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## CRIMINAL LAW CASE NOTES AND COMMENTS

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### THE ADMISSION IN EVIDENCE OF STATEMENTS "MADE IN THE PRESENCE OF THE DEFENDANT"

MALCOLM GAYNOR

A common belief among criminal lawyers is that a statement, although hearsay, is nevertheless admissible in evidence if it is made in the presence of the defendant.<sup>1</sup> There is no support in the cases for that belief. The presence of the defendant is not sufficient to render admissible a statement which would otherwise be hearsay; such presence adds nothing to the trustworthiness of the statement.<sup>2</sup> Nevertheless, testimony concerning statements made in the presence of the defendant may be admissible if the statement evokes a reaction by the defendant which constitutes an acknowledgement of guilt.<sup>3</sup> Thus, testimony that the defendant failed to deny statements made in his presence, which he would naturally deny if they were

untrue,<sup>4</sup> is admissible, providing that the defendant had both the opportunity and the motive to deny the statements.<sup>5</sup>

In accordance with the foregoing theory, *W* may testify that he saw and heard *A* accuse the defendant of a crime, and furthermore that the defendant failed to deny *A*'s accusation. If the accusation and the circumstances accompanying it were such as to call for a denial if the statement were false, the court will admit *W*'s testimony to the fact that the de-

<sup>1</sup> This maxim is probably the result either of a careless reading of the cases, or of reliance upon statements made in legal digests and encyclopedias without reading the cases cited as authority. See, e.g., 20 AM. JUR., *Evidence* § 555 (1939), in which it is said: "An objection that a statement is hearsay is not available as to a statement made in the presence of the party against whom the statement is offered in evidence and in a conversation in which he took part."

<sup>2</sup> *Di Carlo v. United States*, 6 F.2d 364 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925); *State v. Temple*, 240 N.C. 738, 83 S.E.2d 792 (1954); 4 WIGMORE, *EVIDENCE* § 1071 (3d ed. 1940); Morgan, *Admissions*, 12 WASH. L. REV. 181, 188 (1937).

<sup>3</sup> MODEL CODE OF EVIDENCE rule 507, comment b (1942).

<sup>4</sup> This principle is applied to civil as well as criminal cases. In civil cases the failure to deny any statement that contains an assertion of fact, which if untrue, a party would naturally deny, is admissible. *Maryland Casualty Co. v. Pearson*, 194 F.2d 284 (2d Cir. 1952); *Dill v. Widman*, 413 Ill. 448, 109 N.E.2d 765 (1952); *McGulpin v. Bessmer*, 241 Iowa 1119, 43 N.W.2d 121 (1950). In criminal cases, on the other hand, the statement must generally be an accusation of guilt. See, e.g., *Albano v. State*, 89 So.2d 342 (Fla. 1956).

<sup>5</sup> *Di Carlo v. United States*, 6 F.2d 364 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925); *People v. Bennett*, 3 Ill.2d 357, 121 N.E.2d 595 (1954); *People v. Hanley*, 317 Ill. 39, 147 N.E. 400 (1925); *Commonwealth v. O'Brien*, 179 Mass. 533, 60 N.E. 213 (1901); *Commonwealth v. Funai*, 146 Mass. 570, 16 N.E. 458 (1888); *Commonwealth v. Harvey*, 67 Mass. (1 Gray) 487 (1854); *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847); *Vail v. Strong*, 10 Vt. 457 (1838); *McCORMICK, EVIDENCE* § 247 (1954); 4 WIGMORE, *EVIDENCE* § 1071 (3d ed. 1940).

fendant failed to deny *A*'s accusation. Clearly, some accusations are more incriminating than others, and consequently have a greater tendency to require a denial. For this reason, the jury must know the exact wording of the accusatory statement in order to ascertain the need for a denial by the defendant. Therefore, the court must admit *A*'s accusation as well as the defendant's failure to deny. Nevertheless, the jury is to consider the accusation only for the purpose of giving meaning to the defendant's failure to deny. The accusation itself is not to be considered for the truth of the matter asserted.<sup>6</sup>

Since an accusatory statement is not admitted for the truth of its contents, the accusation is technically not within the scope of the rule against hearsay.<sup>7</sup> In addition, because the truth of the accusation has no bearing upon the defendant's reaction, evidence concerning the credibility of the accuser is inadmissible.<sup>8</sup> And, since a person's occupation

his credibility, such evidence of the accuser's identity should, as a rule, be excluded.<sup>9</sup> The court should only admit the fact that an accusation was made, and the contents of that accusation.

