The Hearsay Rule in Federal Criminal Cases--Part One

Lester B. Orfield
THE HEARSAY RULE IN FEDERAL CRIMINAL CASES—PART ONE

LESTER B. ORFIELD*

I. INTRODUCTION

In 1898 Professor Thayer of the Harvard Law School concluded: "There is a great head of the law of evidence, comprising, indeed, with its exceptions, much the largest part of all that truly belongs there, forbidding the introduction of hearsay." A professor at the University of London has pointed out that "nearly one-third of the law of evidence is concerned with the complications arising from the admission of hearsay." Professor McCormick in his Handbook of the Law of Evidence devotes 180 pages out of 712 pages to the subject. Wigmore devotes about 1400 pages to the subject.

Mr. Justice Pitney, speaking for the Supreme Court, has stated that the chief grounds of the exclusion of hearsay evidence "are, that the reported declaration (if in fact made) is made without the sanction of an oath, with no responsibility on the part of the declarant for error or falsification, without opportunity for the court, jury, or parties to observe the demeanor and temperament of the witness, and to search his motives and test his accuracy and veracity by cross-examination, these being most important safeguards of the truth, where a witness testifies in person, and as of his own knowledge . . . ." Mr. Justice Field had earlier stated: "The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court, where they may be subjected to cross-examination, affords the greatest security for truth."²

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† Part Two of this article will appear in the May issue of this volume.


Mr. Justice Harlan has stated that hearsay evidence “denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests, also, in part, on the veracity and competency of some other person.” Hearsay evidence is not admissible in civil cases and a fortiori not in criminal. It is incompetent to establish any specific fact in its nature susceptible of being proved by witnesses who speak from their own knowledge. It may not be used to establish the identity of the victim of murder.

Professor McCormick has offered the following brief definition of hearsay: “Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.” A federal district court has taken a similar view.

Several judicial decisions describe evidence as hearsay, where in fact the objection is that the witness lacks first hand knowledge. For example, a federal court has held that conclusions of immigration inspectors based on reports of testimony as to a person’s citizenship are hearsay.

A few concrete, typical examples of rejection of evidence as hearsay may be helpful to indicate the scope of the hearsay rule. The testimony offered by the defendant that a third person has confessed to the crime is inadmissible as hearsay. In one case the court considered such evidence, but on the facts denied a new trial.

The arresting officer may explain his going to the scene of the crime or his interview with the defendant, or a search and seizure by stating that he did so upon information received. But if the officer becomes more specific by repeating definite complaints of a particular offense by the defendant, this is so likely to be used improperly by the jury as evidence of the fact asserted that it should be excluded as hearsay. The error

5. Hopt v. Utah, 110 U.S. 574, 581 (1884). The Court quoted 1 Greenleaf § 99 (1886), and 1 S. Phillipps, Evidence 169 (2d ed. 1820). See also 5 Wigmore § 1361; 6 Id. § 1766.


9. Fotie v. United States, 137 F.2d 831, 840 (8th Cir. 1943).


may be cured by cautioning the jury not to consider the statement as affecting the guilt or innocence of the defendant. In a prosecution for robbery of a filling station, the police officer's testimony that the robber on approaching an automobile had said, "Wait, don't leave me," was not hearsay, but admissible as an oral part of the robber's act of running toward a standing automobile and as tending to explain the robber's act as his return to a waiting confederate, disclosed to be the defendant by his confession.\(^\text{14}\)

It seems helpful also to consider some utterances to which the hearsay rule does not apply.\(^\text{15}\) Evidence of conversations between conspirators in the absence of the defendant as to statements by one of the defendants, made as an inducement to go on with the conspiracy, is competent against the defendant and is not hearsay.\(^\text{16}\) Proof that a certain statement was made is not hearsay of that fact, but is hearsay of the truth of the statement.\(^\text{17}\)

Testimony of third persons who were present and heard an oral contract made is not hearsay, but competent to prove the contract and its terms.\(^\text{18}\) The testimony was held to be direct evidence of the existence of the contract. It was incorrect to say that only the parties to the contract could testify.

Sometimes a statement is received as circumstantial evidence of an operative fact. On a prosecution for the murder of an F.B.I. agent who was engaged in the performance of his duty, an indictment of the defendant for bank robbery was admissible as evidence that the murder victim, killed while waiting to arrest the defendant, was acting in the performance of duty.\(^\text{19}\)

Evidence of words used in the presence of a person is sometimes received as tending to prove such person's state of mind or emotion. Statements made to a defendant in a fraud prosecution were admitted to show his belief in the efficacy of his product.\(^\text{20}\) On a prosecution for conspiracy


\(^{15}\) 6 Wigmore § 1770; McCormick § 228.

\(^{16}\) Murray v. United States, 10 F.2d 409, 411 (7th Cir. 1925), cert. denied, 271 U.S. 673 (1926).

\(^{17}\) See Enlow v. United States, 239 F.2d 887, 890 (10th Cir. 1957); Harvey v. United States, 23 F.2d 561, 566 (2d Cir. 1928).

\(^{18}\) Prosser v. United States, 265 Fed. 252, 253-54 (8th Cir. 1920), citing 1 Wigmore § 657. See also Paddock v. United States, 79 F.2d 872, 874 (9th Cir. 1935).


\(^{20}\) Frank v. United States, 220 F.2d 559, 563-64 (10th Cir. 1955), citing 6 Wigmore § 1789.
to overthrow the Government in violation of the Smith Act, declarations by the defendant made prior to indictment were held admissible to show intent. But a defendant may not introduce evidence of a discussion he had with a third person when no offer was made by his counsel to introduce such discussion to show the good faith of the defendant, who was charged with using the mails to defraud. In a narcotics prosecution in which the defendant pleaded entrapment, the Government was allowed to show information the officers had received that the defendant was already engaged in the narcotics traffic before they enticed him to sell heroin to them. Here the utterance or writing is offered to show the effect on the hearer or reader.

On a prosecution for extortion, the victim's state of mind may be evidenced by his own testimony at the trial, or pursuant to an exception to the hearsay rule, by statements made by him to others.

In one case, testimony of the postmaster of X that he had no knowledge of A, an insured in a life policy whose residence was given as X, and evidence that his name was not in the city directory of X, were received as tending to prove that A was fictitious. Prosecution was for using the mails to defraud. An objection of hearsay will not be sustained. Fruitless inquiries are evidence of inability of the inquirer to find after a diligent search; and this in turn is circumstantial evidence of the nonexistence of the person in question. It would be difficult to prove nonexistence in any other way. A denial of knowledge is not a statement of opinion.

Sometimes conduct may be hearsay. Thus, in a prosecution for transporting girls for immoral purposes in interstate commerce, evidence that during the investigation the girls had identified the cabin where they stayed was hearsay and incompetent.

In a prosecution for conspiracy to violate the prohibition laws, evidence as to tolls charged to defendant's telephone is admissible against the defendant, from whose telephone the calls were made, over the objections that the evidence was hearsay and

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22. Roberson v. United States, 284 Fed. 503, 505 (8th Cir. 1922).
24. McCormick § 228, at 464-65; 6 Wigmore § 1790.
27. McCormick § 228, at 469; 5 Wigmore § 1414(2), at 190; 46 Harv. L. Rev. 715 (1933); 24 N.C.L. Rev. 274, 278 (1946).
29. Ellis v. United States, 138 F.2d 612, 621 (8th Cir. 1943).
the caller was unidentified.\textsuperscript{30} Payment by the defendant of the tolls charged to their phones tended to establish the identity of the caller in the absence of explanatory evidence. There are cases in which testimony by police officers is admitted that, after seizing an alleged gaming house, they heard on the telephone the incoming calls of customers trying to place bets, as evidence of the character of the place.\textsuperscript{31}

In a mail fraud prosecution the court may refuse to admit in evidence, under an exception to the hearsay rule, declarations made by two persons during the course of bankruptcy proceedings, where the issues were far different from those in the criminal proceeding, and the United States was only a claimant in the bankruptcy proceeding, and there was no showing of occasion to cross-examine the persons in question.\textsuperscript{32}

Hearsay evidence can have the effect of violating the right of the defendant to confront the witnesses against him.\textsuperscript{33} In such case its admission against objection may constitute error. But the Supreme Court later held that the admission of evidence, otherwise hearsay, but admissible at common law because of its relation to the defendant through his own acts and conduct, does not violate the guaranty.\textsuperscript{34} The evidence admitted consisted of letters, bank deposit slips, and book entries. The constitutional provision was not intended to broaden the common-law right of confrontation.

Hearsay evidence, when not objected to, has been admitted and given its natural probative effect even in a murder case.\textsuperscript{35} The right to confrontation may be waived.\textsuperscript{36} For example, there may be waiver by consent to the admission of transcribed testimony where, after mistrial because of illness of a juror, the trial goes on before the remaining eleven


\textsuperscript{34} Salinger v. United States, 272 U.S. 542, 547-48 (1926).


\textsuperscript{36} Diaz v. United States, supra note 35; Kemp v. Canal Zone, 167 F.2d 938, 940 (5th Cir. 1948).
and a substituted juror. Even in a treason case there will be no reversal merely because some purely irrelevant hearsay testimony was admitted. Failure to object immediately after a hearsay answer was given to a proper question was not a waiver where after a few more questions the defendant renewed his objection previously made to the question, and in a prior side-bar discussion defendant's counsel informed the court that answer to the question would be objectionable as hearsay.

The admission of hearsay where the testimony is unimportant and neither adds to nor detracts from the well supported conclusion of guilt is not reversible error whether objected to or not. If evidence to the same effect as the hearsay is introduced—as for example testimony by the defendant—there is not prejudicial error. The defendant cannot object on appeal when he himself secured the introduction of the evidence. Where counsel for the defendant asks a witness what a third person said he has invited hearsay and cannot move to strike out the answer which turns out to be unfavorable.

