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pressed prior to indictment.[35] An extension of the confession doctrine, however, would be easier and far less confusing.

That on certain occasions federal and local police officials have used gestapo methods in wringing confessions out of criminal suspects is a matter of common knowledge.[36] No lengthy discussion is necessary to point out the glaring incompatibility of such methods with the protection of individuals which the Federal Constitution endeavors to guarantee. Perhaps a general adoption of the circuit court's ruling will obstruct public prosecutors more than negligibly. Even so, it seems consistent with the aims of fundamental constitution precepts.

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Admissibility in Evidence of Statements Made in the Presence of the Defendant

There exists today a popular misconception that merely because a statement has been "made in the presence of the defendant" it is for that reason alone admissible in evidence.[1] No justification for this view is to be found in any of the exceptions to the Hearsay Rule,[2] or in any general principle of Evidence. The origin and development of the misconception, however, can be accounted for by a number of decisions which used the phrase "made in the defendant's presence" as a rule of thumb in place of a correct determination of whether or not the statements were hearsay.[3]

That the defendant's presence is not the conclusive element was recognized in the recent case of *People* v. *Bob*,[4] where the Supreme Court of California found it reversible error for the trial court to admit certain extra-judicial statements of an incriminatory and accusatory character, even though they were made in the defendant's presence. In reversing the trial court the state supreme court held that unless such accusatory or incriminatory statements are introduced to show an admission of guilt

35 Go-Bart Co. v. U. S., 282 U. S. 344 (1931).

36 "Report of National Commission on Law Observance and Enforcement," Vol. IV, "Report on Lawlessness in Law Enforcement," (1931). Kooken, "Post War Influence Upon Criminal Investigation," (1946), 35 J. Crim. Law & Criminology 426.

1 Di Carlo v. United States, 6 F. (2d) 364, 366 (C.C.A. 2d, 1925): "It is common error to suppose that everything said in the presence of a defendant is *ipso facto* admissible against him."

2 These exceptions are the following: dying Declarations, statements of fact against interest, statements about family history, attesting witnesses' statements, regular Entries in the course of business, statements about private land boundaries, statements of decedents in general, reputation about land, character, marriage, etc., scientific treatises, commercial and professional lists, etc., affidavits, statements of physical sensations and mental conditions, spontaneous exclamations, and official statements. Wigmore, Treatise on Evidence (3rd Ed. 1940) §§1420-1426.

3 The Hearsay Rule operates to exclude testimony that does not derive its validity solely from the witness, but which rests partly on a declarant not before the court. Because the declarant is not before the court for a cross examination to test the truthfulness of the assertion, such evidence is considered untrustworthy and therefore inadmissible. Two examples will illustrate the point: (1) where *A* testifies as to *B's* utterances for the purpose of showing what was said by *B*, and (2) where *A* testifies to something said by *B* for the purpose of proving the truthfulness of *B's* utterances. It is clear that the first example is not hearsay since the truth of *B's* statement is not in question and it is immaterial that *B* is unavailable for cross examination. The second example is hearsay because it appears that a cross examination of *A* can not adequately probe into the truthfulness of the statements of *B* inasmuch as the declarant is absent. Wigmore, *supra* note 2, §§1361-1362.

4 29 Cal. (2d) 321, 175 P. (2d) 12 (1946). Also *see* Note (1947) 35 Calif. L. Rev. 456.

on the part of the defendant by his silence, they are clearly subject to the operation of the Hearsay Rule and therefore inadmissible.[5]

It has long been the rule that when a defendant in a civil or criminal suit makes an extra-judicial admission of guilt, testimony of such admission may be received in evidence.[6] For example, *A* may testify that in response to *B's* accusation, the defendant readily admitted his guilt. From that universally accepted doctrine there was developed the maxim "silence gives consent."[7] This maxim was a reasonable extension of the doctrine of admissions under the theory that a man may admit his guilt just as effectively by silence in the face of an incriminatory or accusatory statement as by an outright admission of guilt. Like all maxims, this one furnished a broad principle that could not serve without definite qualifications based upon some very practical considerations.[8]

The following qualifications to the principle of "admissions by silence" have been developed and applied by the courts: (1) there must have been an extra-judicial statement, either incriminatory or accusatory, (2) made within the presence of the defendant, (3) within his hearing, (4) understood by the defendant, (5) under circumstances which afforded him an opportunity to reply, (6) and to which statement an innocent man if similarly situated would reply with a denial.[9] At the same time the doctrine of admissions was extended by the courts in deciding that extra-judicial statements need not be of such character that a failure to deny them impliedly admits guilt of every element of the crime for which a party is being tried.[10] It is enough if the silence furnishes a factor for

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5 Although the decision was by a divided court, the two dissenting opinions disagreed with the majority only as to the factor of defendant's alleged failure to properly object to the introduction of hearsay testimony in evidence. *Cf.* People v. Louis, 275 N.Y.S. 263 (1934) (where defendant failed to object to hearsay testimony at all).