The statement is sometimes made that *silence* of the defendant in the face of an accusation is the factor which renders the evidence admissible. However, it is the defendant's *failure to deny* an accusation made in his presence, rather than his silence, which is significant.<sup>10</sup> Therefore, if the defendant expressly denies the truth of the accusation, the statement is inadmissible.<sup>11</sup> On the other hand, if the response to the accusation is an equivocal answer, the accusation and the answer will be admitted, provided that the equivocal answer would tend to raise an implication that the defendant believed the accusation to be true.<sup>12</sup> Silence of the defendant in the face of an

<sup>6</sup> *People v. Davis*, 43 Cal.2d 661, 276 P.2d 801 (1954), *cert. denied*, 349 U.S. 905 (1955); *People v. Baker*, 119 Cal. App.2d 426, 259 P.2d 737 (1953); *People v. Homer*, 8 Ill.2d 268, 133 N.E.2d 284 (1956); *People v. Nitti*, 312 Ill. 73, 143 N.E. 448 (1924).

<sup>7</sup> Hearsay is defined as "testimony in court . . . of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting upon the credibility of the out-of-court asserter." McCORMICK, EVIDENCE § 225 (1954); 5 WIGMORE, EVIDENCE § 1361 (3d ed. 1940). In addition, the principal objection to hearsay evidence, namely, that the opponent does not have the opportunity to cross-examine the declarant, does not apply here because cross-examination of the declarant bears only upon the truth of the matter asserted. See 5 WIGMORE, EVIDENCE § 1367 (3d ed. 1940). Moreover, the defendant may testify if he wishes, and explain the reason for his failure to deny the accusation. See Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L. J. 355 (1921).

<sup>8</sup> *Boston & W.R.R. v. Dana*, 67 Mass. (1 Gray) 83 (1857) in which evidence to discredit the accuser was excluded because his honesty was not in issue; *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847); *State v. Wilson*, 205 N.C. 376, 171 S.E. 338 (1933), where an infant's statement and social status are important elements of

was admitted. *But cf.*, *People v. Jordan*, 292 Ill. 514, 127 N.E. 117 (1920), in which a wife's statement was excluded. See also, Maguire, *Adoptive Admissions in Massachusetts*, 14 MASS. L. Q. 62 (May 1929).

<sup>9</sup> See text at notes 23-24, *infra*, for a discussion of those circumstances in which this evidence should be admissible.

<sup>10</sup> McCORMICK, EVIDENCE § 247 (1954).

<sup>11</sup> *People v. Yeager*, 194 Cal. 452, 229 Pac. 40 (1924); *People v. McCoy*, 127 Cal. App. 195, 15 P.2d 543 (1932); *People v. Nitti*, 312 Ill. 73, 143 N.E. 448 (1924); *People v. Pfanschmidt*, 262 Ill. 411, 104 N.E. 804 (1914); *McGeever v. American Nat'l Red Cross*, 330 Mass. 239, 112 N.E.2d 788 (1953); *Commonwealth v. Twombly*, 319 Mass. 464, 66 N.E.2d 362 (1946); *Commonwealth v. Ellis*, 319 Mass. 627, 67 N.E.2d 234 (1946); *Commonwealth v. Trefethen*, 157 Mass. 180, 31 N.E. 961 (1892); McCORMICK, EVIDENCE § 247 (1954); 4 WIGMORE, EVIDENCE § 1072(5) (3d ed. 1940). *But cf.* *Rex v. Christie*, [1914] A.C. 545, where a denial was held to be admissible. Morgan explains this case away on the theory that an express denial will be admitted as evidence of a state of mind. Morgan, *Admissions*, 12 WASH. L. REV. 181, 187 (1937).

<sup>12</sup> *People v. Popilsky*, 366 Ill. 268, 8 N.E.2d 640 (1937) ("Give me a break" held admissible); *Commonwealth v. Hebert*, 264 Mass. 571, 163 N.E. 189 (1928) ("I have nothing . . ." held admissible);

accusation is of course admissible since it is the clearest type of failure to deny.