In 1813 Mr. Chief Justice Marshall took a very critical attitude towards hearsay. He stated: "Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover, combine to support the rule, that hearsay evidence is totally inadmissible." The implication would seem to be that even if not objected to, it has no probative value. But the modern view is overwhelmingly contrary. In 1952 Judge Jerome Frank stated broadly of the rule that hearsay admitted without objection is to be considered and accorded its natural probative effect as if it were in law admissible: "The federal authorities are unanimous on this point." On review by the court of appeals such hearsay will not be disregarded. But the court of

40. Lypp v. United States, 159 F.2d 353, 355 (6th Cir. 1947).
41. Williams v. United States, 265 F.2d 214, 216 (9th Cir. 1959). See also United States v. Finazzo, 288 F.2d 175, 177 (6th Cir.), cert. denied, 368 U.S. 837 (1961).
47. Metcalf v. United States, 195 F.2d 213, 217 (6th Cir. 1952).
appeals will reverse if there was plain error affecting substantial rights of the defendant.\footnote{48}{Glenn v. United States, 271 F.2d 880, 883 (6th Cir. 1959) (citing many cases).}

Judge Browning has pointed out that Rule 43(c) of the Federal Rules of Civil Procedure allows the district court to admit hearsay evidence if satisfied that reasonable standards of necessity and trustworthiness are met.\footnote{49}{La Porte v. United States, 300 F.2d 878, 882 n.20 (9th Cir. 1962).} Since Rule 26 provides more liberal standards for admission of evidence, the same should be true in criminal cases. But the courts should proceed with caution in whittling down the hearsay rule in criminal cases. Justice Rutledge, speaking for the Supreme Court, stated: "The 'hearsay' rule is often grossly artificial. Again in a different context it may be the very essence of justice, keeping out gossip, rumor, unfounded report, second, third, or further hand stories."\footnote{50}{Kotteakos v. United States, 328 U.S. 750, 761 (1946).}

Admission against the defendant of hearsay testimony of a government agent concerning conversations with an informer is not excusable on the ground that it was merely cumulative of the informer's later testimony when the Government refused to vouch for the credibility of the informer and made it clear that no reliance was to be placed on the testimony of the informer.\footnote{51}{Sanchez v. United States, 293 F.2d 260, 265 (8th Cir. 1961). See also United States v. Ploof, 311 F.2d 544, 546 (2d Cir. 1963).} Where the only evidence of the defendant's guilt was hearsay, the court of appeals will consider the error in admission, even though it was not objected to, as plain error under Rule 52(b) of the Federal Rules of Criminal Procedure.\footnote{52}{United States v. Dunn, 299 F.2d 548, 554 (6th Cir. 1962).}

II. Testimony Taken at a Former Hearing

An examination of a defendant, made before his commitment, under impressions of fear, whether signed by him or not, cannot be read in evidence at the trial on an indictment for murder on the high seas.\footnote{53}{United States v. Mannier, 26 Fed. Cas. 1210 (No. 15746) (C.C.D.N.C. 1792). The defendant was subsequently found guilty upon other evidence. This is the earliest case on evidence in federal criminal cases discovered by the author of this article.} The defendant was a French sailor who did not know the English language. He was not informed that he was then under examination and not on his trial. Apparently he thought he was under trial. Circuit Justice Paterson

thought that the examination should have been signed by the defendant. District Judge Sitgreaves thought that the element of fear had much weight. Counsel for the defendant argued that while the testimony of other witnesses could be used at the trial, that of the defendant could not be used unless he signed. He cited only English precedents, and the two judges cited no precedents at all.

Another early case held against the use of the defendant's testimony given at the preliminary examination. The Government produced the magistrate to prove that the two defendants charged with stealing a cable had testified before him, to show that they had made opposite and inconsistent statements, and to show their confession upon oath before the magistrate. The trial court refused to admit the testimony. Where the magistrate before whom the prisoner was brought, told him that there was evidence enough to commit him at all events, and therefore he had better confess the whole truth, and that he would probably fare the better for it, a confession thereby obtained would not be admitted at the trial.

What was said in the presence of the defendant before the examining magistrate, and to which he made no reply, may not be used at the trial. The defendant had a right to remain silent. But the same court held that statements of the defendant at the preliminary examination or just before it could be used.

A confession made at the preliminary examination after a caution against self-incrimination cannot be used where forty-two hours before, he had made a confession to one of the magistrate’s officers under improper promises.

A court has stated that the admissibility of former testimony in a proceeding at which the defendant was present and could cross-examine is a "well established exception to the rule which excludes hearsay, if, indeed, we may not in one sense, regard it as original testimony. We receive it because it comes up to one of the demands of the law; it is the best evidence which can be produced."

59. United States v. Macomb, 26 Fed. Cas. 1132, 1134 (No. 15702) (C.C.D. Ill. 1851). Wigmore concludes that former testimony and depositions are not hearsay if there is an adequate opportunity for cross-examination. 5 Wigmore § 1370. But writers and courts classify it as hearsay. McCormick § 230.
In 1896 the Supreme Court held that a statement of the defendant not under oath before the magistrate was admissible; but if under oath it was not admissible. It made no difference that the defendant was not warned that his statement might be used against him and that he need not answer. The Court followed this view in a 1912 decision.

Evidence that the defendant asked a witness at the preliminary hearing how the witness knew it was the defendant when he had a handkerchief over his face was properly admitted at a robbery trial as an admission.

On a second trial after the granting of a motion for new trial, evidence of conviction on the first trial cannot be offered by the Government.

A defendant charged with homicide has been permitted to introduce evidence offered at his trial for assault and battery. He cannot then claim that the evidence was hearsay and violated his right to confrontation, as he has waived the privilege.

Testimony given at a former trial cannot be received when the witness is available. This is even clearer where a different proceeding was involved and the parties and issues were different.

What a witness, since dead, swore at the former trial on an indictment, may be proved by a person who was present and heard his testimony if he can repeat the testimony as the witness gave it, and not merely what he conceives to be the substance of it. He may refresh his memory from notes taken at the time; or from a newspaper printed by him containing the evidence as taken down by him. But a more liberal rule has been followed in subsequent cases. Logically, absence from the jurisdiction should be treated like death of the witness.

What a witness, since deceased, testified at the preliminary examina-

64. Diaz v. United States, 223 U.S. 442, 450 (1912).
65. Piassick v. United States, 253 F.2d 658, 661 (5th Cir. 1958), citing McCormick §§ 230-34.
67. United States v. White, 28 Fed. Cas. 572, 573 (No. 16679) (C.C.D.C. 1838). See United States v. Macomb, 26 Fed. Cas. 1132, 1135 (No. 15702) (C.C.D. Ill. 1851). This case involved testimony given at a preliminary examination in which the evidence was not reduced to writing. The witness was dead. See also United States v. Penn, 27 Fed. Cas. 490, 491 (No. 16025) (C.C.S.D. Ohio 1876).
tion may be used at the trial. The defendant had been present and his counsel had cross-examined the witness. The rules of evidence in criminal and civil cases are alike on this point. It is sufficient to prove substantially all that the deceased witnesses testified upon the particular subject of inquiry. The precise words need not be repeated. The law did not require that the preliminary examination be reduced to writing, but it was frequently done, and it ought to be done. The Supreme Court upheld this view. Where the testimony is reduced to writing in a narrative form and signed by the witness, it may be read to the jury, instead of being used merely to refresh the recollection of the witness identifying it.

Where a witness at a proceeding before the United States commissioner for removal to another district thereafter dies, her testimony may be used at a subsequent trial.

Finally in 1895 there was a decision by the Supreme Court upholding the use of testimony of deceased witnesses given at a prior trial. In a murder case the Government was allowed to use the testimony of two deceased witnesses, there being a properly verified copy of the reporter's stenographic notes. There was no violation of the right to confront the witnesses. This rule has been applied where there is a second trial under a new indictment, the first indictment having been held defective.

Where a witness who testified at the preliminary examination of the defendant upon the same charge is living, but has gone out of the jurisdiction of the court, his testimony may not be used at the trial. The defendant cannot insist on the use of his testimony. The Government as well as the defendant has the right to confrontation of witnesses. In 1948 a court held that the defendant, by failure to object, may waive the

70. Mattox v. United States, 156 U.S. 237 (1895).
73. Mattox v. United States, 156 U.S. 237 (1895). But the Court excluded evidence of the defendant that after the first trial the witness said that his testimony was untrue and secured by duress. See criticism, 28 N.C.L. Rev. 205, 206 n.12 (1950).
74. "It is the established rule in federal courts that testimony given in a former criminal trial is admissible in a retrial of that cause when the witness has become unavailable." Coppedge v. United States, 311 F.2d 128, 132 (D.C. Cir. 1962), cert. denied, 373 U.S. 946 (1963).
75. Shaw v. United States, 1 F.2d 199, 201 (8th Cir. 1924), 23 Mich. L. Rev. 408 (1925).
use of a statement made by witnesses absent at the trial but present at the preliminary examination.\textsuperscript{76}

The confrontation provision is violated by admitting in evidence the statement of an absent witness taken at the preliminary examination of the defendant where the absence of the witness was not by the procurement, connivance or suggestion of the defendant, but due to the negligence of the Government.\textsuperscript{77} But where the Government is not negligent a decision of the Supreme Court in a state court proceeding would allow use of the testimony.\textsuperscript{78} Temporary absence of a witness beyond the district wrongfully procured by the defendant is sufficient ground for admitting his testimony of a former trial.\textsuperscript{79} There is no violation of the confrontation provision of the Constitution.

