though the officers were not aware that such property was on the premises when the search was initiated. The draft cards, being government property, were illegally in the custody of the defendant, and in so retaining them, Harris was guilty of a "continuing offense" against the laws of the United States. A crime was being committed in the very presence of the agents conducting the search.

Mr. Justice Frankfurter, dissenting in the *Harris* case, based his dissent largely on the ground that even if the agents had a warrant to search for cancelled checks, they could not seize other items discovered in the process.[36] Repeating his dissenting statements from the *Zap* case, he again emphasized that even if the search was reasonable it did not follow that the seizure was lawful. He was of the opinion, however, that the search was illegal at its inception and so could not retrospectively gain legality by what was uncovered. The Justice further seized upon the fact that there was ample opportunity for the officers to have secured authority from a magistrate to conduct the search, and later authority to have seized the unexpected articles discovered in the search.

While the *Harris* case has made definite inroads on the protection afforded by the Fourth Amendment, later cases, as will be seen, have confined it strictly to its facts. In the later case of *Trupiano v. United States*,[37] after distinguishing its facts from those in the *Harris* case, the Court stated that it was confining itself to the precise facts of the case under consideration, "leaving it to another day to test the *Harris* situation by the rule that search warrants are to be obtained and used whenever reasonably practicable,"[38] Whether the Court, if confronted with similar facts, would overrule the *Harris* case is, of course, speculative. The words of the Court in the *Trupiano* case, however, seem not without significance. Whether the decision in the *Harris* case is sound or not, it does mark the high-water point beyond which the Court has

[35] Note 6, supra.
[36] Cf. Fed. Rules Crim. Procedure, 41(e) (1946), 18 U.S.C.A. (Supp. 1948), following section 687, which provides that the evidence can be suppressed on the ground that "the property seized is not that described in the warrant."
[37] 334 U.S. 699 (1948).
[38] 334 U.S. at 709.

since refused to go. More than that, the *Harris* case is a conspicuous turning point in the trend of decisions in the field of search and seizure.

A Return to Liberality

1. *Johnson v. United States*

Beginning with the case of *Johnson v. United States*,[39] in December, 1947, and continuing through *Lustig v. United States*,[40] in June, 1949, the Court appears to have returned to a policy of applying the Fourth Amendment more liberally in favor of the citizen. The *Johnson* case was the first to be decided in which those Justices who had dissented in the *Davis, Zap* and *Harris* cases began to constitute the majority of the Court, having been joined by Mr. Justice Douglas. While the *Johnson* case deals mainly with the illegality of an arrest made without a warrant, rather than with the scope of a search and seizure as an incident to a lawful arrest, it tends to illustrate the Court's return to a policy of vigilantly guarding the citizens' right to be let alone.

In the *Johnson* case, federal narcotics agents, acting upon information that unknown persons were smoking opium in a certain hotel, were there conducting an investigation. Recognizing the odor of burning opium apparently emanating from the defendant's room, the agents, without a warrant, demanded entry to the room under color of office. They had not known the occupant of the room, until after identifying themselves, they were admitted by the defendant. Placing the defendant under arrest, the agents then conducted a search of her room, which revealed incriminating opium and smoking apparatus. The defendant was subsequently convicted for violations of the federal narcotics laws.[41]

The Supreme Court reversed the conviction. In holding that it was unlawful to arrest the defendant and search her living quarters without the sanction of a warrant, the Court stated that no exceptional circumstances appeared to justify the search without a warrant. The Fourth Amendment, the Court held, requires that those inferences which reasonable men draw from evidence must be drawn by a neutral and detached magistrate instead of being judged by the officers engaged in the "often competitive enterprise of ferreting out crime."[42] The Court also stated that there was not probable cause to arrest the defendant until the officers had entered her room and found her to be the sole occupant. In such case, the Government was obliged to justify the

[39] 333 U.S. 10 (1947).
[40] 69 S. Ct. 1372 (1949).
[41] 26 U.S.C. §2553(a); and 21 U.S.C. §174.
[42] 333 U.S. at 14.

arrest by the search and at the same time justify the search by the arrest. This, the Court said, will not do.