#### ELEMENTS OF THE PRINCIPLE :

Circumstances may be present under which even an innocent man would not deny an accusation. For example, if the circumstances surrounding the accusation are such that there is no opportunity or motive for the defendant to deny, or if the defendant does not hear the statement, or lacks knowledge of the facts stated in the accusation, his failure to deny cannot constitute any evidence of guilt. Moreover, there is danger that a jury might well attach considerable weight to such evidence, even though it has no actual probative value. For this reason courts have attempted to define those circumstances in which failure to deny an accusation will create an implication of guilt.

*Opportunity to Deny*—When the defendant does not have the opportunity to deny an accusation, both the accusation and the response evoked are inadmissible.<sup>13</sup> Such lack of opportunity to answer might arise, for example, from a physical disablement such as intoxication<sup>14</sup> or unconsciousness,<sup>15</sup> or from a

fear of physical violence.<sup>16</sup> In addition, if the defendant has been advised by his attorney not to answer questions, or is in doubt as to his legal rights, no implication of belief by the defendant in his guilt will arise from his failure to deny.<sup>17</sup> Furthermore, in a judicial hearing, where the defendant is obviously not privileged to interrupt, a failure to deny accusatory statements is not admissible.<sup>18</sup>

*Motive to Deny*—In addition to an opportunity to deny the accusation, the defendant must have a motive to deny.<sup>19</sup> For this reason, the statement must be of a type which would naturally call for a reply; that is, it must clearly be an accusation of guilt.<sup>20</sup> In addition, the question of whether the defendant is bound to reply to an accusation made during a conversation between two other parties sometimes arises.<sup>21</sup> It is unreasonable to apply an

<sup>16</sup> See *Sprouse v. Commonwealth*, 132 Ky. 269, 116 S.W. 344 (1909) where the defendant was threatened by a mob.

<sup>17</sup> *People v. Hodson*, 406 Ill. 328, 94 N.E.2d 166 (1950); *People v. Kozlowski*, 368 Ill. 124, 13 N.E.2d 174 (1938); *People v. Blumenfeld*, 330 Ill. 474, 161 N.E. 857 (1928); *People v. Hanley*, 317 Ill. 39, 147 N.E. 400 (1925).

<sup>18</sup> *Friedman v. Forest City*, 239 Iowa 112, 30 N.W.2d 752 (1948); *Commonwealth v. Russo*, 177 Pa. Super. 470, 111 A.2d 359 (1955); *Jones v. State*, 184 Tenn. 128, 196 S.W.2d 491 (1946). *Miller v. Dyess*, 137 Tex. 135, 151 S.W.2d 186 (1941). *McCORMICK, EVIDENCE* § 247 n.7 (1954); 4 *WIGMORE, EVIDENCE* § 1072(4) n.7 (3d ed. 1940).

<sup>19</sup> 4 *WIGMORE, EVIDENCE* § 1072 (3d ed. 1940).

<sup>20</sup> *People v. Hartwell*, 37 Cal. App. 799, 175 Pac. 21 (1918); *Brantley v. State*, 115 Ga. 229, 41 S.E. 695 (1902); *Chapman v. State*, 109 Ga. 157, 34 S.E. 369 (1899); *Newman v. Commonwealth*, 28 Ky. L. Rep. 81, 88 S.W. 1089 (1905); *Davis v. State*, 85 Miss. 416, 37 So. 1018 (1904). *People v. Countryman*, 201 App. Div. 805, 195 N.Y. Supp. 728 (4th Dep't 1922).

<sup>21</sup> *Simmons v. State*, 115 Ga. 574, 41 S.E. 983 (1902) in which a conversation between two officers not addressed to the defendant was held not to call for a reply; hence the failure to reply was inadmissible. *But cf. Rocchia v. United States*, 78 F.2d 966 (9th Cir. 1935) where an officer's accusation of defendant, in the defendant's presence, although addressed to a superior, was held admissible; 4 *WIGMORE, EVIDENCE* § 1072(3) (3d ed. 1940).

*Jones v. State*, 222 Miss. 387, 76 So. 2d 201 (1954); *State v. McKenzie*, 184 Wash. 32, 49 P.2d 1115 (1935); *People v. McCoy*, 127 Cal. App. 195, 15 P.2d 543 (1932); ("I will talk to the jury" held to be admissible); *McCORMICK, EVIDENCE* § 247 (1954); *Morgan, Admissions*, 12 WASH. L. REV. 181, 187 (1837). *But cf. People v. Simmons*, 28 Cal. 699, 172 P.2d 18 (1946), where the defendant's answer that he had nothing more to say was held to be an assertion of his 5th amendment privilege and therefore not admissible.