Permanent physical disability will excuse attendance at the trial and permit use of testimony given by the witness at the preliminary examination. Temporary disability is not a ground, as a continuance may be sought.\textsuperscript{80} This is the prevalent rule in state court cases, though in principle it may be too strict.\textsuperscript{81}

If the defendant exercises his privilege not to testify, his testimony at a former trial may be used, as the requirement of unavailability is satisfied.\textsuperscript{82} If a defendant takes the stand at his first trial, then obtains a reversal and is tried again, his entire testimony at the first trial may be read to the jury by the Government either as admissions by the defendant or under the reported-testimony exception to the hearsay rule.\textsuperscript{83}

The trial judge passes on the question of whether or not the witness is dead as a preliminary question and he will be reversed only for manifest error.\textsuperscript{84} The same is true as to disability of the witness.\textsuperscript{85} The decision

\textsuperscript{76.} Kemp v. Canal Zone, 167 F.2d 938, 940 (5th Cir. 1948).
\textsuperscript{77.} Motes v. United States, 178 U.S. 458, 471 (1900).
\textsuperscript{78.} West v. Louisiana, 194 U.S. 258, 266-67 (1904).
\textsuperscript{79.} Reynolds v. United States, 98 U.S. 145, 160 (1878) (Field, J., dissenting).
\textsuperscript{80.} Smith v. United States, 106 F.2d 726, 728 (4th Cir. 1939).
\textsuperscript{81.} McCormick § 234, at 493-94.
\textsuperscript{84.} Baldwin v. United States, 5 F.2d 133 (6th Cir.), cert. denied, 269 U.S. 552 (1925). See McCormick § 236; 2 Morgan 228-29.
\textsuperscript{85.} Smith v. United States, 106 F.2d 726, 728 (4th Cir. 1939).
lies in the discretion of the trial judge. It will not be reversed if reasonably supported by the evidence, but only where it can be said to be an abuse of discretion. The condition of the witness may be shown by a physician’s testimony.

An early case, while permitting a defendant to take a deposition, left it uncertain whether it could be given in evidence at the trial. But if not admitted it would be considered by the judge in imposing sentence. The scope, force and effect of the deposition could be seen when the case came on for trial. A year later another court seemed clearly to imply that the deposition could be used at the trial. After all, the Government could cross-examine the person giving the deposition at the time it was given. If the reputation for truth and veracity of the deponent was bad, the Government could show this at the trial.

The Government may not take depositions; hence there is no question of their use at the trial. The Supreme Court has pointed out that the “primary object” of the confrontation provision of the Constitution “was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner . . . .” It was subsequently held that the deposition of a witness since deceased, taken by the Government on notice to the defendant, but without his consent or presence or presence of his representative, is not admissible against the defendant at the trial. A deposition of a defendant, taken in a bankruptcy proceeding should not be used against a defendant without his consent, but he should object at the time it is introduced.

A deposition may be used at the trial as to a co-defendant where a physician's report indicates that he should not be subject to the excitement attendant upon a trial. Rule 15(e) of the Federal Rules of Criminal Procedure provides for such use if it appears “that the witness is unable to attend or testify because of sickness or infirmity.”

The trial judge may exclude parts of a deposition having no probative value in the case. Hearsay, leading questions and personal remarks may be excluded.

While an official stenographer’s transcribed notes of the testimony at

a former proceeding are admitted,\textsuperscript{93} when properly authenticated, under the hearsay exception for official written statements, there is no rule of preference for such reports, and any observer, including the stenographer herself, may be called to prove the former testimony without even producing the official transcript.\textsuperscript{94} But this has been criticized by Judge Prettyman in a dissenting opinion.\textsuperscript{95} On principle, before the proponent resorts to recollection testimony, he should produce for inspection by the adversary and trial judge the transcript of the testimony, or show that he has no transcript under his control.\textsuperscript{96}

Notes of a private stenographer are inadmissible in evidence as hearsay.\textsuperscript{97} This admission may be harmless error when other evidence conclusively establishes the defendant’s guilt. Where the stenographer is a witness the notes may properly be used by him as an aid to memory.

Admissions made by the defendant to a grand jury may be used to prove the Government’s case in chief and not simply to impeach the defendant.\textsuperscript{98} The reading before the trial jury of the grand jury testimony of a government witness, when not for the purpose of impeachment, nor within any hearsay exception, but under the pretext of refreshing the witness’ recollection, is reversible error.\textsuperscript{99} The right of confrontation of witnesses was violated. The admission of the record of the grand jury’s proceedings showing the defendant’s testimony as to collateral matters is reversible error.\textsuperscript{100} An unconcluded criminal prosecution such as the ignoramus of a bill by a grand jury or a nolle prosequi cannot be given in evidence.\textsuperscript{101}

\textsuperscript{93} Tatum v. United States, 249 F.2d 129, 131 (D.C. Cir. 1957), cert. denied, 356 U.S. 943 (1958).
\textsuperscript{94} See Wattenmaker v. United States, 34 F.2d 741, 743 (3d Cir. 1929); Boitano v. United States, 7 F.2d 324 (9th Cir. 1929); Brzezinski v. United States, 198 Fed. 65, 66 (2d Cir. 1912).
\textsuperscript{95} Meyers v. United States, 171 F.2d 800, 814 (D.C. Cir. 1948), cert. denied, 336 U.S. 912 (1949); 23 So. Cal. L. Rev. 113 (1949); Annot., 11 A.L.R.2d 30 (1950). Proceedings before a Senate subcommittee were involved, and the general counsel of the subcommittee testified as to the contents. See 4 Wigmore § 1330(2), at 651-52.
\textsuperscript{96} McCormick § 237, at 499 n.11.
\textsuperscript{97} Snederson v. United States, 264 Fed. 268, 275 (4th Cir.), cert. denied, 253 U.S. 490 (1920), citing Wigmore § 1669.
\textsuperscript{100} United States v. Sager, 49 F.2d 725, 730 (2d Cir. 1931). Credibility was not in issue at the time of admission.
\textsuperscript{101} Gaines v. Relf, 53 U.S. (12 How.) 472, 575 (1851) (dissenting opinion by Wayne, J.).
III. AFFIDAVITS

In general, ex parte affidavits are not admissible.\textsuperscript{102} An affidavit made to obtain an attachment in an action against a bank is inadmissible as evidence of the insolvency of the bank in a criminal case against third parties, there being no proof that a judgment was ever obtained in the action or that return of \textit{nulla bona} was made by the sheriff.\textsuperscript{103} Even if such proof had been made, the court left open the issue of admissibility. On a motion for a new trial, a district court held, with some hesitation, that an affidavit made on a motion to suppress evidence was admissible to show defendant’s ownership of wine.\textsuperscript{104}

The use in a prosecution for rape and house breaking, but only for impeachment purposes, of the affidavit which the defendant had made under Rule 17(b) of the Federal Rules of Criminal Procedure to secure a subpoena for a defense witness was proper and did not violate the privilege against self-incrimination.\textsuperscript{105}

The admission of the affidavit of an enforcement officer is not prejudicial when he testified at the trial and opportunity was given for cross-examination.\textsuperscript{106}

In a habeas corpus proceeding, if the prisoner does not object, affidavits presented by the Government may be received in evidence.\textsuperscript{107} The proceeding is civil and not criminal. There is no right of confrontation. Objection to hearsay may be waived.

The defendant may explain his affidavit by showing his purpose in making it.\textsuperscript{108}

IV. ADMISSIONS

The Supreme Court has stated: “Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial.

\begin{itemize}
  \item \textsuperscript{102} United States v. Mack, 249 F.2d 321, 324 (7th Cir. 1957), cert. denied, 356 U.S. 920 (1958); Vendetti v. United States, 45 F.2d 543 (9th Cir. 1930). On affidavits see 6 Wigmore §§ 1709-10; Note, 46 Iowa L. Rev. 356, 372-74 (1961).
  \item \textsuperscript{103} Lemon v. United States, 164 Fed. 953, 960 (8th Cir. 1908).
  \item \textsuperscript{104} United States v. Lindsly, 7 F.2d 247, 255 (E.D. La. 1925), rev’d on other grounds, 12 F.2d 771 (5th Cir. 1926). But the case also held that an ordinary ex parte affidavit contradicting testimony given by the witness in open court is not worthy of belief on motion for new trial. 7 F.2d at 254. See also Vaught v. United States, 7 F.2d 370 (9th Cir. 1925).
  \item \textsuperscript{105} Smith v. United States, 312 F.2d 867, 870 (D.C. Cir. 1962) (one judge dissenting). See also Tucker v. United States, 151 U.S. 164, 168-69 (1894).
  \item \textsuperscript{106} Harris v. United States, 10 F.2d 358 (6th Cir. 1926).
  \item \textsuperscript{107} Burgess v. King, 130 F.2d 761, 762 (8th Cir. 1942). See Note, 58 Mich. L. Rev. 1218, 1225 (1960).
  \item \textsuperscript{108} Morgan v. United States, 169 Fed. 242, 251 (8th Cir. 1909).
\end{itemize}
They had neither the compulsion of the oath nor the test of cross-examination. They are competent as an admission against interest.\textsuperscript{103}

In a prosecution for conspiracy it was held that it was competent to prove a statement made by the defendant to the effect that he would implicate another, as the statement was "against interest."\textsuperscript{110} Such a statement may be proved without a previous denial by the defendant, as impeachment is not involved.

