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THE TWILIGHT ZONE OF HEARSAY

RICHMOND RUCKER*

I. INTRODUCTION

The twilight zone of hearsay and nonhearsay has provoked searching analyses by eminent authorities in the field of evidence.¹ Although these contributions have doubtless been of inestimable value, exerting a profound influence in the solution of problems dealing with acts and utterances within this area of proof, there is much to be desired in the way of clarity as reflected by innumerable opinions of the courts. No fatuous notion is here entertained that within the limits of this discussion order will be rescued from chaos, or for that matter that an appreciable contribution will be made toward that end. Nevertheless, it is hoped that this article will stimulate additional interest in the solution of some of the problems that have been raised.

No purpose would be served in referring to the historical background and development of the doctrines and rules involved, which have been painstakingly and masterfully treated by Wigmore, Morgan, and others.² The approach made here to the questions concerning acts and utterances with relation to this area of proof emphasizes the actualities of the situations presented, somewhat irrespective of the ratio decidendi of the particular cases in which they occur. Although, as hereinafter observed, nonverbal and verbal acts are closely related, sharing in common certain fundamental attributes, a dichotomy will be made between the two groups of acts. In some instances words are less ambiguous than acts; in other instances acts are more persuasive than words. Moreover, the distinction between nonverbal and verbal acts finds justification from the decisions of the courts and as the ensuing discussion of cases indicates, is not merely arbitrary.

II. NONVERBAL ACTS

1. *Preliminary Observations*

The hearsay rule becomes operative whenever the truth of a matter stated out of court is brought into question. Conversely, if the truth

*Member, Ingle, Rucker & Ingle, Winston-Salem, North Carolina; author, pocket supplements to current edition of Wigmore's *Evidence*.

1. Hinton, *States of Mind and the Hearsay Rule*, 1 U. CHI. L. REV. 394 (1934); McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930); Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138 (1935); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948); Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229 (1922).

2. 5 WIGMORE, *EVIDENCE* § 1364 (3d ed. 1940) (hereinafter cited WIGMORE); 6 *id.* § 1767. See also articles, note 1 *supra*.

of the matter stated out of court is not brought into question, the hearsay rule is inapplicable. Thus far, it would appear we are on solid ground. There seems to be complete concinnity on the part of the courts and the authorities as to these hypotheses. Let us now consider whether or not hearsay may include nonverbal acts (conduct).

Undoubtedly, a nod of the head in answer to a question calling for a "yes" or "no" answer is invariably treated in the ordinary affairs of life as the equivalent of the assertion, "yes." Again, the symbol of the buyer's bid at a tobacco warehouse sale is regarded as the equivalent of an assertion of a willingness to buy at a certain price. Thus it is manifest that assertions or their equivalent are not confined to oral or written statements but may include acts; *i.e.*, assertions may be implied from nonverbal acts under some conditions. That being true, it follows as a matter of course that a nonverbal act may constitute hearsay. Before considering under what conditions nonverbal acts constitute hearsay or create hearsay dangers, it is perhaps desirable to direct attention to a formidable question raised with regard to the nature of hearsay.

Mr. Eustace Seligman, in a penetrating and analytical article, contends that hearsay involves the communication of thought.³ While unquestionably in the vast majority of instances such an hypothesis is true, it is not necessarily true in every case. In this connection Professor Morgan⁴ has pointedly observed that an utterance or statement is not shorn of its quality as hearsay by virtue of the fact that it was not intended as a communication of thought. The writer of a letter decides not to mail it; instead he files it away. After his death, it is found among his papers. That portion of the letter narrating a series of events constitutes hearsay. A soliloquy in the wilderness, the declarant being unaware that his statement is being heard, may nevertheless constitute hearsay. But suppose the statement thus made in the wilderness, the declarant being unaware of anyone in hearing distance, is in fact the lines of a play he was rehearsing. Would such a statement constitute hearsay? It would not. It is, therefore, urged that while perhaps in the vast majority of cases the expressed or implied intent of the actor to convey thought may be determinative of whether or not hearsay is involved, it is by no means an invariable criterion for making such determination. As Professor Morgan⁵ has stressed, with respect to both nonverbal and verbal acts, the all-important formula never to be lost sight of is that whenever the truth of

3. Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146 (1912).

4. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 189 (1948).

5. Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138 (1935); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948); Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229 (1922).

the matter asserted out of court is called into question, the hearsay rule is involved—otherwise not. With these observations in mind, let us turn our attention to specific instances of nonverbal acts with a view of ascertaining whether or not they involve hearsay or hearsay dangers.

It is thought that the notable illustrations employed by the court in the celebrated case of *Wright v. Tatham*⁶ admirably answers this purpose. In that case the mental capacity of the testator was in issue. Letters sent to the testator were offered in evidence on that issue. Although these letters did not allude to the mental capacity of the addressee to handle his own affairs, the contents of the letters were such as one would expect to be addressed to a person of mental capacity sufficient for the execution of a will. The proponent, therefore, contended that a reasonable inference was justified from the act of sending any one of the letters to the testator that the addressor believed that the addressee was of sound mind and capable of attending to his affairs. While some question has been raised as to whether the actual decision rendered by the court was not based on the hypothesis that the introduction of the letters would constitute an infraction of the opinion rule, the court emphasized their hearsay aspect by use of the following illustrations:⁷

(1) payment by the underwriters of the amount of a policy as an implied statement that the ship was lost;

(2) payment of a wager as an implied statement that the event which was the subject of the wager occurred;

(3) precaution taken by the family with respect to a member as an implied statement that such member was insane;

(4) election of a person to high office as implying the statements of the voters that they believed such person to be sane;

(5) conduct on the part of an attending physician in permitting the patient to execute a will as an implied assertion of the physician that he regarded the testator to be mentally competent and capable of executing a will;

(6) the act of a ship captain, after examining a vessel, in embarking thereon with his family as an implied statement by him that the vessel was seaworthy.

Each of these hypothetical situations was thought to be the equivalent of an implied out-of-court assertion as to the truth of such implied utterance, and, therefore, hearsay. The argument is meretricious, but not convincing. What basis is there for assuming that the acts, respectively, implied an assertion on the part of the actor? Or, for

6. 7 Ad. & El. 313, 112 Eng. Rep. 488 (Ex. 1834), *aff'd*, 5 Cl. & F. 670, 7 Eng. Rep. 559 (H.L. 1838).

7. *Ibid.*

that matter, what basis is there for attributing to such acts the equivalent of an assertion on the part of the actor? It is earnestly maintained that there was no basis for assuming that the acts in the hypothetical cases were either implied assertions or their equivalent. Surely, it cannot be successfully contended that any one of these hypothetical situations may be assimilated to the nod of the head in answer to a question. The nod of the head is merely symbolical of an assertion. Can any one of these situations be said to be symbolical of an assertion? Nor are they analogous to the soliloquy in the wilderness. While it might be said that that situation has, in common with these hypothetical cases, the feature of a lack of intention to convey thought, the soliloquy was a verbal act. It is one thing to draw an inference from an act, such as an inference of a belief; quite another to attribute an assertion to another from the act. To say that the actor impliedly asserted a particular fact is quite different from saying that an inference may be drawn as to his mental state or condition from such act. The act of the captain, after inspecting the vessel, of embarking thereon with his family is clearly susceptible of the inference that he entertained the belief that the vessel was seaworthy. But to go further and attribute to the captain, on the basis of his acts, an implied assertion as to the seaworthiness of the vessel simply does not coincide with the incidents of such an experience in the ordinary affairs of life. Again, while payment of the wager is clearly susceptible of the inference that the payer believed that the event which was the subject of the bet had taken place, it does not follow that the payer impliedly stated his belief by such payment. The doctrine of judicial notice demonstrates rather conclusively that the courts are prone to abide by the normal experiences of mankind. Otherwise, the ultimate objective in dispensing justice would be frustrated.⁸ In a similar way, according to the normal experiences of mankind, no implied assertion can be reasonably inferred from the illustrative cases.

Before proceeding further, let us pause to take into account the observation of Vaughn, J., who concurred in the opinion of Baron Parke in *Wright v. Tatham*, with reference to the rule therein laid down and its application:

They [acts] may be acts involving a great sacrifice of personal interest, as, the payment of a policy of insurance by an underwriter, on a marine loss; and therefore, as moral evidence, they may be very cogent. Yet does the law, more rigid and inflexible, resist the weight of such moral evidence, although, in the ordinary transactions of life, common sense and experience might possibly yield to it.⁹

8. See Davis, *Judicial Notice*, 55 COLUM. L. REV. 945 (1955); McCormick, *Judicial Notice*, 5 VAND. L. REV. 296 (1952); Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944).

9. 5 Cl. & F. at 739. (Emphasis added.)

Thus, with apparent misgiving, the learned justice felt constrained to apply a rule of precedent which resisted moral evidence and possibly ran counter to "common sense and experience" as gleaned from "the ordinary transactions of life."