6 Van Meter v. Gurney, 240 Ill. App. 165 (1926).

7 Wigmore, *supra* note 2, §1071.

8 Wigmore has suggested that the qualifications universally applied (discussed *infra*) by the courts should be modified. His theory is that they were designed to protect the defendant when he was unable to take the witness stand in his own behalf; however with that disability everywhere removed he suggests a less rigid enforcement of the qualifications. Wigmore, *supra* note 2, §1071. For the historical development of the qualifications see Jasmin v. Parker et. al., 102 Vt. 405, 148 Atl. 874 (1929); Mattocks v. Lyman, 16 Vt. 113 (1844); Vail v. Strong, 10 Vt. 457 (1838); Moore v. Smith, 14 S. & R. 388; Cohen, The Spirit of Our Laws (2d Ed.) at page 190.

9 Gentilli v. U. S., 22 F. (2d) 67 (C.C.A. 9th, 1927); People v. Willmurth, 176 P. (2d) 102 (1947); Tillman v. Commonwealth, 185 Va. 47, 37 S.E. (2d) 768 (1946); Kincheloe v. State, 147 Tex. Crim. 596, 183 S.W. (2d) 463 (1944); Commonwealth v. Zimmerman, 143 Pa. 331, 17 Atl. (2d) 714 (1941); Clark v. State, 240 Ala. 65, 197 So. 23 (1940) (murder; inculpatory statements of co-conspirator unanswered; admitted); People v. Nerida, 29 Cal. App. (2d) 11, 83 P. (2d) 964 (1938) (accusatory statements made by witness in presence of defendant unanswered); People v. Cozzi, 364 Ill. 20, 2 N.E. (2d) 915 (1935); State v. Wilson, 205 N.C. 376, 171 S.E. 338 (1933); People v. Kessler, 333 Ill. 451, 164 N.E. 840 (1929); People v. Dean, 308 Ill. 74, 139 N.E. 37 (1923); Bell v. McDonald, 308 Ill. 329, 139 N.E. 613 (1923); Tate v. State, 95 Miss. 138, 48 So. 13 (1909); People v. Andrae, 305 Ill. 530, 137 N.E. 496 (1922); State v. Epstein, 25 R.I. 131, 55 Atl. 204 (1903) (accusation made while defendant in semi-conscious state inadmissible); People v. Koerner, 154 N.Y. 355, 48 N.E. 370 (1897) (statement made while defendant in pain held inadmissible); People v. Ackerson, 124 Ill. 563, 16 N.E. 847 (1888); 1 Greenleaf, Evidence, §§197-215; Roscoe, Evidence, §353; Wharton, Criminal Evidence, §656; Wigmore, *supra* note 2, §1071.

10 Commonwealth v. Zimmerman, 143 Pa. 331, 17 Atl. (2d) 714 (1941) cited *supra* note 9.

the jury to use in determining guilt. The silence is at most an implied admission or acquiescence in the truth of accusatory or incriminatory statements with the testimonial weight to be given the silence dependent upon the character of the statement.[11]

It must be remembered that the extra-judicial statement alone would of itself be objectionable as hearsay testimony, being a statement made at a time other than at the trial, offered to prove the truth of the matter therein asserted, and based entirely on the credibility of a declarant not then before the court. However, in cases of implied admissions, as in cases of express admissions, the extra-judicial statements or accusations are not offered as evidence of their truth merely because they were uttered. They are secondary in nature and are accepted in evidence as untainted by the hearsay stigma because they are a necessary predicate to the showing of the substantive evidence, *i.e.*, the reaction of the defendant thereto.[12] It can not be over-emphasized that receipt into evidence of extra-judicial statements for the purpose of showing defendant's failure to deny them must be accomplished with caution. Silence in the face of statements made out of court is too great a prejudicial factor to be admitted into evidence lightly. Therefore the courts should and do scrutinize with zeal the circumstances to determine whether the previously stated qualifications have been met. To allow but one of these qualifications, *i.e.*, the defendant's presence, to be all controlling, would be to place a lesser burden of proof upon the prosecution when it seeks to introduce an admission by silence than when it introduces an express admission from the accused person. When an express admission is introduced it is self-evident that the defendant heard the accusation, understood the accusation, and felt obliged to make an admission, for otherwise no answer would be forthcoming from him. It appears reasonable, therefore, that the prosecution when introducing an implied admission should have the same burden of showing the existence of these various qualifying conditions.