Judge Albert B. Maris has stated:

To this hearsay rule there are of course exceptions as firmly fixed in the law of evidence as the rule itself and there are situations to which the rule is inapplicable. So the rule is satisfied in the case of an admission against interest, for it is obvious that the party making the admission would not cross-examine himself. All he need do is to take the stand on his own behalf and explain the admission, if he thinks it advisable.\textsuperscript{111}

The Ninth Circuit\textsuperscript{112} has followed this view, as has the District of Columbia.\textsuperscript{113}

One court has stated broadly: "A party's statements are always competent evidence against him unless they fall within some special exclusionary rule."\textsuperscript{114} Wigmore concludes that once in, admissions "have such testimonial value as belongs to any testimonial assertion under the circumstances . . ."\textsuperscript{115} Adopting this language a court has held that an admission of the defendant is sufficient as corroboration of the testimony of a government witness in a perjury prosecution.\textsuperscript{116}

An admission is received even though it was self-serving when made.\textsuperscript{117} The defendant's petition to suppress evidence secured in a search was involved.


\textsuperscript{110} Adamson v. United States, 184 Fed. 714, 715 (8th Cir. 1910), cert. denied, 220 U.S. 612 (1911).

\textsuperscript{111} Gambino v. United States, 108 F.2d 140, 142 (3d Cir. 1939). See McCormick § 239.

\textsuperscript{112} Kamanosuke Yuge v. United States, 127 F.2d 683, 690 (9th Cir.), cert. denied, 317 U.S. 648 (1942).

\textsuperscript{113} Milton v. United States, 110 F.2d 556, 560 (D.C. Cir. 1940), citing 4 Wigmore §§ 1048-50.

\textsuperscript{114} Phelps v. United States, 160 F.2d 858, 873 (8th Cir. 1947), cert. denied, 334 U.S. 860 (1948).

\textsuperscript{115} 4 Wigmore § 1048, at 5-6.

\textsuperscript{116} United States v. Goldberg, 290 F.2d 729, 734 (2d Cir.), cert. denied, 368 U.S. 899 (1961).

Two circuits have stated: "The extrajudicial statements of a party to the action, civil or criminal, are binding upon him and substantive evidence against him."  

In a prosecution for uttering a check having a forged indorsement, portions of transcripts of testimony given by the defendants in a prosecution for housebreaking and larceny may be received in evidence to prove admissions by the defendants. The court stated:

When evidence is offered to prove an admission—unlike the situation when it is offered secondary evidence to prove statements of dead or absent witnesses—there is no requirement that opportunity should have been given for cross-examination and, consequently, no requirement of identity of issues. Admissions have probative value not because they have been subjected to cross-examination and therefore satisfy the hearsay rule, but because they are statements by a party opponent, inconsistent with his present position as expressed in his pleadings and testimony.

Judge Learned Hand has stated:

It is well settled that, when the veracity of a witness is subject to challenge because of motive to fabricate, it is competent to put in evidence statements made by him consistent with what he says on the stand, made before the motive arose. The common sense of such a rule has been too strong for the formal objection that the evidence is hearsay, and indeed the objection is in substance not good anyway, since the witness is by hypothesis there to be cross-examined.

'A confession is one species of admission. The author has dealt with confessions in a separate article.

Judge Fahy has stated that "admissions or confessions are admissible against the party who made them despite the rule against hearsay evidence . . . . Whether because testimony of admissions and confessions is not obnoxious to the rule or because it is admitted under an exception to the rule is unimportant." Rule 63(6) of the Uniform Rules of Evidence treats confessions as an exception to the hearsay rule.

The admissions of a defendant, not amounting to a confession, may

be admitted, although they are not in writing or given in his words.\textsuperscript{125} But the whole of a connected conversation on the subject must be given.\textsuperscript{126} One court has stated: "Statements and declarations by an accused, from which, in connection with other evidence of surrounding circumstances, an inference of guilt may be drawn, if shown to have been made voluntarily . . . are admissible against him as admissions . . . ."\textsuperscript{127} But the proof thereof ought to show at least the substance of the statement, and not merely a digest thereof; hence a summary prepared by a narcotics agent was not admissible.\textsuperscript{128}

An oral admission made by a juvenile while in police custody and before the juvenile court had waived its exclusive and original jurisdiction is inadmissible in a subsequent criminal proceeding.\textsuperscript{120}

With respect to mental capacity as applied to insane persons, the out-of-court declarant need only possess such minimum capacity to observe, remember, and narrate the facts as will enable him to give some aid to the trier.\textsuperscript{130} If it does not appear that this capacity was wanting, then the insanity of the declarant would only affect the credibility of the declaration. It was so held as to a confession.\textsuperscript{131} Intoxication, short of mania, will not bar a confession.\textsuperscript{132}

The defendant's admissions as to the terms of a writing have been received in evidence.\textsuperscript{133} But there is considerable danger of inaccuracy or untruth in the reporting of an oral admission.\textsuperscript{134}

In an income tax prosecution a waiver of restrictions on assessment and collection of a tax deficiency signed by the taxpayer is not admissible.\textsuperscript{135} But it may be harmless error to admit it where trial is by the court and the evidence against the defendant is strong.

\begin{itemize}
\item \textsuperscript{126} United States v. Wilson, supra note 125, at 704.
\item \textsuperscript{127} O'Neill v. United States, 19 F.2d 322, 325 (8th Cir. 1927). See McCormick § 113.
\item \textsuperscript{128} O'Neill v. United States, supra note 127, at 325.
\item \textsuperscript{129} Harling v. United States, 295 F.2d 161, 164 (D.C. Cir. 1961), 46 Minn. L. Rev. 967 (1962).
\item \textsuperscript{130} McCormick § 240.
\item \textsuperscript{131} McAfee v. United States, 111 F.2d 199, 204 (D.C. Cir.), cert. denied, 310 U.S. 643 (1940).
\item \textsuperscript{132} Bell v. United States, 47 F.2d 438 (D.C. Cir. 1931). See Annot., 74 A.L.R. 1098 (1931).
\item \textsuperscript{133} Dunbar v. United States, 156 U.S. 185, 196 (1895), affirming, 60 Fed. 75, 77-78 (D. Ore. 1894).
\item \textsuperscript{134} See McCormick § 208, at 424; 4 Wigmore §§ 1054, 1255-56.
\item \textsuperscript{135} Clark v. United States, 211 F.2d 100, 103 (8th Cir. 1954), cert. denied, 348 U.S. 911 (1955).
\end{itemize}
An admission of a defendant is not conclusive. He may be permitted to explain it.\textsuperscript{136}

Satisfaction to the owners of the goods stolen is admissible against the defendant; but if made merely to avoid the inconvenience of imprisonment or of a trial, and not under a consciousness of guilt, it is not evidence against the defendant.\textsuperscript{137}

While in civil cases compromise negotiations are privileged, a federal court has held that this is not true in criminal cases.\textsuperscript{138} In this case the defendant offered to plead guilty if he could settle the liquor violation charge against him by paying a fine. The compromise effort was addressed to the Government and not to a private victim of crime. But this approach makes criminal law administration difficult; hence most state courts recognize such offers as privileged.\textsuperscript{139} If the conduct on which the prosecution is based also gives rise to a civil action, a compromise or offer of compromise of the civil claims is privileged if no agreement to stifle the criminal prosecution is involved.\textsuperscript{140}

Where on the way to the police station the defendant pulled his automobile to the curb and said to the policeman "Listen, officer, can’t we talk this thing over?" and no innocent explanation of the inquiry was offered, the effort to effect a settlement could be regarded as evidencing consciousness of guilt.\textsuperscript{141}

A federal statute once provided: "No pleading of a party, nor any discovery or evidence obtained from a party or a witness by means of a judicial proceeding in this or in any foreign country, shall be given in evidence . . . in any court of the United States, in any criminal proceeding . . . ."\textsuperscript{142} Under this statute bankruptcy schedules were treated as pleadings and therefore held not admissible.\textsuperscript{143} But the statute was re-

\textsuperscript{136} Accardi v. United States, 15 F.2d 619, 621 (8th Cir. 1926); Morgan v. United States, 169 Fed. 242, 251 (8th Cir. 1909).


\textsuperscript{138} Christian v. United States, 8 F.2d 732, 733 (5th Cir. 1925). See Downey v. United States, 263 F.2d 552, 553 (10th Cir. 1959); United States v. Picarelli, 148 F.2d 997 (2d Cir.), cert. denied, 326 U.S. 722 (1945).

\textsuperscript{139} McCormick § 251, at 543. See 12 Texas L. Rev. 510 (1934).

\textsuperscript{140} Ecklund v. United States, 159 F.2d 81, 84 (6th Cir. 1947).


\textsuperscript{142} Rev. Stat. § 860 (1875).

\textsuperscript{143} Cohen v. United States, 170 Fed. 715, 716-17 (4th Cir. 1909); Johnson v. United States, 163 Fed. 30, 31-32 (1st Cir. 1908).
pealed by act of May 7, 1910. Consequently bankruptcy schedules now became admissible in evidence. However, a reclamation petition filed by a third party was not admissible. While the statute was in effect, possibly it barred the use of a guilty plea, but after its repeal it did not.

A defendant is not entitled to offer in evidence an allegation in a prior indictment. Judge Learned Hand held that an indictment is not a pleading, and did not assume that even if it were, it would be competent as an admission. Rule 12(a) of the Federal Rules of Criminal Procedure provides that indictments and informations are pleadings. In some cases the court may take judicial notice of the indictment.

Admissions of counsel in one suit or proceeding are not competent evidence as admissions of his client to prejudice him in the trial of a different issue in another action or proceeding. On a prosecution for conspiracy to use the mails to defraud, the arguments of the defendant's attorney before a state insurance commissioner when opposing a rival's attempt to do business there were not admitted.