One of the most criticized parts of the Court's opinion in *Harris v. United States* [43] was the implication that a search could be justified by the nature of what was turned up during such search. It would seem that any such implication was repudiated in the *Johnson* case, the Court stating:

> Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.[44]

2. *McDonald v. United States*

A recent case somewhat similar in its facts to the *Johnson* case, although involving the rule that in order to complain of an unreasonable search and seizure one must have a property interest in the premises searched or the articles seized, is *McDonald v. United States*.[45]

In the *McDonald* case, police officers in the District of Columbia, believing that an illegal lottery was in process in a room rented by the accused, gained access to the rooming house by entering a window leading into the landlady's room. They had neither an arrest nor a search warrant. After illegally gaining entrance to the building, one of the officers, looking through the transom of accused's room, saw the tenant and another person in the room, as well as numbers slips, money and adding machines. The officers entered the room, placed the occupants under arrest and seized the lottery paraphernalia. On the basis of this evidence, both the tenant and his guest were convicted of carrying on an illegal lottery.[46]

The conviction was reversed by the Supreme Court in an opinion written by Mr. Justice Douglas. The Court held, with regard to the tenant, that the evidence should have been excluded and the property returned to him, on the ground that the search and seizure were made without a warrant and no compelling reasons appeared to justify the non-procurement of a warrant. Assuming, without deciding, that none of the guest's constitutional rights had been violated, the Court, nevertheless, felt obliged to reverse the guest's conviction, because the convictions of both the tenant and the guest were based on the same physical evidence which the Court held should have been returned to the tenant in response

[43] Note 19, supra.
[44] 333 U.S. at 14.
[45] 69 S. Ct. 191 (1948).
[46] 22 D.C. Code, §§ 1501, 2, 5 (1940).

to his motion for suppression and return. The admission of the evidence against the guest was necessarily prejudiced to the rights of the tenant.

3. *Di Re v. United States*

Because of the similarity in facts between the *McDonald* and *Johnson* cases, the chronological arrangement of the cases herein was interrupted for the purpose of facilitating comparison between these two cases. In the interim, the case of *United States v. Di Re*,[47] which further illustrates the Court's trend toward a more liberal application of the Fourth Amendment, was decided.

In the *Di Re* case, an investigator for the Office of Price Administration had received information that his informer had arranged to purchase ration coupons from one Buttitta. The investigator and a local police officer trailed Buttitta's car to the appointed place. There they found the informer sitting in the back seat of the car holding two ration coupons, which he said he had obtained from Buttitta. The coupons were counterfeit. The investigator had not known that Di Re, who was sitting in the front seat with Buttitta, was to be present at the rendezvous. Nor was he pointed out by the informer as being a participant in the illegal transaction. Di Re, along with the others, was taken into custody and "frisked". He was found to have two gasoline ration coupons in his pockets. He was then booked and thoroughly searched, at which time additional coupons were found in an envelope between his shirt and underwear. Di Re was subsequently convicted of knowingly possessing counterfeit gasoline ration coupons, a misdemeanor.[48]

The Supreme Court, in reversing the conviction, rejected the Government's contention that the search of Di Re was justifiable either as an incident to a lawful arrest or as an incident to a search of a vehicle believed to be carrying contraband.

Under the applicable law, an arrest without a warrant, to be valid, must be for a misdemeanor committed in the arresting officer's presence; or, if for a felony, the officer must have reasonable cause to believe that the suspect had committed a felony.

The defendant was arrested for a misdemeanor. But no misdemeanor had been committed by Di Re in the officer's presence. Admittedly, at the time of the arrest, the officer had no information implicating Di Re and no information pointing to his possession of the coupons. His mere presence in the car, the Court held, did not permit the inference that he was then committing a misdemeanor. Hence, the arrest itself was unlawful.

On appeal, the Government attempted to justify the arrest on the ground that probable cause existed for believing that Di Re

[47] 332 U.S. 581 (1948).
[48] Section 301 of the Second War Powers Act, 1942, 50 U.S.C. App. §633 (Supp. V, 1946).

had committed the felony of conspiracy under Section 37 of the Criminal Code.[49] It was also asserted that probable cause existed for believing the defendant guilty of possessing a known counterfeit writing with the intent to utter it as true for the purpose of defrauding the United States, a felony under Section 28 of the Criminal Code.[50]

The Court, assuming *arguendo*, that an arrest without a warrant on a charge not committed at the time may later be justified if the arresting officer's knowledge gave probable cause to believe any felony in the statute books had been committed, held that the circumstances at the time of this arrest afforded no reason to believe that Di Re had committed any felony. If the presence of Di Re in the automobile did not authorize an inference of bare participation in the sale of the coupons, *a fortiori*, it could not support an inference of felony where knowledge and intent are elements of the offense.