Moreover no comfort may be derived by those who advocate the conclusions of Baron Parke with respect to these cases on the theory that the acts are the equivalent of such contended assertions. No circumvention of this sort is available. So-called hearsay dangers, which consist of: (1) lack of observation; (2) lack of memory; (3) faulty narration, and (4) lack of truthfulness, are not as formidable with reference to acts involving conduct as they are in cases of assertions offered to prove the truth of the matter stated.¹⁰

It is a daily experience in the trial of cases for witnesses to testify to the occurrence of acts coming within their observation. Once it is shown that the witness, not being under disability either at the time of the occurrence or at the time of trial (assumed in absence of circumstances to the contrary), was afforded the opportunity to observe and did observe the occurrence, his testimony in regard thereto is admissible. Under those conditions other evidence challenging the observation of the witness usually goes to credibility rather than to admissibility. Whether the one whose act is narrated lacked observation would depend upon the surrounding circumstances. Surely, a most extraordinary situation would be necessary to create the hearsay danger of lack of observation.

Similarly, as the second hearsay danger, lack of memory, usually affects the credibility and not the admissibility of testimony in the trial of cases with reference to acts other than human conduct, no reason suggests itself why the latter—*i.e.*, testimony with reference to human acts—should be relegated to a less favorable position. It is difficult to conceive of a situation where the question of the actor's memory would be raised.

Faulty narration is far less likely to occur in relating an act than in recounting an oral assertion. In most instances, the witness does not undertake to quote literally what was said by another, but rather to give his interpretation of what was said. Therefore, it would seem the hearsay danger of faulty narration, which is apparent in every case where the witness professes to relate what was said by another, has no efficacy in cases of proof of human conduct, or at least no more force than in those instances in which the witness is narrating his personal observations.

Finally, the hearsay danger of lack of truthfulness, it is submitted, is likewise deserving of no more weight. While exceptional instances might conceivably arise of fraudulent use of conduct for the purpose

10. See Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

of deception, such a charge is rarely made with reference to this type of evidence. The attendant risks of disclosure from the other facts and circumstances of the case doubtless inhibit the extensive use of such evidence by those engaging in deceitful practices.

From the foregoing illustrations, in particular of nonaction, it is not to be implied that the admission of such testimony is here advocated. At this point it is contended merely that neither hearsay nor the dangers of hearsay present a formidable barrier to the testimony. A consideration of the basis for the hearsay rule should throw some light upon the problem.

Cross-examination has for a long time been recognized by the courts as a most effective means of developing the truth in the trial of a cause.¹¹ Accordingly, the lack of opportunity for such cross-examination is unquestionably the principal reason for the existence of the rule against hearsay. It would seem to follow, therefore, that in a situation where the cross-examination could be said to be of no value to the opponent, the rule of exclusion having thus collapsed of its own weight, the evidence should be admitted. And, of course, by like reason, if it is obvious that the cross-examination would be of questionable benefit to the opponent, the court in a borderline case should take this factor into account in making the decision. In the absence of some information that the underwriters paid the amount of the policy on the loss of the ship in consequence of fraud or a mistake of fact, would it amount to a rash assumption that cross-examination of the underwriters would probably afford the opponent slight comfort? In fact, is it not true that during the course of the investigation of such a lawsuit a check-up would be made as to the circumstances surrounding the payment? Therefore, if some doubt was cast with reference to the payment, the opponent could avail himself of the underwriter as a witness at the trial or by deposition. In the case where the testator's mental capacity was questioned inquiries would no doubt be made of the attending physician. Both parties would no doubt seek an interview. The proponent would doubtless call him as a witness or procure his deposition. Suppose, however, the physician died before a deposition was taken. Evidence that he permitted the testator to sign the will would probably be attended by other circumstances exposing the error committed by him if he made error in permitting the testator to sign the will. From these observations it is not to be inferred that any withdrawal is intended from the position hereinabove taken with respect to these hypothetical cases enumerated in *Wright v. Tatham*. Moreover, the doctrine of harmless error is not being invoked. The thesis here advanced is that where evidence of an act closely approximates an assertion and there-

11. 5 WIGMORE § 1367; Morgan, *Hearsay Dangers and Non-Hearsay*, 48 HARV. L. REV. 1138 (1935).

fore might offend the hearsay rule, the court might well consider the end the hearsay rule is designed to effect in the light of the circumstances presented.

It has been noted that nonverbal acts may amount to or be the equivalent of hearsay. The nod of the head in response to a question calling for an affirmative or negative answer is an illustration of this situation. Nevertheless, disagreement has been found in this article with the noteworthy examples of nonverbal acts which were designated as hearsay or the equivalent thereof by Baron Parke in *Wright v. Tatham*. It would seem to follow that any doubt arising from the possible applicability of the hearsay rule or a danger therefrom should call for the reception of the evidence. Manifestly, the nonverbal illustrations employed in *Wright v. Tatham*, as hereinabove indicated, are more clearly within the periphery of conduct rather than of implied assertions. "Actions speak louder than words." Yes! Usually they involve a much higher degree of credibility. Both courts and ordinary persons rely heavily upon probabilities, predicated, of course, upon experience. While a high degree of certainty as to the statement of a rule of evidence is desirable, justice should not be sacrificed for certainty, and due weight should be accorded probability. Rules are merely the means of attaining the ultimate, the dispensing of justice; they are not in themselves the ultimate. The empirical process employed in the development of the law of evidence draws constantly from the storehouse of everyday experience.

2. Active and Inactive Conduct (Silence)

The problem arises as to what distinguishing features, if any, exists between active and inactive conduct with relation to hearsay.¹² A cursory examination of some of the decisions of the courts should, it would seem, afford a desirable approach to the problem. First, let us make note of cases involving active nonverbal conduct.

In *Thompson v. Manhattan Ry.*,¹³ the plaintiff sought to recover for injuries to her spine. Evidence that her attending physician treated her for such injuries was excluded, on the ground that such evidence was the equivalent of the physician's out-of-court assertion that plaintiff suffered an injury to her spine.

Nevertheless, in an action by a veteran to recover for tubercular disability, his testimony that in the hospital he was transferred to the tuberculosis ward was allowed in *United States v. Sessin*.¹⁴

In *McCurdy v. Flibotte*,¹⁵ an action of negligence arising out of an

12. See Falknor, *Silence as Hearsay*, 89 U. Pa. L. Rev. 192, 194 (1940).

13. 11 App. Div. 182, 42 N.Y. Supp. 896 (2d Dep't. 1896).

14. 84 F.2d 667 (10th Cir. 1936).

15. 83 N.H. 143, 139 Atl. 367 (1927).

automobile collision, cross-examination of the driver of one of the cars as to whether his driver's license had been revoked was excluded as hearsay.

On the other hand in *Meserve v. Folsom*,¹⁶ upon the issue of plaintiff's domicile, cross-examination of the plaintiff by defendant as to whether he was permitted to vote at the place which he claimed to be his residence was allowed. Powers, J., disposed of the hearsay objection to the testimony as follows:

It is now argued that this question called for the action of the board of civil authority, and this was hearsay evidence. But the question was not admitted for the purpose of proving what the board said or did respecting the plaintiff's residence in Sutton. It was admitted to show a fact; to show that one of the characteristics of residence was lacking.¹⁷

In *Daly v. Publix Cars*,¹⁸ an action for personal injuries was brought by the passengers against the operator of a taxicab in consequence of a collision between the cab and an automobile. Evidence that the driver of the automobile paid damages sustained by the taxicab was excluded.

The issue of survivorship between two persons killed in the same train wreck was presented in the case of *In re Louck's Estate*.¹⁹ Witness' testimony that one of the victims was placed on a stretcher and the other was not was excluded.

It is apparent from these cases that there is no uniformity of holdings under similar factual situations.²⁰ There are, however, two groups of cases relating to (1) belief with reference to family matters, and (2) implied admissions discrediting a party or witness in which the admission of similar testimony is allowed.²¹ As not infrequently verbal and nonverbal acts appear in the same case and are treated indiscriminately by the courts, no point is seen in doing other than alluding to these cases particularly in the light of a seeming concinnity among the decisions in dealing with this group of situations.

Let us now briefly examine those cases within the ambit of inactive nonverbal conduct (silence).

In *George W. Saunders Live Stock Commission Co. v. Kincaid*,²² an issue was raised as to the soundness of hogs sold to packers. Testimony of the seller that he had received no complaints from others to whom he had sold hogs of the same shipment was excluded as hearsay.

Yet, in *Katz v. Delohery Hat Co.*,²³ evidence that no complaints had

16. 62 Vt. 504, 20 Atl. 926 (1890).

17. 20 Atl. at 928.

18. 128 Neb. 403, 259 N.W. 163 (1935).

19. 160 Cal. 551, 117 Pac. 673 (1911).

20. See McCORMICK, EVIDENCE § 229 n.15 (1954).

21. 2 WIGMORE § 267.

22. 168 S.W. 977 (Tex. Civ. App. 1914).

23. 97 Conn. 665, 118 Atl. 88 (1922).

been received about fur from the same lot as that from which the buyer had purchased was admitted.

In *Sullivan v. Minneapolis St. Ry.*,²⁴ a passenger on a street car sought to recover for personal injuries. Testimony offered by the defendant that no other claim was made against it resulting from the occasion in question was held admissible, as within the discretion of the trial court, in view of the crowded condition of the car. It is to be observed, however, that the court made no allusion to the hearsay aspect of the evidence, but rather directed its attention to materiality and relevancy.