There may be admissions by conduct. A leading example is flight of the defendant. The flight of the defendant is a circumstance "proper to be laid before the jury as having a tendency to prove his guilt. But flight does not create a legal presumption of guilt. Evidence of flight

144. 36 Stat. 352 (1910).
146. Todd v. United States, 221 Fed. 205, 207-08 (8th Cir. 1915).
150. Miller v. United States, 133 Fed. 337, 350 (8th Cir. 1904). But admissions in the same case are binding. Jones v. United States, 72 F.2d 873 (7th Cir. 1934).
151. Miller v. United States, supra note 150, at 350.
152. McCormick § 248; 2 Wigmore § 276.
153. Allen v. United States, 164 U.S. 492, 499 (1896). See also Monnette v. United States, 299 F.2d 847, 851 (5th Cir. 1962); Corbin v. United States, 253 F.2d 646, 649 (10th Cir. 1958); Gicinto v. United States, 212 F.2d 8, 11 (8th Cir.), cert. denied, 348 U.S. 884 (1954); Shelton v. United States, 169 F.2d 665, 668 (D.C. Cir.), cert. denied, 335 U.S. 834 (1948) (citing 1 Wigmore § 276); Kanner v. United States, 34 F.2d 863, 866 (7th Cir. 1929); Campbell v. United States, 221 Fed. 186, 190 (9th Cir. 1915); Stewart v. United States, 211 Fed. 41, 45 (9th Cir. 1914).
154. Hickory v. United States, 160 U.S. 408, 422-23 (1896); Alibert v. United States, 162 U.S. 499, 509-11 (1896); Green v. United States, 259 F.2d 160, 182 (D.C. Cir. 1958), cert. denied, 359 U.S. 917 (1939); United States v. Bookie, 229 F.2d 130, 134 (7th Cir. 1956);
is admissible in a prosecution for using the mails to defraud.\textsuperscript{156} It is not confined to homicide cases. While a court has held that evidence of flight is never admissible in cases where the proof of the crime consists of direct evidence,\textsuperscript{156} another court has denied this.\textsuperscript{157} Where several defendants are jointly prosecuted, the evidence of flight of one defendant should be confined to him.\textsuperscript{158} The probative effect of a flight depends upon the conditions and motives which prompted it.\textsuperscript{159} Evidence is admissible of an attempt to escape.\textsuperscript{160} A warrant of arrest need not have been issued.\textsuperscript{161}

A court\textsuperscript{162} has quoted the view of Wigmore: "It is to-day universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest . . . and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself . . . ."\textsuperscript{163} Concealment of the results of the crime is admissible.\textsuperscript{164}

Personal falsification by the defendant in the course of the criminal proceeding may operate as an implied admission against him.\textsuperscript{165} It has been so held as to contradictions, misstatements, and falsification of entries.\textsuperscript{166} The Government may introduce an affidavit setting forth three witnesses desired by the defendant, but whom he did not call at the trial.\textsuperscript{167} On a second trial of the defendant it may be shown that he feigned

\textsuperscript{155}Rowan v. United States, 277 Fed. 777, 779 (7th Cir. 1921), cert. denied, 257 U.S. 660 (1922) ; Betts v. United States, supra note 154, at 233-34.

\textsuperscript{156}Trapp v. New Mexico, 225 Fed. 968, 973 (8th Cir. 1915).

\textsuperscript{157}Rowan v. United States, 277 Fed. 777, 779 (7th Cir. 1921), cert. denied, 257 U.S. 660 (1922).

\textsuperscript{158}Braswell v. United States, 200 F.2d 597, 599 (5th Cir. 1952).

\textsuperscript{159}Vick v. United States, 216 F.2d 228, 232 (5th Cir. 1954). See also Hickory v. United States, 160 U.S. 408, 417 (1896).

\textsuperscript{160}United States v. Campisi, 248 F.2d 102, 107-08 (2d Cir.), cert. denied, 355 U.S. 892 (1957).

\textsuperscript{161}United States v. Ayala, 307 F.2d 574, 576 (2d Cir. 1962).


\textsuperscript{163}2 Wigmore § 276, at 111.

\textsuperscript{164}Rivers v. United States, 270 F.2d 435, 438 (9th Cir. 1959), cert. denied, 362 U.S. 920 (1960).

\textsuperscript{165}See 2 Wigmore § 278, at 122.

\textsuperscript{166}United States v. Randall, 27 Fed. Cas. 696, 703 (No. 16118) (D. Ore. 1869). See also Wilson v. United States, 162 U.S. 613, 620 (1896) (false stories); Corey v. United States, 305 F.2d 232, 239 n.20 (9th Cir. 1962), cert. denied, 371 U.S. 956 (1963); Holt v. United States, 272 F.2d 272, 275-76 (9th Cir. 1959); United States v. Simone, 205 F.2d 480, 482 (2d Cir. 1953); United States v. Smolin, 182 F.2d 782, 786 (2d Cir. 1950); Andrews v. United States, 157 F.2d 723 (5th Cir. 1946), cert. denied, 330 U.S. 821 (1947).

\textsuperscript{167}Tucker v. United States, 151 U.S. 164, 165, 169 (1894).
insanity at his first trial. A scheme to concoct a perjured alibi may be shown.

An attempt to bribe the arresting officer may be shown. An attempt to bribe a witness may be shown. Forfeiture of a bond by failure to appear may be shown; and the Government may show also that the defendant by failing to appear forfeited bonds in other cases pending against him. Fabrication of false testimony may be shown. On a prosecution for murder a letter forged by the defendant purporting to be the confession of another was admitted. "An attempt to fabricate evidence is to be considered as evidence of guilt as to the main facts charged."

If the defendant attempts to suppress or destroy evidence, this may be shown. But it is not alone conclusive evidence of guilt. Mutilation of books and disappearance of records may be shown. It may be shown that the defendant persuaded a witness to make statements different from his prior affidavit. On a perjury prosecution it may be shown that the defendant had attempted to persuade a witness to leave town. The defendant may show intimidation of witnesses by the Government.

Where the defendant urges a government witness to refuse to testify

168. Waller v. United States, 179 Fed. 810, 813 (8th Cir. 1910), citing 1 Wigmore, Evidence § 278 (1st ed. 1904).
172. Affronti v. United States, 145 F.2d 3, 7 (8th Cir. 1944).
175. Stanley v. United States, 245 F.2d 427, 433 (6th Cir. 1957).
177. Ayala v. United States, 268 Fed. 296, 299-300 (1st Cir. 1920).
179. United States v. Freundlich, 95 F.2d 376, 378 (2d Cir. 1938).
because of self-incrimination, this may be shown to prove conscious guilt.\textsuperscript{182} It may be shown that the defendant assaulted a witness who before the trial announced his intention to tell the truth.\textsuperscript{183} Attempts to suppress evidence may be shown.\textsuperscript{184} Fabrication of false documents may be shown.\textsuperscript{185} Fabrication of a story may be shown.\textsuperscript{186} Evidence of a defendant's attempt to tamper with or impede a witness is admissible as an act of admission.\textsuperscript{187}

In 1893 the Supreme Court stated: "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transactions, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."\textsuperscript{188} The court did not state that the United States Attorney could comment on such failure. If the witness would be incompetent, counsel may not comment.\textsuperscript{189} An inference unfavorable to the defendant cannot be drawn from the absence of witnesses who had no relation to him in the case and were equally available to the Government.\textsuperscript{190} The trial judge should not comment where neither side has suggested absence of witnesses. Where the trial judge may comment he

\begin{enumerate}
\item Madden v. United States, 20 F.2d 289, 294 (9th Cir.), cert. denied, 275 U.S. 554 (1927). See McCormick § 250.
\item Hass v. United States, 31 F.2d 13, 14 (9th Cir.), cert. denied, 279 U.S. 865 (1929).
\item Harris v. United States, 169 F.2d 887 (D.C. Cir.), cert. denied, 335 U.S. 872 (1948); United States v. Werner, 160 F.2d 438, 441 (2d Cir. 1947).
\item Segal v. United States, 246 F.2d 814, 818 (8th Cir.), cert. denied, 355 U.S. 894 (1957); DiCarlo v. United States, 6 F.2d 364, 366 (2d Cir.), cert. denied, 268 U.S. 706 (1925); Wallace v. United States, 243 Fed. 300, 308 (7th Cir.), cert. denied, 245 U.S. 650 (1917), citing 2 Wigmore, Evidence § 278 (1st ed. 1904).
\item Hamburg-American Steam Packet Co. v. United States, 250 Fed. 747, 768 (2d Cir.), cert. denied, 246 U.S. 662 (1918).
\end{enumerate}
should state the inference to be drawn, that the witness would be adverse. Failure to present witnesses favorable to a party gives rise to the inference that his testimony would be unfavorable to that party.¹⁹¹ Unless the witness is dead, the party should exercise due diligence to account for a failure to call him. Since a party may comment on the absence of an opposing party's witness, the opposing party may introduce evidence excusing the absence, such as illness.¹⁹²

Where the Government failed to call an informer as a witness against the defendant, the Supreme Court stated that it must assume that the informer's testimony "would not have been helpful in bringing guilty knowledge home to [the defendant]. . . ."¹⁹³

In a manslaughter prosecution when the Government subpoenaed several witnesses but did not call them to testify although they were present, the trial judge need not charge on request of the defendant that if the jury found that a party had it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do so creates a presumption that the testimony if produced would be unfavorable.¹⁹⁴ In a narcotics prosecution it was held that the failure of the Government to call subpoenaed witnesses who could to some extent have contradicted the defendant's testimony gave rise to an inference that the testimony would have been against the Government.¹⁹⁵ However, there is no absolute duty in all cases on the Government to call all witnesses subpoenaed by it.¹⁹⁶

Comment of the trial judge to the jury that the defendant, relying on alibi, did not call the party he was allegedly with to corroborate alibi testimony, is not reversible error.¹⁹⁷

The Government may excuse the failure to produce a material witness

¹⁹₅. Wesson v. United States, 172 F.2d 931, 936 (8th Cir. 1949).
by showing he cannot be found or that he is ill. There is also excuse if the witness is not competent.