In reply to the Government's second defense of the search, that it was justified as an incident to the search of a vehicle reasonably believed to be carrying contraband, the Court held that, assuming reasonable ground to search the car existed, this did not confer an additional right to search the occupants. The right to search a car without a warrant confers no greater latitude to search occupants than a search with a warrant would permit. Had the officer been armed with a warrant to search the car, he would have no authority to search the persons found therein. The defendant's mere presence in the car did not cause him to lose immunities from search of his person to which he would otherwise be entitled. In this respect, it will be remembered that the Fourth Amendment requires a warrant "particularly describing the place to be searched, and the persons or things to be seized."

4. *Trupiano v. United States*

The rule that a search warrant may be dispensed with under certain circumstances where it is not reasonably practicable to secure one is only applicable when there has been a lawful arrest. The converse of this rule is also true. An interesting case on this point is *Trupiano v. United States*,[51] in which the Court held that, notwithstanding the existence of a lawful arrest, the officers could not seize contraband which was in plain sight where they had ample opportunity and it was reasonably practicable for them to have secured a warrant.

In the *Trupiano* case, federal agents had received information that the defendant planned to build and operate a still. One of the agents succeeded in obtaining employment with the defendant and,

[49] 18 U.S.C. §88.
[50] 18 U.S.C. §72.
[51] Note 37, supra.

over a period of three months, aided him in erecting the still. This agent was in possession of a two-way radio set, and consequently, kept the head office informed of the progress being made. At the opportune time, while the defendant was in the act of operating the still, federal agents moved in and arrested him. After placing him under arrest, certain contraband material was seized, although the officers had not a search warrant.

The Supreme Court held that the arrest was valid since made for a crime committed in the presence of the officers; but the search and seizure were held invalid because of the abundance of time in which the officers could have secured a search warrant. Recognizing the well-established rule that arresting officers may look around at the time of the arrest and seize those items of contraband which are in plain sight, the Court held that it did not apply where it was reasonably practicable for the officers to secure a warrant. Quoting from *Johnson v. United States*,[52] the Court said:

> No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement.[53]

5. *Lustig v. United States*

One of the latest cases in the field of search and seizure is *Lustig v. United States*,[54] decided in late June, 1949. The case deals not so much with the scope of a search and seizure, but rather involves the rule that, unless federal officials have participated or cooperated in an illegal search, the fruits of such illegal search are admissible as evidence in a federal prosecution.[55] The case is an excellent illustration of what constitutes participation by a federal officer in an illegal search, and serves further to illustrate the Court's liberal application of the federal exclusionary rule of evidence.

In the *Lustig* case, a federal secret service agent received information indicating a violation in a hotel room of a counterfeiting statute, made a preliminary investigation, and conveyed to local police his suspicion and the fact that he was "confident that something was going on" in the room. Thereafter, the local police secured warrants for the arrest of the defendants, occupants of the room, charging the violation of a local ordinance requiring "known criminals" to register with the local police within a cer-

[52] 333 U.S. 10, 15 (1948).
[53] 334 U.S. at 706 (1948).
[54] 69 S. Ct. 1372 (1949).
[55] Cases cited notes 7, 8 & 9, supra.

tain period after arrival in town. The local police, unaccompanied by the federal agent, proceeded to the hotel, and upon finding the defendants absent, entered and searched their room. Only after this search revealed counterfeiting paraphernalia was the federal agent summoned to the hotel. The federal agent examined the evidence uncovered by the local police in their search of the room and in a subsequent search of defendants who were arrested upon returning to the room; however, he did not participate in the actual searches. The evidence so uncovered was eventually turned over to federal authorities for use in prosecuting the defendants on counterfeiting charges.

The defendants were convicted. The District Court admitted the evidence after concluding that the illegal search had been conducted entirely by state or local officers, independent of any participation, connivance or arrangement on the part of the federal agent to have an illegal search made.