<sup>13</sup> *People v. Hanley*, 317 Ill. 39, 147 N.E. 400 (1925); *Slattery v. People*, 76 Ill. 217 (1875); *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847); 4 *WIGMORE, EVIDENCE* § 1071 (3d ed. 1940).

<sup>14</sup> *People v. Allen*, 300 N.Y. 222, 90 N.E.2d 48 (1949).

<sup>15</sup> See *People v. Koerner*, 154 N.Y. 355, 48 N.E. 730 (1897), where the court went so far as to indicate that the defendant did not have an opportunity to reply even if he was faking unconsciousness, since to reply would have given away the ruse.

inflexible rule that a response to a third-party statement is always inadmissible. The fact that an accusation was not addressed directly to the defendant may not be a significant element in every case. Accordingly, such statements are generally treated in the same manner as if they were addressed directly to the defendant. Courts inquire into the particular facts of each case in order to determine whether the circumstances were such as to call for a reply from the defendant.<sup>22</sup>

The identity of the accuser is apparently not considered a significant factor as to whether the defendant should have replied to an accusation<sup>23</sup> and yet the factor of his age, position or mental status may well be important. For example, if the accuser were an infant, or other person whose statements would normally be disregarded, there would be little motive to deny an accusation. For this reason, the element of identity should be considered. However, a jury may well use evidence of the identity of the accuser for the purpose of adding weight to the testimony.<sup>24</sup> Accordingly, evidence of identity of the accuser should only be admitted when it tends to rebut the defendant's motive to deny.

*Within the Defendant's Hearing*—Before any implication from the failure to deny a statement can arise, the defendant must hear the statement.<sup>25</sup> There is controversy, however, as to whether it is the responsibility of the prosecution to show that the statement was heard, or whether the defendant must establish that he was unable to hear the accusation. The majority view is that the prosecution must offer affirmative proof that the defendant heard the accusation.<sup>26</sup> Wigmore, on the other

hand, favored a more liberal view which would allow a presumption that the defendant heard the statement, upon a showing by the prosecution that the statement was made in the presence of the defendant. Presence, under this view, implies that the statement was made within the range of hearing of the defendant.<sup>27</sup> Although it is clear that the prosecution will have some difficulty in proving that an accusation was heard, the presumption of a defendant's innocence should place the burden of production of this evidence upon the prosecution. The majority view is thus the more rational, because it eliminates the danger that a defendant will not be able to offer proof that he did not hear the accusation.

*Knowledge of the Facts*—A majority of courts have held that the defendant must have a knowledge of the truth of the facts stated in the accusation before any implication can arise from a failure to deny it. Thus, under the majority view, the evidence is inadmissible unless the prosecution can establish that the defendant was aware of the incident described in the accusation.<sup>28</sup> Wigmore, on the other hand, proposed that the evidence should be received regardless of the defendant's personal knowledge of the facts stated.<sup>29</sup> His view is based upon his classification of this type of evidence as an admission. The basis of the admissibility of an admission is the conflict between what the party now claims and what he "admitted" in prior statements. Since the basis of admissibility is the conflict of claims rather than the personal knowledge of the accused, such knowledge can, under this view, affect the weight to be given an admission by a jury, but cannot affect its admissibility.<sup>30</sup> For this reason, an admission is receivable against a

<sup>22</sup> *People v. Fibern*, 138 Cal.App. 56, 31 P.2d 470 (1934); *People v. McCoy*, 127 Cal.App. 195, 15 P.2d 543 (1932); *Kelley v. People*, 55 N.Y. 565 (1874).

<sup>23</sup> A search of the cases has not revealed any consideration of this problem by the courts.

<sup>24</sup> See text at note 7.

<sup>25</sup> *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847); McCORMICK, EVIDENCE § 247 (1954); 4 WIGMORE, EVIDENCE § 1072(2) (3d ed. 1940).

<sup>26</sup> See *Ruth v. Rhodes*, 66 Ariz. 129, 185 P.2d 304 (1947).

<sup>27</sup> 4 WIGMORE, EVIDENCE § 1072(2) (3d ed. 1940).