Failure of the defendant to call his wife as a witness with reference to a trip may warrant an inference against the defendant. The Government may comment on the failure of the defendant to call his wife where she was willing to testify.

Ordinarily no inferences can be drawn from the failure to call a witness whose testimony is privileged. But if there be a waiver of the privilege an inference can be drawn.

Possibly there is a duty on the Government to call all available witnesses, although its failure to do so is usually not held reversible error. At least it has been held that when a Government witness is called and he admits that all the testimony he has given is untrue, the defendant should not be deprived of a full right to cross-examine so as to obtain a full disclosure of the interest and nature underlying the previous testimony and so that the jury has all the facts. A witness whose name is on the back of an indictment should be called by the Government if he is a material witness. But he need not be called otherwise. In a prosecution for second degree murder the Government need not call a witness merely because his name is indorsed on the back of an indictment. The trial judge may refuse to direct the United States Attorney to call such witness. No adverse presumption can be drawn against the Government for failure to call at the trial all witnesses subpoenaed where there is no indication that their testimony is more than cumulative. It is

198. Gentili v. United States, 22 F.2d 67, 69 (9th Cir. 1927).
199. Schumacher v. United States, 216 F.2d 780, 787 (8th Cir. 1954).
200. In 1893 it was held that a wife was incompetent for or against the defendant. There could therefore be no comment by the United States Attorney on the defendant's failure to call her. Graves v. United States, 150 U.S. 118, 120 (1893) (one justice dissenting). But since 1933 the wife has been competent to testify for the defendant. United States v. Conforti, 200 F.2d 365, 369 (7th Cir. 1952), cert. denied, 345 U.S. 925 (1953).
204. United States v. Bourjaily, 167 F.2d 993, 995 (7th Cir. 1948).
207. United States v. Antonelli Fireworks Co., 155 F.2d 631, 638 (2d Cir.), cert. denied,
only when it is shown that the testimony of an uncalled witness would be superior to testimony already introduced by a witness who had been called, that failure to call a witness would permit a jury to draw an inference.209

There should be no absolute right to instructions on failure to produce witnesses.210 The Second Circuit by Learned Hand, in rejecting the defendant's exception to the trial judge's refusal to instruct the jury to disregard the Government's argument based on the defendant's failure to call witnesses, stated:

A judge is not required to intervene here any more than in any other issue of fact. He must indeed, as he always must, keep the prosecution...just as he must keep passion out of the debate and hold the parties to the issues. But he is not charged with correcting their non-sequiturs; the jury are to find these for themselves. So the judge in the case at bar was not required to correct the argument, that the failure of the defendants to call the four witnesses was a ground for supposing that they would swear against them. He might have done so, but he need not...211

The decisions supported this view.

It is frequently stated that if the witness is equally accessible to both parties, no inference arises from the failure of either to call him.212 But what is probably meant is that if it appears that the witness would be as likely to favor one party as the other, there can be no inference. Where the defendant did not call his employees, the Government may comment: as there is likelihood of bias, the witness is not equally available.213 Even if there appears to be equality of favor, either party should be permitted to argue the inference against the other.214


210. McCormick § 249, at 536.


212. McCormick § 249, at 534. See Johnson v. United States, 291 F.2d 150, 154 (8th Cir. 1961); McClanahan v. United States, 230 F.2d 919, 925 (5th Cir.), cert. denied, 352 U.S. 824 (1956), citing 2 Wigmore § 288; Billeci v. United States, 184 F.2d 394, 398 (D.C. Cir. 1950); United States v. Antonelli Fireworks Co., 155 F.2d 631, 639 (2d Cir.), cert. denied, 329 U.S. 742 (1946); Milton v. United States, 110 F.2d 556, 559 (D.C. Cir. 1940); Moyer v. United States, 78 F.2d 624, 630 (9th Cir. 1935); Rostello v. United States, 36 F.2d 899, 901 (7th Cir. 1929); Egan v. United States, 287 Fed. 958, 969 (D.C. Cir. 1923).


Some cases talk in terms of "presumption." One court stated that "if the witness is available to the accused and not to the Government and is informed concerning facts material to the case, the presumption arises from his unexplained absence that the accused had good reason for not calling him; and this may properly be argued against him." But perhaps it should be phrased in terms of inference or permissive presumption.

If a party—even the defendant—takes the stand but fails to give evidence as to relevant matters within his knowledge, an adverse inference may be invoked, and the judge may comment.

The failure of a party, including the defendant, to produce books which show the character of his business transactions, warrants an inference that such evidence would be damaging.

When it would be natural under the circumstances for a party to produce documents or other objects in his possession as evidence and he fails to do so, his adversary may use this failure to invoke an adverse inference. Counsel may not, however, comment on the failure to produce evidence which would be incompetent. It was held in one case that it was error for the court to comment on the failure to produce certain letters which certain witnesses testified were written to him. This was "in derogation of the Constitutional right of the accused to furnish no evidence in aid of the prosecution."

A trial judge correctly denied the defendant an instruction that the Government's failure to produce account books of a Government witness raised an inference that they would be unfavorable to the Government's claim, where the Government had produced primary evidence on the issue and the defendant did not demand that such account books be produced.

Several cases have held that a guilty plea could be received at the preliminary examination, and then could be offered in evidence at the

217. McCormick § 249, at 535.
221. Hamburg-American Steam Packet Co. v. United States, supra note 220.
In 1942 the Court of Appeals for the District of Columbia held to the contrary on the ground of violation of the defendant’s privilege against self-incrimination. Historically this theory was unsound.

Rule 5(c) provides that the “defendant shall not be called to plead” upon his preliminary examination. But at the trial it is proper for the United States Commissioner to testify that the defendant stated that he was guilty and pleaded guilty to the complaint as read to him where the defendant’s rights were outlined to him and where defendant’s counsel had previously tried to draw from a witness testimony that the defendant had pleaded not guilty before the Commissioner.

In 1918 a court held that a guilty plea made at arraignment and later withdrawn could not be used at the trial. In 1926 a court of appeals, in refusing to reverse, held that use of the withdrawn plea was “not clearly improper...”. In 1927 the Supreme Court held that a plea of guilty made at arraignment and later permitted to be withdrawn is not admissible at the trial, for the reason that it would nullify the order of the court allowing the plea to be withdrawn. Another case put the rejection on the ground that the same considerations of fairness which induced the trial judge to allow the withdrawal operated to cause rejection of the evidence.

Where a confession and guilty plea was found to be coerced, even cross-examination concerning them may be reversible error.

An unaccepted plea of guilty has been held admissible. Wigmore has suggested that an unaccepted


227. White v. United States, 200 F.2d 509, 513 (5th Cir. 1952), cert. denied, 345 U.S. 999 (1953).


229. Hodge v. United States, 13 F.2d 596, 598 (6th Cir. 1926).


232. Bayless v. United States, 150 F.2d 236, 238 (8th Cir. 1945).

233. Christian v. United States, 8 F.2d 732, 733 (5th Cir. 1925).

offer to plead guilty should be governed by the rules covering a withdrawn plea of guilty. Possibly it should be governed by the discretion of the court.

A guilty plea in another federal criminal case, when offered in evidence against the defendant in the pending federal criminal prosecution, in which the facts admitted in the plea are material, is regarded as extrajudicial, and the defendant may show that he did not intend to enter the plea recorded, or at the time did not know the nature of the charge.

Admissions by reference to a third person are receivable in evidence. On a white slave prosecution "letters written at the direction of the accused" were admitted.

Judge Friendly cited the language of Wigmore that failure to deny the statements of others is admissible "only when no other explanation is equally consistent with silence; and there is always another possible explanation—namely, ignorance or dissent—unless the circumstances are such that a dissent would in ordinary experience have been expressed if the communication had not been correct." But the case was decidable on other grounds.

Whether the statement was heard by the defendant has been held for the jury to determine. In practice the Government bears the burden of proof. If the defendant does not understand English, he need not respond to a statement in English.

In 1843 a court stated: "The more recent decisions look with great disfavor to the implication as by admissions of a party accused of a crime, because his participation is asserted in his presence by a third person without being denied by him." Where the defendant was under arrest and in the charge of an officer in one room of his house, while an-

235. 4 Wigmore § 1061, at 31, § 1067, at 66.
236. 27 Va. L. Rev. 703, 704 (1941).
238. 4 Wigmore § 1070.
239. Shama v. United States, 94 F.2d 1, 5 (8th Cir.), cert. denied, 304 U.S. 568 (1938).
240. 4 Wigmore § 1071, at 70.
244. Sandez v. United States, 239 F.2d 239, 246 (9th Cir. 1956); Kalos v. United States, 9 F.2d 268 (8th Cir. 1925).
other officer with defendant's wife searched the adjoining room, incriminating statements made by the wife were not admissible against the defendant on the theory that he could have heard and did not deny them, since even if he had heard, being under arrest, he might have felt that he was not at liberty to speak. When the defendant is under arrest he is said to be under duress.

The silence of a codefendant, although present at the time of a conversation between a police officer and the defendant as to an attempted bribe under circumstances not requiring the codefendant to speak, was not admissible. The rule might be different if there were a charge and proof of conspiracy at the time of the conversation. Silence is not admissible where there is no motive for the defendant to answer, as is often the case where the statement is addressed to a third person.