The Supreme Court reversed the conviction, in a 5-4 decision. Recognizing their earlier pronouncements of the rule that evidence obtained as a result of an illegal search made by other than federal officers is admissible in a federal prosecution, the Court held that the federal agent had participated in this search and seizure. It was pointed out that a search is a functional, not merely physical process; that it is not completed until the illicitly obtained articles have been effectively appropriated from the premises. The federal agent, having joined the searchers and examined the evidence, had participated in its appropriation. To distinguish between parties who participate from the beginning of a search and those who participate by joining in the search before it has run its course, the Court said, would be to draw too fine a line in the application of the Fourth Amendment.

Holding as they did, that the federal agent had participated in the search, the Court found it unnecessary to consider the result had the search been conducted entirely by local officers and the evidence turned over to federal authorities for use in a federal prosecution. The Court's earlier pronouncements on this question would seem to have set the question at rest, as it has been frequently held or stated that evidence received as a result of an illegal search conducted solely by local officers is admissible in a federal prosecution.[56] But in a concurring opinion by the late Mr. Justice Murphy, joined by Mr. Justice Douglas and Mr. Justice Rutledge, their position on the reserved question seems clear. The important consideration to them is the presence of an illegal search; whether local or federal officers participated should be of no consequence.

Conclusions and Acceptibility of Rule

The question of the admissibility of evidence in a state court which has been illegally obtained by local officers is not properly

[56] Cases cited notes 7, 8 & 9, supra.

within the scope of this article. Suffice to say that the state courts are free to accept or reject the federal exclusionary rule.[57] This was set at rest in *Wolf v. People of Colorado*,[58] decided by the Court the same day as the *Lustig* case. It was there held that the federal exclusionary rule is not a command of the Fourth Amendment, but is a judicially created rule of evidence, and does not impose its sanction upon the States through the Due Process Clause of the Fourteenth Amendment.

Although the federal exclusionary rule is not a command of the Fourth Amendment, is it not essential to the enforcement of the commands of the Fourth Amendment? Is there any alternative means of protecting the citizen from unreasonable searches and seizures? It has been frequently stated that the victim of an unreasonable search may find his redress in a civil action for trespass against the violator. Just as frequently, it has been asserted that the violator is amenable to criminal prosecution. In form, these are the alternatives. In substance, they are illusory.

The fallacies in these so-called alternatives are forcefully exposed by the late Mr. Justice Murphy in his dissenting opinion in *Wolf v. People of Colorado*.[59] There, it is pointed out that the nominal damages usually recoverable in an action for simple trespass is no deterrent to an officer who envisions a salary increase for "cracking the case." There, it is pointed out that the futility of expecting a district attorney to prosecute himself or his associates for violations of the Fourth Amendment during a raid which he, himself, or his associates had ordered is only too well known.

It must, of course, be recognized that the exclusionary rule sometimes delays the apprehension and prosecution of criminals. Sometimes it prevents their conviction, although they are manifestly guilty of the crime charged. But it must also be remembered that innocent citizens may be, and are, the victims of the trespass.

Apropos of this conclusion is the admonition expressed by Mr. Justice Frankfurter in his dissenting opinion in *Davis v. United States*:[60]

> It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.

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[57] At the present time, the federal exclusionary rule has been accepted in seventeen states, rejected in thirty, and undecided in one. Accepted: Fla., Idaho, Ill., Ind., Iowa, Ky., Mich., Miss., Mo., Mont., Okla., S. D., Tenn., Wash., W. Va., Wis., and Wyo. Rejected: Ala., Ariz., Ark., Cal., Colo., Conn, Del., Ga., Kans., La., Me., Md., Mass., Minn., Neb., Nev., N. H., N. J., N. M., N. Y., N. C., N. D., Ohio, Ore., Pa., S. C., Tex., Utah, Vt., and Va. Undecided: R. I. Wolf v. People People of Colorado, 69 S. Ct. at 1367, App., Table I, to Court's opinion.

[58] 69 S. Ct. 1359 (1949).

[59] 69 S. Ct. at 1369, 1370.

[60] 328 U.S. at 597.