<sup>28</sup> 2 WIGMORE, EVIDENCE §§ 650-86 (3d ed. 1940). Before a witness can be considered competent to testify to a fact, the courts usually require that he be an eye witness to that fact. This requirement is in essence the rule against hearsay. See note 8 *supra*. *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847); *Reall v. Deiriggi*, 127 W.Va. 662, 34 S.E.2d 253 (1945).

<sup>29</sup> 4 WIGMORE, EVIDENCE § 1072(2) (3d ed. 1940).

<sup>30</sup> 4 *id.* § 1053.

party regardless of his personal knowledge. However, a defendant cannot be expected to deny an accusation when he has no knowledge of the facts bearing on his guilt. For example, if he were suffering from a lapse of memory, or was unconscious at the time of the alleged commission of the crime, his lack of response to an accusation would have no significance. For this reason a majority of courts exclude the evidence when knowledge of the facts has not been established by the prosecution.

#### ACCUSATIONS MADE WHILE THE DEFENDANT IS UNDER ARREST

Frequently, situations in which the defendant fails to deny an accusation arise while the defendant is under arrest. There are three views as to the admissibility of the defendant's reaction to statements made while he is in the custody of the police.

Some jurisdictions follow a strict rule which excludes all evidence of failure to deny an accusatory statement after the defendant is under arrest.<sup>31</sup> The rationale of this view is that frequently even an innocent man will not speak while under arrest if he knows that whatever he says may be used against him. The strict view is also directed at the police practice of reading long statements to an accused for the purpose of inducing him to confess.<sup>32</sup>

A second view, known as the "Massachusetts rule," excludes evidence of the defendant's *silence* in the face of an accusation made while he is under arrest<sup>33</sup> but permits the use of an *equivocal answer*.<sup>34</sup> Actually, there is no signifi-

<sup>31</sup> *Yep v. United States*, 83 F.2d 41 (10th Cir. 1936); *Rickman v. State*, 230 Ind. 262, 103 N.E.2d 207 (1952); *McCORMICK, EVIDENCE* § 247 n.12 (1954).

<sup>32</sup> *People v. Simmons*, 28 Cal.2d 699, 172 P.2d 18 (1946).

<sup>33</sup> The rule was first laid down in *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235 (1847).

<sup>34</sup> *Commonwealth v. Hamel*, 264 Mass. 564, 163 N.E. 168 (1928); *Commonwealth v. Madeiros*, 255 Mass. 304, 313; 151 N.E. 297 (1926); *Commonwealth v. Spiropoulos*, 208 Mass. 71, 94 N.E. 451 (1911). New York at the present time follows the Massachusetts view but there was conflict in that

cant distinction between silence and an equivocal answer. The admission of equivocal answers, while excluding evidence of silence, indicates a lack of confidence in the validity of the exclusion of the defendant's reaction to statements made while he is under arrest.<sup>35</sup>

Under the third and majority view of arrest cases, the courts inquire into the circumstances of each case in order to determine whether the defendant was, in fact, prevented from denying the accusation by fear of physical or mental duress from the police.<sup>36</sup> The fact that the accused is under arrest does not, in every instance, preclude the defendant from giving an accurate portrayal of his belief in his innocence. The majority is the better reasoned view because it treats arrest as just another factor bearing upon whether the circumstances were such as to call for a denial, rather than as the decisive factor.

#### ADMISSIBILITY AND BURDEN OF PROOF

The preliminary question of whether the jury could reasonably find that the circumstances surrounding the accusation were such as to call for a reply from the defendant is a

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jurisdiction for some time. Compare *People v. Rutigliano*, 261 N.Y. 103, 184 N.E. 689 (1933), with *People v. Kelley*, 55 N.Y. 565 (1874).

<sup>35</sup> As a result of the strict nature of its rule, Massachusetts, on one occasion, has been quite technical as to what constitutes an arrest, and thereby eased the rule to some extent. *Commonwealth v. Morris*, 264 Mass. 314, 162 N.E. 362 (1928) held that a defendant was not under arrest, although the officer who was with him at the time of the accusation testified that had the defendant tried to escape, he would have detained him. This holding leaves considerable doubt as to whether a defendant can be sure of the protection of the Massachusetts rule. This is the natural effect of the creation of a rule that eliminates evidence by means of a mechanical test, which is applied inflexibly in all cases.