Identification of the defendant made out of court is not admissible merely because made in the defendant's presence. There must have been some evidence of acquiescence by the defendant. "It is a common error to suppose that everything said in the presence of a defendant is ipso facto admissible against him." Where defendants under arrest were taken before the United States Attorney for examination, and another arrested with them had said that the defendants were the ones who maintained a place for selling liquor, and defendants did not deny the statements, admission of evidence over objection regarding the statement made in the defendant's presence was reversible error as the defendant has a right to be silent. The Tenth Circuit followed this view in 1936. In 1943 the Second Circuit followed this view, and declined to pass on whether or not there are exceptional situations in which the evidence is admissible. In 1952 the Second Circuit reaffirmed its position. On the facts the error was cured by instructions, although Judge Frank dissented.

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248. United States v. Harris, 45 F.2d 690 (2d Cir. 1930).
250. Miller v. United States, 21 F.2d 32, 35 (8th Cir. 1927) (liquor offense), cert. denied, 276 U.S. 621 (1928).
252. McCarthy v. United States, 25 F.2d 298 (6th Cir. 1928). But if the evidence was received without objection, it is not reversible error to refuse to strike it out. Price v. United States, 5 F.2d 650 (6th Cir. 1925) (per curiam).
253. Yep v. United States, 83 F.2d 41, 43 (10th Cir. 1936).
In 1955 the Fifth Circuit vehemently condemned the use of such evidence.\textsuperscript{256}

In 1956 the Court of Appeals for the District of Columbia held that evidence as to an accusatory statement and as to the defendant's failure to deny the same is admissible only if the circumstances were such as to warrant the inference that the defendant would naturally have contradicted it. An officer's testimony as to accusatory statements made by an accomplice of the defendant was hearsay. The mere fact that the defendant failed to deny the accusation did not render the testimony of the officer admissible where the defendant was under arrest at the time and gave as his reason his desire first to consult his lawyer, and also went on to say: "Do you think I would tell you something that would put me in jail?"\textsuperscript{257}

In 1958 the Eighth Circuit held a statement as to homicide inadmissible because the Government failed to show that the circumstances called for a denial by the defendant.\textsuperscript{258} Most federal courts have held that no inference of assent can be drawn from the silence of the defendant when he is under arrest at the time of the accusation.\textsuperscript{259} In 1962 the Ninth Circuit stated: "False exculpatory explanations made to investigating officers by a defendant are to be distinguished from flat denials of accusatory statements. If the accusation is simply denied, the accusatory statement is inadmissible hearsay.\textsuperscript{260}

There have been a number of decisions taking the opposite point of view. As has been seen these cases represent a minority view. Where, at the time a statement incriminating the defendant was made, no warrants had been issued, and prohibition officers were merely inquiring and investigating, the defendant's failure to deny the statement had evidentiary force as he was not under duress.\textsuperscript{261} The fact that the defendant, when arrested for possessing counterfeit money, made no explanation of the manner in which he got the money nor any assertion of innocence, may be considered by the jury as a circumstance against him.\textsuperscript{262} Evidence is

\textsuperscript{256} Helton v. United States, 221 F.2d 338, 342 (5th Cir. 1955), 7 Baylor L. Rev. 447.


\textsuperscript{258} Arpan v. United States, 260 F.2d 649, 655 (8th Cir. 1958), 61 W. Va. L. Rev. 320.

\textsuperscript{259} 40 Minn. L. Rev. 598, 599 (1956); Orfield, supra note 224, at 510-11.


\textsuperscript{261} Parilla v. United States, 280 Fed. 761, 765 (6th Cir. 1922).

\textsuperscript{262} United States v. Kenneally, 26 Fed. Cas. 760 (No. 15522) (N.D. Ill. 1870).
admissible that the defendant was silent when a telegram indicating his guilt was shown him.\textsuperscript{263} In 1895 the Supreme Court held admissible the declarations of a codefendant against a defendant "because they appear to have been made in his presence and under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth."\textsuperscript{264} This case was followed in 1958 in the Third Circuit, the court referring to "adoptive admissions" as justified under Rule 26.\textsuperscript{265} The defendant, an executor, had opened the deceased's safe and taken out money in bundles which he said contained $500 each. But another person present stated that each bundle contained $5,000. The defendant was silent after such statement.

In 1897 the Supreme Court referred to the view of some state courts of last resort as holding that where a person is accused of a crime under circumstances calling for a denial, his silence is competent evidence tending to establish his guilt.\textsuperscript{266} But the court did not say that it necessarily approved of this view. In 1926 the Eighth Circuit let in such evidence.\textsuperscript{267} In 1943 the same court repeated this view.\textsuperscript{268} In 1935 the Ninth Circuit let in such evidence.\textsuperscript{269} In 1946 the Court of Appeals for the District of Columbia took the same view.\textsuperscript{270} In 1954 a district judge of the District of Columbia stated: "Where accusatory statements are made in defendant's presence or hearing, his silence may make admissible both the statements and his failure to deny them, whether occurring immediately following commission of the crime . . . or in the presence of police officers at the scene . . . or at police headquarters. . . . Similarly, not only silence but also an evasive answer or one unresponsive to the statement may be the basis for an inference of acquiescence."\textsuperscript{271} But the court held that in a prosecution of two others for sodomy, one defendant's statements, on reading his codefendant's confession, that he would tell his story to his lawyer and had nothing to say, was not an admission of guilt; a new trial

\textsuperscript{263} United States v. Gardner, 42 Fed. 832, 834 (C.C.N.D.N.Y. 1890).
\textsuperscript{264} Sparf & Hansen v. United States, 156 U.S. 51, 56 (1895). This was followed in Dickerson v. United States, 65 F.2d 824, 826 (D.C. Cir.), cert. denied, 290 U.S. 665 (1933).
\textsuperscript{266} Brain v. United States, 168 U.S. 532, 563 (1897).
\textsuperscript{267} Graham v. United States, 15 F.2d 740, 743 (8th Cir. 1926), cert. denied, 274 U.S. 743 (1927).
\textsuperscript{268} Egan v. United States, 137 F.2d 369, 380-81 (8th Cir.), cert. denied, 320 U.S. 788 (1943), citing 4 Wigmore § 1071.
\textsuperscript{269} Rocchia v. United States, 78 F.2d 966, 972 (9th Cir. 1935).
\textsuperscript{270} Skiskowski v. United States, 158 F.2d 177, 181 (D.C. Cir. 1946), cert. denied, 330 U.S. 822 (1947). One judge dissenting stated that most federal courts held otherwise. 158 F.2d at 183 (dissenting opinion).
was granted. Where a defendant made an admission to another person in his codefendant's presence implicating the codefendant in a bank robbery, such statement was admissible against the codefendant, as his silence under the circumstances was an admission.\textsuperscript{72}

Where the response to the statement made in the hearing of the defendant is a denial, the courts exclude the evidence.\textsuperscript{72} The defendant has not adopted the statement made.

In a prosecution for counterfeiting, the declaration of the defendant, when he was apprehended, that he had never been at the house where he was apprehended until that time may be given in evidence, to repel any unfavorable conclusion which his silence might have warranted, but not to prove the fact.\textsuperscript{74}

The defendant's possession of a document made by a third person may sometimes justify an inference of assent to the statements contained therein.\textsuperscript{72} There are federal cases going both ways. In one case an unanswered letter to the defendant from a victim of his fraud, found in the defendant's possession, was excluded.\textsuperscript{76} Incriminating letters from the defendant's wife to a third person are inadmissible where it is not shown that he saw or knew of the letters.\textsuperscript{77} On a narcotics prosecution an unsigned letter from a third person as to such drugs, found in the defendant's possession, was excluded.\textsuperscript{77} But on a prosecution for altering a postal money order, a memorandum book taken from the possession of the defendant was admitted as containing admissions by him, and also as containing handwriting by him to be used for comparison.\textsuperscript{70} On a prosecution for sending obscene matter in the mail, in which the package was found in possession of a woman who had received it from the express agent, the finding of a photograph of the defendant in the woman's purse was held admissible to show concert with her.\textsuperscript{269}

In 1901 the Second Circuit stated that "it has been uniformly held by the courts that the failure to reply to a letter is not to be treated . . . as

\textsuperscript{72} Campbell v. United States, 269 F.2d 688, 690 (1st Cir. 1959), rev'd on other grounds, 373 U.S. 487 (1963), citing 4 Wigmore § 1071. See also Tucker v. United States, 279 F.2d 62, 64 (5th Cir. 1960).

\textsuperscript{73} Thompson v. United States, 227 F.2d 671, 674 (5th Cir. 1955), citing 4 Wigmore § 1071. See also United States v. Dellaro, 99 F.2d 781, 783 (2d Cir. 1938); Amezaga v. United States, 296 Fed. 915, 916 (5th Cir. 1924).


\textsuperscript{75} 4 Wigmore § 1073, at 90.

\textsuperscript{76} Packer v. United States, 106 Fed. 906, 909 (2d Cir. 1901).

\textsuperscript{77} Sorenson v. United States, 168 Fed. 785, 794-97 (8th Cir. 1909).

\textsuperscript{78} Poy Coon Tom v. United States, 7 F.2d 109 (9th Cir. 1925).

\textsuperscript{79} Dean v. United States, 246 Fed. 568, 576 (5th Cir. 1917) (one judge dissenting).

\textsuperscript{80} United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933) (opinion by Learned Hand).
an admission of the contents of the letter. But an unanswered tele-
gram to the defendant was held admissible if under all the circumstances
of the case the jury found that it called for an answer. Evidence is
admissible that the defendant tore up the letter, and told a witness to
tear up his copy.