ADMISSIBILITY OF DECLARATIONS MADE IN THE PRESENCE OF A LITIGANT

WILLIAM P. HORAN*

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).

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in helping to prevent the preparation of such documents by real estate brokers and others. The Unauthorized Practice committee is continuing to study ways and means of implementing this entirely wholesome practice. Such possibilities are the printing of association forms of conveyancing which could be copyrighted and used exclusively by attorneys with the certification printed on. Active steps are also being taken to hit unauthorized practice through the courts.

Notwithstanding other measures which may be taken, however, the use of the certification is important in itself, and in a letter to all members of the Denver Bar Association, Mr. Newcomb stated "There should be no delay in its enthusiastic and wholehearted acceptance by the members of the bar. The use of the stamp, of course, is purely voluntary. The success of the practice, however, depends entirely upon you and the generality with which it is used."

Any member of the bar, whether or not a member of the Denver or Colorado bar association, may purchase one or more of these stamps by remitting a check for the proper amount, payable to the Denver Bar Association, 319 Chamber of Commerce Bldg.

JANUARY INSTITUTE ON CREDITORS' RIGHTS

(or Squeezing Blood from Turnips)*

Creditors' rights and remedies after judgment will be the general subject of the next institute being sponsored by the Denver Bar Association on successive Tuesday evenings, January 24 and January 31, 1950.

The institute will be open to all members of the Colorado bar, without charge, and will be held in the Chamber of Commerce Dining Room (sans dinner) beginning at 8:00 p.m. each evening.

The principal speakers and their respective subjects will be:

Tuesday, January 24

"Supplemental Proceedings and Contempt Citations" (or "Back 'Em Up to the Wall"), by Wm. Rann Newcomb.

"Rights and Remedies of Creditors with Respect to Fraudulent Conveyances" (or "Cherchez la Femme"), by Worth Allen.

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PATENT SECTION OF THE COLO. BAR ASSN.

On November 17, 1949, a new section of the Colorado Bar Association was established, the name of which is the "Patent Section of the Colorado Bar Association."

Active membership in this section is open to members in good standing of the Colorado Bar Association, admitted to practice before the United States Patent Office, who make a specialty in their practice of the law of patents and Federal trade marks. Associate membership is open to attorneys admitted to practice before the highest court of their respective states who are interested in promoting the best interests in the patent profession. The latter will be accorded all of the privileges of active members except that of voting.

The officers of this organization for the year 1949-50 are as follows: Woodruff A. Morey—Chairman; Horace B. Van Valkenburgh—Vice-Chairman; Victor C. Muller—Secretary-Treasurer, (300 E & C Bldg., Denver).

Two committees have been formed. The Legislative and Patent Office Affairs Committee is composed of Phineas H. Lamphere—Chairman; Woodruff A. Morey; and Victor C. Muller. The Trade Mark Committee is made up of Horace B. Van Valkenburgh—Chairman; Carle Whitehead; and Charles B. Messenger.

OUT OF STATE BAR JOURNALS AVAILABLE

Some thirty or forty bar association journals from other states and cities are currently being received in exchange for DICTA. Since the joinder of the University of Denver College of Law in the publication of DICTA, law review exchanges are directed to the University law library.

Current issues of the following publications are on hand in the secretary's office at 319 Chamber of Commerce Building, Denver, and are available to members:

American Bar Association Journal
American Judicature Society Journal
Army Information Digest
California State Bar Journal
Case and Comment
Los Angeles Bar Bulletin
Connecticut Bar Journal
Commercial Law Journal
District of Columbia Bar Association Journal
Florida Law Journal
Illinois Bar Journal
Chicago Bar Record
Iowa State Bar Assn. News Bulletin
Kansas Judicial Council Bulletin
Michigan State Bar Journal
Detroit Lawyer
Massachusetts Law Quarterly
Boston Bar Bulletin
Minnesota Bench and Bar
Hennepin Lawyer
Missouri Bar Journal
New York State Bar Assn. Bulletin
New York City Record
Ohio Bar
Cleveland Bar Association Journal
Pennsylvania Bar Association Quarterly
Philadelphia Shingle
Popular Government (Univ. of N. C.)
Texas Bar Journal
Utah Bar Bulletin
Vancouver Bar Association Advocate
Washington State Bar News
Wisconsin Bar Bulletin