Likewise in *Segars v. City of Cornelia*²⁵ the testimony of a husband that his wife had said nothing to him about signing an easement, although they invariably discussed business matters between themselves, was held inadmissible.

But in *Latham v. Houston Land & Trust Co.*,²⁶ where the existence of a trust fund was in issue, testimony of the widow of and the attorney for the alleged settlor, since deceased, and others to whom he would likely have mentioned the matter, that they had never heard him say anything with reference to the existence of such a trust was received.

Indisputably, these inactive nonverbal conduct cases share in common with the active nonverbal conduct cases a varied treatment at the hands of the courts. One experiences a sort of phantasmagoria in reviewing the cases within the periphery of inactive conduct (silence). Not infrequently, in these silence cases, the court disposes of the question of admissibility by excluding the evidence on the ground of lack of relevancy,²⁷ and in this connection, "materiality" and "competency" are often seemingly employed synonymously with relevancy. Be that as it may, let us examine more closely this inactive nonverbal conduct with reference to hearsay or hearsay dangers.

Occasionally, the inactive nonverbal conduct may approach closely an implied negative assertion. For example, A sells goods to B from a lot or bulk. On the same day from that same lot he sells quantities of the goods to C, D, E, F, and G. B brings an action against A for breach of warranty of quality in the sale of the merchandise. A proposes to testify about the other sales to C, D, E, F, and G and to the further fact that none of them had complained to him as to the quality of the goods.

At the outset, it should be observed that the proffered testimony might well be excluded on the ground of lack of relevancy. C might refrain from complaining because of his friendship with A. D might experience some embarrassment in this connection because of the

24. 161 Minn. 45, 200 N.W. 922 (1924).

25. 60 Ga. App. 457, 4 S.E.2d 60 (1939).

26. 62 S.W.2d 519 (Tex. Civ. App. 1933).

27. See McCORMICK, EVIDENCE § 229 n.28 (1954).

liberal credit extended him by *A* on other occasions. In the same case *E* intended to call *A*'s attention to the inferior quality of the goods but delayed in doing so and subsequently sold them to *Y* at a substantial profit. Thus it is apparent that the silence of the purchasers gives rise to a wide range of inferences. Moreover, it is likewise apparent that the receipt of *A*'s testimony would invite an investigation of the various circumstances impelling silence on the part of the respective purchasers; this investigation in turn would be calculated to create a confusion of issues.

Passing over relevancy, let us now examine the hearsay aspect of the proffered testimony. Suppose *B* testifies that some few days after the delivery of the goods purchased from *A*, he met *A* on the street and told him that the goods did not come up to warranty in quality, to which *A* made no reply. Would it be seriously contended that *B*'s testimony was inadmissible? Does it not show conduct on the part of *A*, being equivalent to, if not in fact, an implied admission? Would not *X*, a reasonably intelligent person who was present, in narrating this occurrence, probably describe *A*'s silence by saying that "*A* agreed that the goods were not as warranted" or "*A* certainly implied that the goods were inferior"? But going back to *A*'s proffered testimony that the other purchasers did not complain of the quality of the merchandise, this testimony would not come within the scope of an implied admission, because admissions (express or implied) apply to parties and their privies, only.²⁸ Nonetheless, although the silence of these purchasers does not qualify as an implied admission, what is to prevent this silence being dealt with as an implied assertion?

May it not be said that any conduct of a party to a cause tending to show the weakness of his position either as plaintiff or as defendant is generally spoken of as implied admission? In other words, the term "implied admission" in this sense may include, but does not necessarily include, an implied assertion.²⁹ From this observation, it is not to be inferred that any puristic approach to the problem of the nature of conduct against the interest of a party or otherwise is here advocated. The importance, however, of taking note that such a term as "implied admission" is not to be taken literally and that the language of the court must be construed in the light of the facts presented is here stressed. With these cautions in mind let us proceed with the situation presented.

Silence of the purchasers, whether they are parties or not, suggests to a varying degree, depending upon the attendant circumstances, the same underlying notion of conduct against interest.³⁰ It would seem to follow, therefore, that such silent conduct against the interest of

28. 4 WIGMORE §§ 1048, 1076.

29. 4 *id.* § 1060.

30. See 2 *id.* § 277.

the person refraining from speech is entitled to a higher degree of trustworthiness than where this against interest factor did not exist. The practical difficulty lies in the determination of whether the silent conduct was, in fact, or, perhaps more accurately stated, could reasonably have been thought of by the silent person as against his interest. Therefore, when A proposes to testify that the purchasers of the goods other than B made no complaint, such testimony, in the absence of additional facts, would have little weight and, therefore, correspondingly a small degree of trustworthiness. Additional circumstances indicating that a person in the position of one of the purchasers would protest if the goods were inferior and that the purchaser did not would add to the strength of the silent conduct.

In doubtful situations where much is left to conjecture as to the significance to be attached to the silent conduct, it would seem to be sound policy to exclude the evidence.³¹ For example, in *Lake Drainage Commissioners v. Spencer*³² the issue arose as to whether the defendants' mother had been served with summons. Testimony of the defendants that they had never heard her say anything about the service of summons was held inadmissible. The court assimilated such testimony to hearsay. The aspect of the silence as being against the interest of the mother was not alluded to in the opinion of the court. To speculate as to whether such silence on the mother's part should be construed as likely to be against her interest, or rather whether she thought so, or not, seems of slight value in the solution of the problem of admissibility. The reasoning of the court in that case would seem to support the hypothesis that inactive nonverbal conduct (silence) runs afoul of hearsay. Does such a hypothesis tally with experiences in the ordinary affairs of life? Does not much depend upon the setting or surrounding circumstances? In that case, it seems doubtful that the mother's conduct (silence) should have been treated as hearsay, the attendant circumstances being insufficient to raise an inference of an implied assertion. Exclusion of the testimony as to her silence could, it would appear, have been more effectively placed upon the ground of relevancy. Her silence might have been attributed to many factors, such as forgetfulness, assumption that the children knew of the service of process, reluctance to bring up an unpleasant subject, and others. Granting, however, that the barrier of relevancy is overcome, the question of whether she probably knew that silence was in derogation of her interest is left to speculation. That being true, it would seem to follow that a court adopting the theory of the detriment concept as a factor to be considered in determining the existence of an implied assertion or at least the equivalent of hearsay

31. This position is perhaps a slight departure from the one advocated by Professor Falknor, *supra* note 12, at 215.

32. 174 N.C. 36, 93 S.E. 435 (1917).

should have no difficulty in disposing of this factor on the ground that no evidence was offered in support of the existence of such a detriment.

The foregoing observations demonstrate the intricacies attending the perplexing problem of hearsay or a hearsay equivalent in these cases of silence. Many of the inconsistencies in the decisions are probably as much attributable to inarticulation as to articulation. In *Fogg v. Oregon Short Line R. R.*,³³ the plaintiff claimed compensation for an injured knee. The defendant contended that the injured knee was the result of a prior accident and introduced plaintiff's statement that he had had such an accident in support thereof. In rebuttal, testimony was elicited from plaintiff's wife that he had not complained of an injured knee growing out of the prior accident. The appellate court, in affirming the admission of this evidence, referred to the admissibility of declarations of present pain or suffering. In effect, the court seemed to say that even if the wife's testimony was hearsay, nevertheless it was admissible as a logical extension of the exception to the hearsay rule relating to present pain and suffering. What do we glean from these nonverbal inactive (silence) cases with relation to hearsay?

In many instances silence under appropriate circumstances approaches, if it does not in fact constitute an implied assertion, *i.e.*, hearsay. Such a situation is perhaps more prevalent in inactive nonverbal conduct cases than in those of active nonverbal conduct. If a hearsay clash is encountered, there is the possibility of some exception being applicable. While the factor of detriment may be helpful in arriving at a particular determination, the basic thesis involves the application of the common experience of mankind (judicial notice) to the facts of the case. Any attempt to categorize the cases, for example, into those with reference to sales of goods, injuries sustained, service of summons, etc., is thought of slight value because of the myriad situations that may develop.³⁴

From what has been said it is not to be inferred that the writer believes the entire scope of the subject of nonverbal acts in their relation to hearsay is in a state of chaos. Most of the questions that arise in the classifications, hereinafter indicated, are determined by the courts with remarkable dispatch, attended by no pitfalls. It is within the periphery of a limited, although frequently encountered, area that pandemonium holds sway. One further observation having to do with nonverbal acts is perhaps worthy of note.

33. 78 Utah 105, 1 P.2d 954 (1931).

34. Falknor, *supra* note 12, at 209.

3. *Conduct as Ultimate or Probative Fact*

It should be borne in mind that nonverbal acts or conduct may be: (1) directly probative of an ultimate fact in issue, as where the knowledge of the owner as to the vicious propensities of an animal is in issue³⁵ or (2) indirectly probative of an ultimate fact in issue, as where testimony that a defendant, charged with the murder of an FBI agent, had participated in a bank robbery was allowed.³⁶ This indirect probative use of conduct encompasses every conceivable kind of mental state or condition.