<sup>36</sup> *United States v. Kelley*, 119 F.Supp. 217 (D.C. 1954); *People v. Davis*, 43 Cal.App. 661, 276 P.2d 801 (1954); *People v. Bennett*, 3 Ill.2d 357, 121 N.E.2d 595 (1954); *State v. Landeros*, 20 N.J. 76, 118 A.2d 524 (1955); 4 *WIGMORE, EVIDENCE* § 1072(4) (3d ed. 1940); *McCORMICK, EVIDENCE* § 247 n.13 (1954).

question for the judge.<sup>37</sup> Thereafter the question of whether the circumstances were, in fact, such that an innocent man could and would deny the accusation is for the jury.<sup>38</sup>

In practice, the prosecution has the burden of establishing the existence of conditions which call for a denial of the accusation.<sup>39</sup> Wigmore, on the other hand, proposed that all accusatory statements made in the presence and hearing of the defendant be admissible unless the defendant can show that he could not reasonably be expected to deny the statement.<sup>40</sup> Under this view the defendant would have the burden of showing the absence of conditions raising an implication of his assent to the statement. This view is predicated upon the argument that the defendant can testify himself, and thereby show the judge that he did not have the opportunity or motive to deny. The effect of this reasoning is to create an unjustified presumption that conditions surrounding the accusation called for a denial. In view of the fact that this evidence is highly prejudicial, courts should continue to require that the prosecution make a convincing showing of conditions calling for a denial before admitting this type of evidence.

#### THEORETICAL JUSTIFICATION FOR ADMISSIBILITY OF FAILURE TO DENY

Although it is generally agreed that the type of evidence under consideration is admissible,

<sup>37</sup> *People v. Simmons*, 28 Cal.2d 699, 172 P.2d 18 (1946); *Johnson v. Underwood*, 102 Ore. 680, 203 Pac. 879 (1922); *McCarthy v. Bishop*, 102 S.W.2d 126 (Mo. App. 1937).

<sup>38</sup> There are cases which apparently hold that the jury is to consider the evidence, in the first instance, without a preliminary finding by the judge as to whether the circumstances are sufficient to raise an implication of his belief in his guilt. However, upon closer analysis of those cases, it is clear that the issue at which they are really directed is whether the question of the conditions surrounding the accusation should be considered at all by the jury. See *McCORMICK, EVIDENCE* § 247 nn.17 & 18 (1954).

<sup>39</sup> See, e.g., *Ruth v. Rhodes*, 66 Ariz. 129, 185 P.2d 304 (1947).

<sup>40</sup> 4 WIGMORE, *EVIDENCE* § 1071 at 74 (3d ed. 1940).

there are two theories upon which it is admitted. Each theory labels the evidence differently. Wigmore termed this evidence an "adoptive admission," and justified its admission on the theory that the silence of the defendant in the face of an accusation is the equivalent of assent.<sup>41</sup> The comments to the Model Code of Evidence, on the other hand, classify this evidence as "conduct evidence," and justify its admission on the theory that, from the defendant's conduct in failing to deny an accusation, one might reasonably conclude that he *believed* the accusation to be true.<sup>42</sup>

Where the defendant is silent in the face of an accusation, the difference in the theory of admissibility is one of form rather than substance; evidence of the defendant's silence is admissible under both theories. However, it is difficult to classify an evasive response as the equivalent of assent. For this reason, the application of Wigmore's theory would preclude the admission of evidence of an equivocal answer to an accusation. Nevertheless, equivocal answers have generally been held admissible.<sup>43</sup> The theory of the Model Code allows the admission of an equivocal answer as conduct which indicates that the defendant believed the accusation to be true. For this reason, the Model Code's theory is a better explanation of how the courts actually treat this evidence.<sup>44</sup>

<sup>41</sup> 4 *id* § 1071.

<sup>42</sup> MODEL CODE OF EVIDENCE rule 507, comment b (1942).

<sup>43</sup> See note 12 *supra*.

<sup>44</sup> *Morgan, Admissions*, 12 WASH. L. REV. 181, 187 (1937). Wigmore classified a different type of evidence as "conduct evidence," and justified its admission on the theory that some inference could be drawn from the conduct of the defendant that he believed himself to be guilty. 4 WIGMORE, *EVIDENCE* § 1052(b) (3d ed. 1940). However, he did not include the evidence with which we are concerned within that classification. 2 *id* § 292. As examples of "conduct evidence" Wigmore cited demeanor when charged with a crime, when arrested, or during a trial; refusal to undergo a superstitious test; and flight, escape, resistance, or concealment from justice. 2 *id* §§ 273-6.