There is a wide divergence of judicial opinion concerning the acceptability of statements made while defendant is under arrest or in custody.[13] Some courts hold that the mere fact of arrest or detention does not destroy admissibility but should be weighed as a factor in considering whether the accused was able and called upon to make a reply.[14] In other jurisdictions it has been held that the defendant is under no obligation to speak when under arrest or in custody, and that the maintenance of silence in the face of accusations is the best policy strategically for the

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11 State v. Brown, 209 Minn. 478, 296 N.W. 582 (1941); Doherty v. Edwards, 227 Ia. 1264, 290 N.E. 672 (1940); but *cf* Greenwood v. Bailey, 28 Ala. App. 362, 184 So. 285 (1928).

12 See Wharton, *supra* note 9 §656.

13 Wharton, *supra* note 9, §661; Wigmore *supra* note 2 §1072.

14 Hawthorn v. State, 206 Ark. 1009, 178 S.W. (2d) 490; Cawthorn v. State, 71 Ga. App. 497, 31 S.W. (2d) 64 (1944) (assault with intent to murder; silence of defendant when statement of co-defendant read in his presence held admissible); Emmett v. State, 195 Ga. 517, 25 S.E. (2d) 9 (1943); Commonwealth v. Vallone, 347 Pa. 419, 32 Atl. (2d) 889 (1943) (transporting female for purpose of prostitution; statement read to defendant held admissible; see dissent by Maxey, J.); Muse v. State, 29 Ala. App. 271, 196 So. 148 (1940); Hardwick v. State, 26 Ala. App. 536, 164 So. 107 (1935) (a co-defendant makes accusation in presence of other defendant); People v. Egan, 133 Cal. App. 152, 23 P. (2d) 1042 (1933); People v. Kessler, 333 Ill. 451, 164 N.E. 840 (1929).

accused to follow.[15] Wharton in his treatise on criminal evidence has supported this latter view on the grounds that it has long been a popular practice among police officers to read detailed statements purportedly of a co-defendant with a view of eliciting either a complete confession or an admission by silence, to be used against the defendant to whom the statement is read.[16] He believes that such accusatory statements should be held inadmissible on the ground that there is no necessity for denying or answering them.[17] A doctrine known as the Massachusetts Rule has developed, which strictly holds that the mere fact of arrest is sufficient to render inadmissible an implied admission, but the arrest must be actual and based on charges of commission of a crime, and custody must be such as to deprive the accused of his freedom.[18]

It appears that the general approach to determine admissibility of extra-judicial statements has consisted chiefly of an investigation to determine the factor of defendant's presence. That such approach has been highly unsatisfactory is evidenced by the ambiguous and uncertain language used by the courts, and the resulting uncertainty and confusion. Because the objection to the introduction of such statements is based upon their hearsay character, it is submitted that only a determination of the hearsay elements in each instance will result in consistent and understandable holdings. The unrealistic and unwarranted use of a theory that the "defendant's presence" as the criterion can lead only to a confusion of concepts and a gross misapplication of evidentiary rules.

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15 U. S. v. LoBiondo, 135 F. (2d) 130 (C.C.A. 2d, 1943); Yep v. U. S., 83 F. (2d) 41 (C.C.A. 10th, 1936); State v. Redwine, 23 Wash. (2d) 467, 161 P. (2d) 205 (1945); State v. Bowdry, 346 Mo. 1090, 145 S.W. (2d) 127 (1940); Trimble v. State, (Texas Crim. Rpts. 1937) 104 S.W. (2d) 31 (incriminating statement made over telephone in defendant's presence); State v. McKenzie, 184 Wash. 32, 49 P. (2d) 1115 (1935).

16 Wharton, *supra* note 9 §661.

17 See People v. Simmons, 28 Cal. (2d) 699, 172 P. (2d) 18 (1946) (for an indication of a trend towards curtailing admissibility of statements made while defendant under arrest; noteworthy because of California's former policy of acceptance of all such admissions by silence).

18 See Commonwealth v. Morriss, 264 Mass. 314, 162 N.E. 362 (1928) (admission prior to arrest); Commonwealth v. Reibstein, 257 Mass. 436, 154 N.E. 271 (1926) (admission by silence prior to arrest followed by reiteration after arrest of former admission).