4. *Proof of Conduct Limited to Mental State*

It is to be observed from the foregoing cases that whenever proof of conduct (active or inactive) is offered in spite of the hearsay rule, such proffered evidence performs its function if it tends to establish a mental state or condition. To hold in addition that such proffered evidence tends to establish the doing or not doing of an act in consequence of such mental state or condition is to exceed the scope of proof of the evidence. For example, in a criminal prosecution evidence is offered of defendant's flight shortly after the commission of the alleged offense. Insofar as this evidence is concerned, it has performed its service by tending to establish the defendant's mental condition (fear)—not guilt. Again, in a civil action, on direct examination *W* testifies favorably for *B*, who called him as a witness. On cross-examination *A*, the opponent, seeks to elicit testimony of a prior altercation between the witness and himself. Such evidence is manifestly limited to indicating the ill-feeling of the witness towards *A*. By the same token in those cases wherein the quality of merchandise sold and delivered is in issue, evidence that no complaints were made to the seller by other buyers from the same lot or bulk raises a possible inference of the mental state of such buyers that they were not dissatisfied with the goods—not that the goods were of merchantable quality.

The fact that in many instances no harm results from ascribing to such evidence of nonverbal acts (conduct) an additional inference, such as the doing of an act in consequence of the mental state, does not justify the perpetration of the fallacy. There are instances, repeatedly exemplified in the realm of verbal acts, wherein such unwarranted usage exerts a baleful influence.

From the foregoing observations, it is not to be implied, however, that the proposition that an inference may not be based upon an inference, convincingly exposed by Wigmore,³⁷ is here advocated.

35. 2 WIGMORE § 251; 6 *id.* § 1770.

36. *United States v. Puff*, 211 F.2d 171 (2d Cir. 1954).

37. 1 WIGMORE § 41.

The circumstance that the proffered nonverbal or verbal act is reasonably susceptible of more than one inference does not derogate from the position here taken. If such proffered evidence is reasonably probative of the mental state involved, the fact that it may also warrant other inferences does not in and of itself demand exclusion. To contend otherwise would be to ignore the principle that a proffered act or assertion may be probative of one or more propositions. Let us now proceed with a consideration of verbal acts.

III. VERBAL ACTS

The term "verbal acts," as the words imply, is used to designate assertive acts, words (written or spoken), but with the limitation that the truth of the matter stated is immaterial. Therefore, the rule against hearsay does not apply to verbal acts.

The "verbal act doctrine" is usually applied in one of two situations: (1) when the assertion is in itself directly probative of the ultimate fact in issue or (2) when the assertion tends to explain an ambiguous act.³⁸

1. *Assertions Directly Probative of an Ultimate Fact*

In a case where the terms of an oral contract are in issue, the declarations of the parties at the time the alleged contract was entered into are admissible as within the first classification; so also the performance of a contract might demand an assertion, as where "proofs of loss" are refused under an insurance policy.³⁹ Here again such proofs (written assertions) are illustrative of the category. Words written or spoken in actions for libel and slander, respectively, are also within the first group of cases. None of these instances raises the question of hearsay. It is inconceivable that such evidence would have the effect of proof of the truth of the assertion. The evidence not being susceptible of contravening the rule against hearsay, no hearsay exception need be considered.

2. *Assertions Explaining an Ambiguous Act*

When the proffered assertion tends to explain or elucidate an ambiguous act a different situation is presented.⁴⁰ The equivocal conduct or act must of course be material and must accompany the assertion. Without deviating further than to point out Wigmore's illuminating discussion⁴¹ of the limitations attending this group of

38. 6 *id.* § 1770.

39. 6 *id.* § 1770.

40. 6 *id.* § 1772.

41. 6 *id.* §§ 1772-1785.

verbal acts, let us examine them with a view of ascertaining their status within this area of proof. A delivers ten dollars to B. The question may arise as to whether the delivery was intended as a gift, a loan, the payment of a debt, or for some other purpose. Accordingly, W's testimony that A, upon handing over the money to B, said: "This is in payment of the loan you made me," tends to clarify the nature of the transaction.⁴² By the same token, upon the issue of adverse possession, declarations of those in possession characterizing their occupancy are received—not as testimonial assertions but merely to throw light upon or give color to the occupancy.⁴³ In a proceeding to recover death benefits under workmen's compensation, the declaration of the employee, a salesman, made the evening of and before the injury with respect to the nature of his duties and the purpose of a trip was admitted. This type of case is illustrative of the many approaches employed by the courts in this penumbra of verbal acts.⁴⁴ The court might properly conceive of the declaration as coming within the hearsay exception of a present state of mind,⁴⁵ although, as Wigmore observes, it seems that the verbal-act area is the favored ground of receiving these statements.⁴⁶

The cases are legion admitting statements explaining an ambiguous act. Undoubtedly, Wigmore's outstanding contribution to the subject,⁴⁷ ear-marking many of the pitfalls encountered and the way they should be avoided has had a marked and stabilizing influence upon the courts. Furthermore, an apparently increasing number of cases bear witness to the influence he has exerted⁴⁸ in broadening the scope of the applicability of the spontaneous exclamation exception to the hearsay rule, as well as extending the scope of operation of the verbal act doctrine. There is a marked tendency to break away from the shackles of the doctrine, notably with reference to the requirement of contemporaneousness. And in dealing with the spontaneous exclamation exception to hearsay, emphasis is now laid upon the emotional influence aspect, rather than upon proximity of time with relation to the event. Moreover, the startling event, essential to the application of the spontaneous exclamation exception, need not be relevant to the issue.⁴⁹ Notwithstanding these encouraging trends, there is much to be desired in the way of clarity in the decisions of the courts.

42. 6 *id.* § 1777 n.4.

43. 6 *id.* § 1778.

44. *Schmidt v. Pittsburgh Plate Glass Co.*, 243 Idaho 1307, 55 N.W.2d 227 (1952); *Gassaway v. Gassaway & Owen*, 220 N.C. 694, 18 S.E.2d 120 (1942) (similar statement excluded).

45. 6 WIGMORE § 1725.

46. 6 *id.* § 1726.

47. 6 *id.* § 1772.

48. 6 *id.* §§ 1750 n.3, 1777 n.2.

49. 6 *id.* § 1753.

The recurring use of the enigmatical phrases "res gestae" and "a part of the res gestae" has added immeasurably to the confusion. A customary employment of the former phrase is to denote a circumstance or event inseparably connected with the one at issue. For example, in a prosecution for murder evidence of another crime in the link of attendant circumstances was allowed.⁵⁰ Such phraseology is often misleading in cases within the borderland of hearsay and verbal acts, including the circumstantial use of statements to indicate a mental condition, hereinafter discussed. Frequently, it is impossible to determine whether an exception to the hearsay rule is applied, or the evidence is received despite the hearsay rule.

The time element of the statement probably accounts, in part at least, for this indiscriminate treatment at the hands of the courts. A prerequisite of the verbal-act doctrine, as above noted, is that the statement accompany the act or transaction in question; while the spontaneous exclamation, as its name implies, usually must accompany an event. And, of course it is possible that the declaration may fulfill the requirements of a spontaneous exclamation, or for that matter those of some other hearsay exception such as that of an existing state of mind, as well as the prerequisites of the verbal-act doctrine, elucidating an ambiguous act. *B* shoots *A*. *A*'s exclamation while under shock: "C, my son *B* shot me. I dislike him and as I am about to die, I hand you my watch as a gift." In the homicide action against *B*, *A*'s declaration might be received under the following exceptions to the hearsay rule: (1) a spontaneous exclamation; (2) a dying declaration; (3) a declaration indicating a present state of mind, or (2) and (3), depending upon attendant facts. Now then in the civil action by *A*'s personal representative to recover the watch from *C*, *D*, who was present when *A* spoke to *C*, would no doubt be permitted to testify by reason of the exceptions (1) and (3), and also to testify as to the declaration accompanying the delivery of the watch by virtue of the verbal-act doctrine. Moreover, in this last case, *A*'s declaration of his dislike for *B* might be considered by the court as indicating circumstantially his state of mind. Too much emphasis cannot be placed upon the hypothesis that in each of these instances the attending facts and circumstances play an indispensable role in the determination of whether or not the declaration meets any one or more of the prerequisites of admissibility.

Illustrative of the latter situation is the case of *United States v. Mesarosh*.⁵¹ There the defendants were charged with conspiring to teach and advocate the overthrow of the United States Government by force and violence. Admitting testimony that one of the defendants,

50. *State v. Peters*, 90 N.H. 438, 10 A.2d 242 (1939); see also 1 WIGMORE § 218 n.1.

51. 223 F.2d 449 (3d Cir. 1955).

prior to the period complained of, "instructed a class that revolution could come about only by the violent overthrow of the government," and permitting the witness to read certain passages from a book which defendant had read to the class was upheld on the appeal. Apparently, the court based its decisions on two grounds: (1) "on the question of his intent," etc., the declarations indicated circumstantially the declarant's state of mind; and passages from the book indicated circumstantially the state of mind of defendant in consequence of the assertion of another; (2) "to prove the objective fact of the Party's teachings" probative of an ultimate fact in issue. What the court did make crystal clear in that case, however, was that hearsay was not involved. This determination was the all-important question to be decided.

IV. CIRCUMSTANTIAL USE OF STATEMENTS TO PROVE STATE OF MIND⁵²

When the mental state or condition of a person is brought into question, an utterance (oral or written) may become probative either (1) in proof of the mental state of a person in consequence of a statement made by another, or (2) in proof of the declarant's mental state. Manifestly, in either event the rule against hearsay is not offended because the truth of the assertions is immaterial. The principle has become axiomatic; nevertheless, disagreement often arises in its application, as hereinafter indicated.

Under the previous classification of statements, mental condition became essential to throw light upon an ambiguous act; while here mental condition may be said to have probative value other than to elucidate an ambiguous act.

Moreover, no fundamental distinction in principle exists between the two groups of cases within this classification. Cases involving proof of the mental condition of one person in consequence of the statement of another are cited in support of a decision relating to the declarant's own statement as indicative of his own state of mind, and vice versa.

Accordingly, in the ensuing discussions of the two groups of cases, certain propositions stressed as being perhaps helpful in the solution of problems arising under one group may be equally apposite in those arising under the other. In fact, it may be said that most of the observations hereinafter made are applicable to proffered evidence generally within the whole gamut of this twilight zone of hearsay. Nevertheless, the treatment of the propositions will be presented under the above categories in the interest of graphic illustration.

52. 6 WIGMORE §§ 1788-1790.

1. *Proof of the State of Mind of One Person
in Consequence of the Assertion of Another*

A. Substantive Law and Pleadings Differentiated from Rules of Evidence.—A proper perspective of the exact setting, in relation to the substantive law and pleadings, of evidence involving the circumstantial use of statements of one person as indicative of the mental state of another by reason thereof, would seem essential to an intelligible approach to the subject. The failure to make such a delineation, and as an incident thereto to consider the incidental effect of any disabling factors, perhaps accounts for the occurrence of occasional sophistries in the discussions of the cases. In any event, let us undertake the delineation, not with the idea of criticising the positions taken by others, but rather of determining what benefit, if any, may be derived therefrom in the solution of problems within this orbit of proof.

A communicated threat of the deceased in a homicide case where evidence supporting the plea of self-defense is introduced is receivable to indicate the mental state of the defendant at the time of the affray.⁵³ In such a case the substantive law affords the accused complete exoneration for the taking of the life of the deceased if it is established that at the time of the homicide the defendant had reasonable apprehension of death or great bodily harm at the hands of the deceased. The mental state of defendant does not become material unless there is some evidence of self-defense.⁵⁴ Turning to the adjective law, we find that the threat is logically probative of the probable mental state, provided, of course, such threat was communicated, for otherwise it would lack probative value on this issue.

B. Role Played by Disabling Factors.—The communicated threat presupposes the following reactions of the defendant in consequence thereof: (1) that he understood the words of the threat—its nature and character; (2) that he remembered the threat at the time of the assault; (3) that he then reasonably believed the deceased was about to carry out the threat. Absence of any one of these mental reactions would render the threat ineffectual. If the defendant did not understand the words used by the deceased, or if from the surrounding circumstances he thought they were made in jest, the threat would have no efficacy. The threat would be lacking in probative value because the defendant would not undergo the mental state (fear) of great bodily harm or death in consequence of the deceased's assertion. Unless there is some proof of the existence of one of these disabling factors, however, the communicated threat is not excluded.

53. 2 *id.* § 247 n.1.

54. See note 51 *supra*.

In an action against police officers for alleged false arrest and false imprisonment, prior statements of a third person to the defendants complaining of the plaintiff's activities were received "upon the ground of probable cause."⁵⁵ Under the substantive law, we find that the establishment of "probable cause" is a complete bar to the plaintiff's right of recovery. Information calculated to create an impression in the minds of the defendants that the plaintiff was engaged in disobeying the law to the extent that her arrest was warranted is logically probative of the sufficiency of their apprehension in making the arrest and imprisoning the plaintiff and, therefore, in the absence of some rule of exclusion, is legally relevant. Even from a cursory examination of some tabular analysis of rules of exclusion, we readily conclude that the only possible rule to be considered is the analytic rule of auxiliary probative policy designated as hearsay. But hearsay is no barrier, for the reason that neither the substantive law dealing with materiality nor the evidential rule of relevancy presupposes the truth of the utterances (information) in question. Though analogous to the prerequisites for admissibility of the communicated threat in the homicide case, mentioned above, here the information presupposes the following mental reactions in consequence thereof: (1) that the defendants understood the information given; (2) that the defendants remembered the information at the time of the arrest and of the imprisonment; (3) that the defendants believed the information to be true. The lack of any one of these factors would deprive the evidence of any probative value. In the absence of extenuating circumstances, these factors are assumed to exist, however.

Moen v. Chestnut,⁵⁶ an action for damages arising out of an automobile collision, presented the question as to whether the driver of one of the cars involved should have been permitted to testify that, as she approached the intersection where the collision occurred, her companion stated that it was a dangerous one and enjoined the driver to be careful. The ruling of the trial court, admitting the evidence, was upheld on the ground that the driver of the car thereby derived knowledge of the hazardous condition of the intersection. In a lucid opinion, Justice Steinert points out the inapplicability of hearsay to the companion's statement. The sole use of the statement was to establish knowledge of the character of the intersection on the part of the driver of the car. Knowledge in this case was not directly probative of an ultimate fact in issue, as in the homicide and false arrest cases; here it played the role of an evidentiary fact, which in turn was probative of the ultimate fact of conduct. In brief, under the substantive law, knowledge in this case was not itself determinative of

55. *Clark v. Alloway*, 67 Idaho 32, 170 P.2d 425, 430 (1946).

56. 9 Wash. 2d 93, 113 P.2d 1030 (1941).

an issue in the case; nevertheless, knowledge of the hazardous condition of the intersection was a factor to be taken into account with reference to the probable conduct of the driver on being apprised of such condition, the ultimate question being whether the driver of the car exercised the degree of care of a reasonable, prudent person on reaching and entering the intersection. And although the statement is merely proof of an evidentiary fact, the factors to be reckoned with are similar to those in the cases wherein belief and knowledge are directly probative of an ultimate fact in issue. If the driver did not understand the statement of her companion; or if the driver did not remember it when they reached or entered the intersection; or if the driver, upon reaching the intersection, did not believe the information to be true—the existence of any one of these factors would destroy the probative value of the assertion.

Inferences from the assertions in these illustrative cases to the respective mental states in issue would perhaps afford no serious grounds of difference between the cases; likewise, there would be agreement as to the effect of the disabling factors. In other words, these factors would be dealt with as exceptions rather than as conditions precedent insofar as the inference of mental state is concerned. Stated differently, the usual is normally assumed, rather than the unusual.

Although the disabling factors are seldom articulated in reference to the problem of admissibility, more often in considering the sufficiency of the evidence for the jury to consider, it is here urged that their status should not be lost sight of in a determination of the effect of a proffered assertion as hearsay or as creating a hearsay danger. To say that an argument based upon such a course of reasoning in conjunction with the inferences to be gleaned from such an assertion is in reality a matter of relevancy is beside the point, for here we assume that neither materiality nor relevancy is involved.

C. Similarity of Reasoning Employed with Relation to Relevancy and Rule of Auxiliary Policy.—There is, however, a close relationship between the reasoning employed in determining relevancy and this rule of auxiliary policy. Relevancy does not denote that the proffered assertion is susceptible of but one inference; in order to pass over the barrier of relevancy, if the submitted evidence reasonably raises a probable inference of the fact sought to be proved, this should suffice. There is no occasion to consider other inferences. Thus, where the statement of one person is proffered in proof of the mental state or condition of another in consequence thereof, the court is not called upon to summon all probable inferences that may arise therefrom. If the statement reasonably tends to indicate the mental state or condition involved, that suffices insofar as relevancy is concerned.

Similarly, when the court is confronted with hearsay or hearsay dangers from such proffered statement, it should confine its investigation to such inference or inferences as are reasonably calculated to arise therefrom. To indulge in other inferences not only serves no useful purpose but invites excursions into the nebulous area of unbounded speculation. Even though a liberal attitude toward inferences should be called for, remote inferences of the unusual or exceptional should not be resorted to. Otherwise, before the circumstantial use of mental state could be received, disabling factors, or at least some of them, would have to be taken into account.

D. Lack of Materiality Does not Necessarily Warrant Exclusion of Evidence.—The cases discussed should suffice to demonstrate the hypothesis advanced that assertions of one person used to indicate the mental state of another in consequence of them do not clash with hearsay, because the truth of the matter asserted is not brought into controversy. Furthermore, lack of materiality does not in itself necessarily call for exclusion. Materiality outlines the scope of the ultimate issues in the case. The court therefore might very properly decline to receive evidence beyond the scope of such issues in order to avoid the possibility of a confusion of issues and to prevent unnecessary delay in the presentation of the cause. It does not follow, however, that lack of materiality invariably warrants the exclusion of evidence. Such evidence might be received despite the issues, as where it is sought to impeach a witness, or where the evidence is probative of some evidentiary fact as distinguished from an ultimate fact. Thus the statement made by the occupant of the car with reference to the dangerous character of the intersection she and her companion were approaching was material under neither the substantive law nor the pleadings, insofar as the limited use for which this evidence was admitted is concerned.

E. Testimonial Use May Overshadow Circumstantial Use.—Are there situations where unwarranted testimonial use is likely to attach to such an assertion so as to call for its exclusion? Suppose an issue is raised as to whether the defendant entered into an oral contract to employ the plaintiff to manage a business. The defendant takes the stand in his own behalf and proposes to testify that some few days prior to the time the alleged contract was entered into A told him that: (1) the plaintiff had been convicted the year before for reckless driving; (2) the plaintiff had failed to support his wife; (3) the plaintiff had told him an untruth; (4) the plaintiff had embezzled money from his former employer; (5) some months prior the plaintiff had defrauded him in the sale of merchandise; and (6) the plaintiff had recently stolen a car from a neighbor. In the absence of extenuating circumstances, such as the defendant's belief that A was telling an

untruth, would not most of the information thus imparted tend to inhibit him from entering into the contract of employment with the plaintiff? Hence, would not the inference arise that he did not enter into such contract? All items after (1) and (2) and, perhaps, (3) would certainly warrant such an inference. Furthermore, the truth of what *A* said to the defendant is beside the point. We are not confronted with hearsay, but is it not most probable that the jury would accept such assertions for the illegitimate testimonial use? Would a cautionary instruction suffice to limit the consideration of the assertions to the mental state of the defendant in consequence of the assertions? To simplify matters, we will say that items (1), (2), and (3) are considered as having too little probative value and are excluded. The defendant seriously contends that if the remaining statements made to him by *A* are withdrawn from the jury's consideration, he will be immeasurably harmed by thus being deprived of strong, cogent, and convincing evidence. On the other hand, the plaintiff strenuously contends that such evidence would be most harmful to him. It would amount to the height of incredulity to assume that the jury would or could apply the instruction of the court and consider the evidence for the legitimate use solely, says the plaintiff. We will assume *A* is unavailable as a witness. What choice has the trial judge between these conflicting positions? It would seem that defendant's interest might be substantially protected in such a case by permitting him to testify that, in consequence of information given him by *A*, which reflected upon the plaintiff's desirability as an employee, he relied upon it and did not enter into any contract with the plaintiff. The defendant's proffered testimony as to the incidents having been presented to the court in the absence of the jury, the plaintiff would have the opportunity of cross-examining the defendant about them in open court if he so desired.

2. *Mental State of Declarant Shown from His Own Statement*

A. Scope of Investigation.—Attention is now focused upon the other circumstantial use of statements—to indicate the declarant's own mental condition. Consciousness, belief, good faith, insanity, and innumerable other states of mind are illustrative of mental states or conditions often sought to be established circumstantially by use of the speaker's assertions. Every conceivable kind of mental state is encompassed within the rule. And as no formula appears to have evolved for the treatment of any particular mental state, an attempted classification on the basis of mental states would be valueless. Our investigation lies first in ascertaining whether these utterances are likely to infringe upon the rule against hearsay directly or indirectly; secondly, in instances where the hearsay rule is involved, and therefore all the dangers it is designed to guard against are present, in determining what measures, if any, may be of practical value in the

solution of the problem of admissibility. Manifestly, there are innumerable instances where these utterances raise no serious question of hearsay or of a hearsay danger.

In an action by a husband for alienating the affections of a wife, testimony of witness is offered that a short time prior to the occurrences in question, the husband told him that the wife continuously nagged him. Would the hearsay aspect of the statement warrant its exclusion?

Sanity being an issue, the declaration of the person in question, "I am the Emperor of China," would probably be accorded circumstantial use without serious opposition.⁵⁷

The plaintiff seeks damages for being wrongfully accused of the theft of a car. *W* testifies that subsequent to the time when the slanderous remark was alleged to have been made about the plaintiff, he heard *A*, a third person, say, at a gathering of people, that the plaintiff had stolen a car. The declaration would no doubt be admitted on the question of the extent of damages sustained by the plaintiff.

In order to account for his failure to report a burglary because of fear, the prosecuting witness was allowed to testify that he had told his wife not to say anything about the matter.⁵⁸ Here again, the legitimate circumstantial use of the assertion to indicate the state of mind of the speaker is manifest. In fact, the circumstantial use of such assertions, perhaps, invites no serious opposition. There are instances, however, that have evoked much divergency of views and discussion.

*B. Wright v. Tatham Reviewed.—Wright v. Tatham*⁵⁹ furnishes a classical illustration of a case that has provoked widely divergent views. It will be recalled that, on the issue of sanity, certain letters addressed to the testator, Marsden, were offered in evidence. The act of sending the letters was discussed in the treatment of nonverbal acts; now let us examine the contents of the letters from the aspect of whether or not they reflect the mental state of their writers as to the sanity or mental capacity of Marsden. One of the letters offered conveyed an express hope of Marsden's good health; another requested Marsden to instruct his attorney to proceed with the settlement of a dispute; and the third expressed appreciation for favors conferred. It is apparent that in the normal course of events, letters of this character would not be sent to a person mentally deranged. The case may be viewed from two aspects: (1) the act of sending the letters, (2) the assertions in the letters. Suppose it was established

57. See, however, Hinton, *State of Mind and the Hearsay Rule*, 1 U. CHI. L. REV. 394, 398 (1934); see also Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138, 1143 (1935).

58. *The Queen v. Gandfield*, 2 Cox Crim. Cas. 43 (1846).

59. See Seligman, *supra* note 3; Maguire, *The Hillmon Case—Thirty-three Years After*, 38 HARV. L. REV. 709 (1925).

that one of the letters had not been sent because it had been misplaced and was not found until after Marsden's death. How would this affect the mental state of the writer as reflected by the assertions in the letter? Not at all. Does it not follow, therefore, that the contents of the letters have significance separate and apart from the act of sending?

Baron Parke, in the *Wright* case, emphasized the acts of sending the letters as controlling on the hearsay aspect of the case; nevertheless, he also stressed the hypothesis that the contents of the letters in question, according to his view, amounted to the implied assertions of the senders, respectively, as to their beliefs or opinion that Marsden was sane. Application is made as follows:

[I]n this case the letters which are offered only to prove the competency of the testator, that is, the truth of the implied statements therein contained, were properly rejected, as the mere statement or opinion of the writer would certainly have been inadmissible.⁶⁰

What distinction, if any, exists between the contents of the letters in this case and the statement of the prosecuting witness to his wife asking her not to speak of the burglary? How do the statements in these letters differ from the assertion of the husband in the alienation of affections suit? Pretermitting for a moment the fact that the letters were written many years prior to the execution of the will, which would raise a serious question of relevancy, and assuming for the moment that the letters were written immediately prior to the execution of the will, would not even then serious doubt arise as to their probative value as indicating circumstantially a state of mind? Baron Parke considered the contents of the letters as implied statements that Mr. Marsden was sane. Is it not true that, while an implied assertion may reflect a mental state of the speaker, it does not follow that any assertion reflecting a mental state of the speaker necessarily carries with it an implied assertion of that mental state? Take, for example, the assertion of the prosecuting witness in the burglary case enjoining his wife not to say anything about the crime; this assertion indicated the state of mind of the prosecuting witness—fear—but did it necessarily amount to an implied assertion that he was fearful?

A comes into possession of a valuable first edition of a noted work, long since out of print. Needing money, he desires to sell the book. He recalls that B, now living in a distant city, and whom he had not seen nor heard from in years, was once interested in purchasing first editions of the kind he has acquired. Thereupon, A writes B, describing the book and inquiring whether he would be interested in its purchase. A short time after A writes this letter, the question of B's mental capacity is brought into issue with respect to a deed of

60. 7 Ad. & El. at 389.

land executed by *B* about the time *A*'s letter was written. The letter is offered in support of *B*'s mental capacity. It is contended that the contents of the letter reflect circumstantially *A*'s belief that *B* was capable of handling his own affairs. From that belief, it is to be inferred that *B* did have mental capacity. Is it not daily experience for one to write to others without any thought as to the mental condition of the addressee? *B*'s mental capacity to execute the deed was material under the substantive law. Therefore, any evidence that is logically probative of mental capacity is relevant. Does the letter meet the minimum requirements of logical relevancy to prove the mental state of *B*? Would not the court be disposed to say that the inference would be wholly unwarranted under the facts? *A*, like anyone else, reasonably assumes that the addressee is mentally competent in the absence of information to the contrary. In the absence of some showing that *A*, pursuant to a conversation or correspondence with *B*, wrote the letter, the writing of the letter forms not the slightest basis for the inference that *A* believed *B* to be of sound mind. In other words, there is a total lack of probative force as to *B*'s mental condition. The conclusion is inescapable, therefore, that the contents of the letter are inadmissible because of lack of relevancy. But let us suppose that the letter in our hypothetical case was considered relevant. Does it follow that the hearsay rule would be applicable? No. This is true because—in the ordinary course of events—the contents of the letter would not be considered as constituting an implied assertion of *A* that *B* was sane for the reasons above stated. And by like reason the hearsay rule is inapplicable to the contents of the letters in *Wright v. Tatham* because they did not imply an assertion that Marsden was sane.

C. Circumstantial Evidence with Relation to Proof.—Even if the letters in our hypothetical case reflected a mental state of *A* that *B* was sane, would not this constitute a mere link in the chain of circumstantial evidence of mental state? Surely, relevancy does not require that the complete gamut of proof of the ultimate fact be completed by one item of evidence. Assume that the contents of *A*'s letter is some evidence of *A*'s belief of *B*'s sanity. It does not follow, however, that the contents of the letter amount to direct proof of *B*'s sanity. In other words, standing alone—unless fortified by other evidence—it could be withdrawn from the jury's consideration. The trial judge might instruct the jury not to consider the contents of the letter as evidence of *B*'s sanity but only of *A*'s mental state, which, together with other evidence, might be considered by them on the ultimate question of *B*'s mental capacity. Both in the opinions of the courts, as well as in the discussion of the cases by the authorities, there seems to be a disposition in dealing with questions involving the circumstan-

tial use of statements in proof of a mental state to overlook entirely the proposition that there are many links in the chain of circumstantial evidence.

D. When Circumstantial Use May be More Trustworthy than Testimonial Use and Vice Versa.—Another argument repeatedly advanced is that if *A* in our hypothetical case would not be permitted to testify to the bald fact that *B* was sane, a fortiori, the letter is not receivable to prove that fact indirectly. This reasoning loses sight of the circumstantial use involved, which is attended by a much higher degree of trustworthiness than the testimony of *A* on the stand that *B* was sane. This is so because the writing of the letter at a time and under circumstances not connected with the controversy relieves the statement therein of the possibility of having been made with any intent to influence the proceedings in court. It is to be assumed, of course, that *A* had the same opportunity of observing *B* before writing the letter as he had before testifying. In the absence of evidence indicating such knowledge, the letter would fare no better than the proffered testimony of the witness. In both the burglary case and the alienation of affections suit the statements were made before the actual case being tried had been started and in both there were attendant circumstances which lead one to believe that the declarant had knowledge of the subject of his assertions from which the state of mind was inferred. The assertions in these cases likewise are attended with a high degree of trustworthiness.

E. Implied Use Distinguished from Circumstantial Use of Statements.—At this juncture, in order to clear the way for the ensuing discussion, certain fundamental observations should be noted. The direct or implied statement of an intention is an assertion of a present state of mind—the narration of a fact—and when so presented obviously constitutes hearsay. The word “implied” is used in the sense of a direct implication as distinguished from the circumstantial use of an assertion from which an inference of a state of mind is permissible. For example, the implied assertion “I am going to leave this place tomorrow” is treated as the equivalent of “I plan to leave this place tomorrow.” But “I thoroughly dislike this place” illustrates a circumstantial use of the assertion in proof of the declarant’s plan to leave. With these concepts clearly in mind, let us direct our attention to a case that has not only provoked learned disputations, but one that, although involving an exception to the hearsay rule, seems admirably suited for the purpose of presenting some of the difficulties evolving from this area of the twilight zone of hearsay.

F. The Hillmon Case Reviewed.—The case of *Mutual Life Ins. Co. v. Hillmon*⁶¹ involved an action to recover on certain life insurance policies issued upon the life of one Hillmon. Plaintiff contended that the body of a man found at Crooked Creek, Kansas, was that of the insured, Hillmon; defendants contended that it was not Hillmon, but Walters. In short, the defendants charged that a gigantic fraud was being perpetrated upon them. Hillmon they asserted was still alive. Letters written by Walters from Wichita, Kansas, several days before the body was found, one to his sweetheart, another to his sister, both expressing his intention of going on a journey with a man by the name of Hillmon, were declared admissible.

Mr. Eustace Seligman assailed the doctrine applied in the *Hillmon* case as destroying the last vestige of hearsay.⁶² The gist of his argument is that a logical extension of the ruling there applied would lead to the receipt of an expression of memory to prove a past act. Professor Maguire,⁶³ in a thought-provoking dissertation, takes issue with Mr. Seligman's view on this point.

Doubtless the most engaging feature of that decision is the use of the declaration of the writer to indicate his state of mind, which was not directly probative of an ultimate question in the case. It seems that in prior cases wherein declarations had been admitted to prove the declarant's state of mind, such state of mind, in most instances at least, had borne directly upon an ultimate fact in issue.⁶⁴ To illustrate, if Hillmon had written a letter expressing his intention to go to Colorado and other places, no serious question would have been raised with reference to the admissibility of the letter to indicate his present state of mind—intent to go on a journey. However, we have no fault to find with the decision as it relates to this aspect of the case. Calling attention to this feature of that case is deemed essential to a better understanding of other aspects there encountered and now to be discussed.

Let us assume that under the substantive law it becomes material to prove that A was in the Town of X on March 15. B's testimony that a few days prior thereto A told him "I plan to go to X on March 15" is received as evidence of A's mental state (intent to go to X on March 15). Stop! The rule of evidence authorizing proof of a mental state does not go so far as to authorize proof of A's act in going to X. Obviously, from the establishment of the state of mind, an inference is permissible that he did go. This is simple enough. Frequently, however, A's declaration is treated as the equivalent of direct evidence of his going to X. Remember, A's declaration is here a

61. 145 U.S. 285 (1892).

62. See Seligman, *supra* note 3.

63. See Maguire, *supra* note 59.

64. See note 59 *supra*.

testimonial assertion in proof of an existing state of mind. Accordingly, if the jury should believe that A was telling the truth, they would not be permitted to infer that he went to X, certainly on the strength of the assertion alone. The result should warrant the abandonment of the fallacious notion that a declaration of intent is evidence of the act. Granting, however, that the elimination of the intermediary step is readily accounted for by implication, *i.e.*, that the jury must find that A told the truth in making the declaration before they could infer that he went to X and, that therefore, no serious harm is likely to ensue from the erroneous hypothesis, we strongly contend, nevertheless, that much of the confusion existing in and with reference to the discussion of cases in this area of proof is attributable to the use of figurative terms and of inferences at the expense of the actualities of the legal processes involved. Let us see if this is not so.

We take another look at the case where A's presence in the Town of X on March 15 becomes material under the substantive law, and A's prior declaration of his intention of being in X on March 15 is proffered. The declaration of intent is logically probative of intent. From the storehouse of general experience we find that the declaration of a person of his intention to do an act in the absence of extenuating circumstances indicates that he probably had the intent to do the act. In other words, it is more reasonable to assume that he had the intent than that he did not have it. Requirements of materiality and relevancy interposing no obstacle, we turn now to see if some rule of policy demands the exclusion of such a statement. A cursory examination of a general classification of such rules discloses that the analytical rule of auxiliary policy—*hearsay*—is the only one in any way applicable.⁶⁵ But, as we have observed, this rule affords no barrier because of the exception to the hearsay rule relating to an existing state of mind, and unlike the letters in the *Hillmon* case, the declaration here did not raise any shadow of a hearsay danger lurking in the background. In other words, statements in the letters of Walters have been thought to imply an understanding on his part with Hillmon⁶⁶ that Hillmon had expressed his consent, perhaps, for Walters to go with him. Accordingly, the formidable question before the court, after noting that the statements in the letters fell within the exception to the hearsay rule relating to present intent, was whether or not an instruction by the court would have eliminated the danger of the illegitimate use of Walter's statement. In all probability such an instruction would have sufficed. There are of course instances where such an instruction would not take care of the illegitimate use. For example, in *Shepard v. United States*⁶⁷

65. 1 WIGMORE xci.

66. See Maquire, *supra* note 59.

67. 290 U.S. 96 (1933). See also *People v. Formato*, 286 App. Div. 357,

a declaration of the victim, Mrs. Shepard, that the defendant had poisoned her was excluded irrespective of materiality, relevancy and a possible hearsay exception. The court was convinced that the jury would attach to the evidence an improper usage.

The court in the *Hillmon* case, however, after dealing with the relevancy of the contents of the letters to indicate the state of mind, and then, inferentially at least, applying the exception to the hearsay rule based on necessity, proceeded to the seemingly unsound conclusion that "the letters were competent . . . as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention."⁶⁸ We repeat that the letters were merely evidence of intent. The court was not called upon to discuss the various inferences to be drawn.

*State v. Farnam*⁶⁹ presented an analogous situation to that in the *Hillmon* case. There the defendant was charged with the murder of a young girl whose body was found among the ashes of a burning barn about three-quarters of a mile from her home. The declaration of the victim on the evening of the homicide, refusing to go out with the witness because she expected the defendant to call, was admitted in evidence. And as in the *Hillmon* case, where the letters of Walters were received in proof of his state of mind (intent), so here the declaration was received for the same use. But at this juncture, it is to be noted that, unlike in the *Hillmon* case, a vigorous dissenting opinion urges that the declaration was the equivalent of a hearsay assertion attributable to the defendant. According to this opinion, it was not essential, in view of other evidence, to prove that the victim was at home on the night in question and, consequently, the only motive the prosecution could have had in insisting upon the introduction of the declaration was to persuade the jury that the defendant informed the victim that he was coming to see her that night; that he did call for her at the home; and that he induced her to go to the barn with him.

The *Hillmon* decision is heavily relied upon in support of the receipt of the victim's declaration in the *Farnam* case. Disagreement among text writers and authorities as to such declarations was noted by the court, which pointed out that many considered them admissible as part of the *res gestae*, others referred to them as verbal acts, and still others characterized them as coming within an exception to the hearsay rule. Apparently an exception to the hearsay rule was the

143 N.Y.S.2d 205 (3d Dep't. 1955); *McQuage v. City of New York*, 285 App. Div. 249, 136 N.Y.S.2d 111 (1st Dep't. 1954).

68. 145 U.S. at 296.

69. 82 Ore. 211, 161 Pac. 417 (1916).

avored ground, as in the *Hillmon* case, for the reception of the declaration.

A summary comparison of the two cases with reference to the possible theories that could have influenced or did influence the courts, respectively, is indispensable to a proper evaluation of the problem of the admissibility or exclusion of declarations of this character, as presented in those cases. The court in the *Farnam* case might have considered that the declaration did not meet the minimum requirements of relevancy and excluded it on that basis. Moreover, here also as in the *Hillmon* case, the court, after passing favorably upon the question of relevancy and concluding that the hearsay exception of present mental state was applicable, could have justified exclusion if it thought the assertion justified an inference of a prior assertion of intent on the part of another to the declarant, creating thereby a hearsay danger quite apart from the mental state of the declarant. And as we observed in the discussion of the *Hillmon* case, the hearsay danger would not justify exclusion unless—not as a rule of evidence but as one of practice—the court should determine that the illegitimate use (inference of an assertion by another) of the assertion would probably outweigh in the minds of the jury its legitimate use to prove an existing state of mind of the declarant.

Mental state of intent or purpose is merely illustrative of the innumerable mental states that may be included within this exception to the hearsay rule. For every circumstantial use of an assertion to prove the mental state of the declarant, there is no doubt a corresponding hearsay exception. The all-important question, never to be lost sight of in the consideration of a statement to prove a mental state, is whether it is a testimonial assertion or not.⁷⁰ Unfortunately, throughout this twilight zone of hearsay, no satisfactory conclusions may be reached from the decisions. It is frequently impossible to tell from a given opinion whether the assertion is dealt with as an exception to the hearsay rule or is admitted despite that rule. Here again, the employment of such phrases as "a part of the *res gestae*" or "verbal acts" accompanied by an application that perhaps would be more consonant with the theory of a circumstantial use of an assertion to indicate the state of mind of the declarant only adds to the unsatisfactory condition of the cases.⁷¹ Therefore, while the actual decisions in this sphere are left wholly within the realm of conjecture, nevertheless, theoretically the line between the hearsay and nonhearsay use is clearly drawn, as well as between the various aspects of the latter

70. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

71. 6 WIGMORE §§ 1745, 1767; Hinton, *supra* note 1, at 400 n.20; Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229 (1922).

division. Let us proceed to take under advisement another group of cases closely allied to those involving the circumstantial use of declarations in proof of a mental state.

V. CIRCUMSTANTIAL USE OF STATEMENTS TO PROVE
IDENTITY OF TIME, PERSON OR THING

Proof of the identity of a person or thing affords another circumstantial use of utterances despite the hearsay rule, the truth of the subject matter of the assertion not being called into question.⁷² Occasionally an assertion is made by a witness to identify a time when an event took place or a place where it occurred. No ingenious argument is necessary in some cases to expose the testimonial use likely to be accorded such an assertion by the jury and the highly prejudiced effect resulting therefrom. For example, in a criminal prosecution for the theft of a car, a witness for the prosecution on direct examination testifies that he is positive that the defendant was the man whom he saw drive off with the car in question because the day before A had pointed out the defendant to him as the man who robbed a bank. A sharp conflict of testimony is presented from seemingly credible witnesses for both the state and the defendant. Would anyone be so credulous as to believe that the jury probably would or could limit the consideration of this assertion to the proper use in compliance with the directions of the court to do so? Would the application of the theory of dual admissibility comport with the realities of the situation? Should the crucial question be avoided by resorting to the trial court's discretion? Even if such a course were pursued, would the admission of the declaration constitute an abuse of discretion?

On the other hand, in many cases no formidable question arises upon the offer of the declaration. In *Kyzer v. State*⁷³ the defendant was charged with robbery. To prove the time of the alleged offense, testimony of witnesses that they had heard of the robbery or read about it in a newspaper was admitted. Again, in an action on a policy of life insurance, although certain hospital records, not shown to have been kept within the requirement of the regular entries rule, were held inadmissible to prove what the patient was treated for, these records were allowed to show his attendance at the clinic on the dates mentioned therein.⁷⁴ In a prosecution for the forgery of a check, the defendant interposed the defense of an alibi. A sale order given the defendant in another city on the day in question was admitted.⁷⁵

72. 6 WIGMORE § 1791.

73. 250 Ala. 279, 33 So. 2d 885 (1947).

74. *Harkins v. John Hancock Mut. Life Ins. Co.*, 154 Pa. Super. 387, 35 A.2d 754 (1944).

75. *State v. Krout*, 183 N.C. 804, 112 S.E. 23 (1922).

With respect to the circumstantial use of such assertions to identify a time, place or person, the judicial attitude is quite similar to that toward the circumstantial use in proof of a mental state. Here the question of identity in some manner becomes material to the issues of the case, being either directly involved, as where in a criminal action an alibi is injected as a defense, or indirectly involved as a corroborating circumstance tending to support the testimony of the witness. Therefore, just as in the case of the circumstantial use to prove a mental state, the assertion is here scrutinized to discover whether a reasonable inference of identity may be drawn from it. If legal relevancy is established, which, of course, implies that the assertion tends to prove identity, we then turn to the evidential rules of policy. And, as in the mental state cases, we conclude that the hearsay rule is the sole one to be reckoned with. At this point, as in those cases establishing a mental state circumstantially, the general experience of mankind must be given due weight in order to find out the true effect of the assertion. It is conceivable that here, too, some exception to the hearsay rule might clear the declaration, such as the exception concerning spontaneous declarations.⁷⁶ For example, if the identity of the accused charged with murder is at issue, *W*'s testimony that within seconds after the firing of the fatal shot *X*, standing by him, exclaimed, "There goes the man that shot the gun!" pointing to his right, and that thereupon *W*, looking in that direction, caught sight of the defendant a few yards distant as he passed a street light, hat off, and gun in hand, would no doubt be allowed insofar as *X*'s statement is concerned as within the spontaneous exclamation exception to the hearsay rule. The parallelism between the two classes of cases in close proximity to hearsay seems complete when we further observe that here, as in the mental state cases, the declaration constitutes only a link in the chain of circumstantial evidence.

VI. CONCLUSION

In conclusion, it is suggested that the following observations be considered with relation to cases occurring within this intriguing twilight zone of hearsay:

(1) Circumstantial use of a proffered act or assertion does not necessitate that it fulfill the requirements of conclusive proof; it may constitute a mere link in the chain of proof.

(2) It is possible, of course, for the proffered evidence to fulfill a hearsay exception requirement, and at the same time meet the prerequisites of one or more of the classes of evidence that are admissible despite the hearsay rule.

76. 6 WIGMORE §§ 1749, 1755.

(3) In passing upon the question of relevancy, the court is not called upon to consider the numerous inferences which may be drawn from the proffered evidence, but only whether it logically tends to prove an ultimate fact or an evidentiary fact.

(4) In a case where the proffered evidence does not come within a hearsay exception and some doubt is raised as to whether a testimonial assertion is in fact involved, the court is called upon to consider probable inferences from the proffered evidence.

(5) In thus making a determination as to whether or not the proffered evidence is admissible in spite of the hearsay rule, the trial judge's discretion should not enter the picture; the invocation of the rule of discretion (1) adds to the onerous duties of the trial judge, and (2) is calculated to engender a high degree of uncertainty. While in innumerable instances, such as in passing upon the competency of an expert witness, the rule of discretion serves a useful purpose, even then in these and other situations involving discretion, frequently an appellate court, ostensibly approaching the assignment of error from the point of view of an abuse of discretion, will in effect review the ruling just as if no discretion was involved.

(6) In passing upon a borderland situation of hearsay and nonhearsay, it is here stressed that the trial judge should adopt the standard of the reasonably intelligent person in dealing with the ordinary affairs of life. Such a standard calls for the employment of the doctrine of judicial notice with reference to indisputable matters derived from experience; it is here that the consideration of suggested classifications, such as the against-interest notion, and those alluded to in outstanding contributions by McCormick, Morgan, Maguire, Falknor and others, will be found of invaluable assistance to the trial judge.

(7) Finally, in those instances where the proffered evidence has a legitimate use but is like to be accorded an illegitimate one by the jury, the trial judge, as a matter of law—not discretion—should weigh the attendant facts and circumstances, again by the standard of the reasonably intelligent person, to determine whether or not the illegitimate use may be taken care of by instructions.