The books of a partnership are receivable against a partner. On
principle the corporation account books should be receivable in the same
way. The federal cases seem to look in that direction, although perhaps
they are explainable on their particular facts. On a prosecution for
fraudulent use of the mails, the two defendants were the only persons
interested in the finance company. The corporate books were admitted.
On a similar prosecution books of certain corporations were received
against certain defendants who completely dominated the corporations.
The court may charge that the account books must be shown to have been
kept or supervised by and known to the defendant.

The admissions of a codefendant are receivable against himself only.

Statements made by an agent within the scope of his authority are
admissible against the principal. To render admissible extrajudicial
statements of an alleged agent of the Government, it must be established
that he was an agent of the Government, that he was acting within the

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281. Packer v. United States, 106 Fed. 906, 910 (2d Cir. 1901). See also Sorenson v. United
States, 168 Fed. 785, 795 (8th Cir. 1909). See Cestaro, Admission by Silence of Written
Matter: A Comment on Evidence and Public Policy, 39 Chi.-Kent L. Rev. 138, 154-57
(1962).

See also Rumble v. United States, 143 Fed. 772, 780 (9th Cir. 1906) (part of a larger
correspondence).

283. Simons v. United States, 119 F.2d 539, 555-56 (9th Cir.), cert. denied, 314 U.S. 616
(1941).

284. Coplin v. United States, 88 F.2d 652, 670 (9th Cir.), cert. denied, 301 U.S. 703
(1937).

285. 4 Wigmore § 1074, at 105.

286. Osborne v. United States, 17 F.2d 246, 248 (9th Cir.), cert. denied, 274 U.S. 751
(1927).

287. Wilkes v. United States, 80 F.2d 285, 290 (9th Cir. 1935). See also Taylor v. United
States, 96 F.2d 16 (5th Cir.), cert. denied, 305 U.S. 596 (1938); Levey v. United States, 92
F.2d 688, 691 (9th Cir. 1938), cert. denied, 303 U.S. 639 (1938). Compare Beck v. United
States, 33 F.2d 107 (8th Cir. 1929).

(1948). See Orfield, Relief from Prejudicial Joinder in Federal Criminal Cases (pt. 1),
36 Notre Dame Law. 276, 299-302 (1961); id. (pt. 2) at 495, 503-07; 4 Wigmore § 1076,
at 116.

289. United States v. Miller, 246 F.2d 486, 490 (2d Cir.), cert. denied, 355 U.S. 905 (1957),
citing 4 Wigmore § 1078. See also Goldsmith v. United States, 42 F.2d 133, 138-39 (2d Cir.
scope of his authority, and that the statements were made before the
termination of the agency.\textsuperscript{290} The alleged agent may testify upon the
stand to the fact of his agency.\textsuperscript{291} A special agent for the Government
who participated in a narcotics sale and is now being prosecuted cannot
bind the Government by his statement made some two months after his
participation had led to the arrest.\textsuperscript{292} The court may exclude a tape record-
ing of the conversation offered by the defendant.

Judge Albert B. Maris has stated:

The hearsay rule is likewise satisfied when a vicarious admission is made. The classic
examples are the admission made by an agent on behalf of his principal and of an
accomplice on behalf of his co-conspirators. The privity of interest is such as to
make the assertion of the one making it that of the principal or of his fellows.

However, if the agency is terminated or the conspiracy is over, there is no longer
any authority in the agent to act on behalf of his principal or of the accomplice to act
on behalf of his co-conspirators. This is a part of the substantive law of agency and
of conspiracy, rather than of the law of evidence.\textsuperscript{293}

The Supreme Court has stated by Mr. Justice Black:

There are many logical and practical reasons that could be advanced against a special
evidentiary rule that permits out-of-court statements of one conspirator to be used
against another. But however cogent these reasons, it is firmly established that where
made in furtherance of the objectives of a going conspiracy, such statements are
admissible as exceptions to the hearsay rule. This prerequisite to admissibility, that
hearsay statements by some conspirators to be admissible against others must be made
in furtherance of the conspiracy charged, has been scrupulously observed by federal
courts.\textsuperscript{294}

One court has stated: "It is of course a rule, scrupulously observed
in the federal courts, that hearsay statements made outside the presence
of an alleged conspirator before the conspiracy is established, are not
admissible to incriminate him."\textsuperscript{295}

The Supreme Court stated:

Doubtless, in all cases of conspiracy, the act of one conspirator in the prosecution
of the enterprise is considered the act of all, and is evidence against all. . . . But only

\textsuperscript{290} Eastman v. United States, 212 F.2d 320, 322 (9th Cir. 1954). See McCormick § 244.
\textsuperscript{291} Shama v. United States, 94 F.2d 1 (8th Cir.), cert. denied, 304 U.S. 568 (1938).
\textsuperscript{292} Escandar v. United States, 295 F.2d 58 (5th Cir. 1961).
\textsuperscript{293} Gambino v. United States, 108 F.2d 140, 142 (3d Cir. 1939). See McCormick § 244,
at 521; 4 Wigmore § 1079.
\textsuperscript{294} Krulewitch v. United States, 336 U.S. 440, 443-44 (1949). See Orfield, Relief from
Prejudicial Joinder in Federal Criminal Cases (pt. 1), 36 Notre Dame Law. 276, 301-02
(1961); id. (pt. 2) at 495, 503-05 (1961).
\textsuperscript{295} Briggs v. United States, 176 F.2d 317, 320 (10th Cir.), cert. denied, 338 U.S. 861
(1949).
those acts and declarations are admissible under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object.296

Declarations of a confederate made after his arrest will not, except in the most unusual cases, be in furtherance of a common plan so as to be admissible against a codefendant.297 When the conspiracy has ended, logically the subsequent conduct of a conspirator cannot be in furtherance of it.298 So, in many cases the question becomes whether the conspiracy has ended. The life of the conspiracy will not be extended on any theory of an implied agreement to conceal the crime.299 The rule against admission of extrajudicial admissions of a conspirator made after the termination of a conspiracy cannot be circumvented by leaving the issue of termination to the jury with an instruction to disregard the admission if the jury found the conspiracy ended before the admission.300

Declarations of one coconspirator to another are not competent to establish connections of a third person with the conspiracy.301 Independent evidence showing the existence of the conspiracy and the defendant's participation therein when the declarations were made, is a prerequisite to the admissibility of declarations against the defendant.

The federal courts usually do not discriminate between declarations offered as conduct constituting part of the conspiracy and declarations offered as a vicarious admission of the facts declared. Even when offered for the latter purpose, the same test is imposed; i.e., the declaration must have been made while the conspiracy was continuing.302 Statements made by a conspirator after arrest by way of confession were held inadmis-

298. 72 Harv. L. Rev. 920, 989 (1959); 56 Colum. L. Rev. 1112 (1956).
300. Yokely v. United States, 237 F.2d 455, 458 (9th Cir. 1956).
301. Mayola v. United States, 71 F.2d 65, 67 (9th Cir. 1934); Nibbelink v. United States, 66 F.2d 178, 179 (6th Cir. 1933); Minner v. United States, 57 F.2d 506, 511 (10th Cir. 1932); Kuhn v. United States, 26 F.2d 463 (9th Cir. 1928); Kelton v. United States, 294 Fed. 491, 495 (3d Cir. 1923), cert. denied, 264 U.S. 590 (1924); Pope v. United States, 289 Fed. 312, 315 (3d Cir.), cert. denied, 263 U.S. 703 (1923); Stager v. United States, 233 Fed. 510, 513 (2d Cir. 1916); United States v. McKee, 26 Fed. Cas. 1107, 1110 (No. 15686) (C.C.E.D. Mo. 1876).
Furthermore, the declaration must have constituted a step in furtherance of the venture.

While the existence of the conspiracy must be proved independently to justify the admission of the declaration, the trial judge in his discretion may vary the order of proof, and admit the declaration contingent upon the later production of the preliminary proof. A witness' testimony that others had told him that the defendant was a member of a conspiracy is hearsay and incompetent to link the defendant with the conspiracy. Before the statements of an alleged coconspirator may be received in evidence as an exception to the hearsay rule, there must be some competent proof, aliunde, from which the jury could conclude that the speaker was a member of the conspiracy.

The record of the conviction of the principal on a plea of nolo contendere is admissible on a trial of confederates who were jointly indicted with him and tried on the theory that they are accessories, for the purpose of establishing the conviction and prima facie guilt of the principal. The same effect would be given to a plea of guilty. The accessories may introduce evidence that the principal was not guilty. Minutes of the clerk showing a plea of guilty by the principal are admissible. On the prosecution of an accessory after the fact, the principal offense cannot be proved by introduction of the judgment of conviction of the perpetrators thereof. A statute making the record of the conviction of one person of stealing given property conclusive evidence of the fact that property had been stolen in the prosecution of the receiver, violates the defendant's constitutional right to confront the witnesses against him.

V. STIPULATIONS

The evidential admissions just considered should be carefully distinguished from judicial admissions. Professor McCormick points out:

303. Rimmer v. United States, 172 F.2d 954, 959 (5th Cir. 1949).
305. United States v. Pugliese, 153 F.2d 497, 500 (2d Cir. 1945).
307. Carbo v. United States, 314 F.2d 718, 735-38 (9th Cir. 1963); Dennis v. United States, 302 F.2d 5, 10 (10th Cir. 1962); Glasser v. United States, 315 U.S. 60, 74 (1942).
309. Colosacco v. United States, 196 F.2d 165, 167 (10th Cir. 1952).
310. Barone v. United States, 205 F.2d 909, 914 (8th Cir. 1953).
Judicial admissions are not evidence at all, but are formal admissions in the pleadings, or stipulations, oral or written, by a party or his counsel which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.312

Stipulations of fact made by the Government and the defendant are binding. In an immigration prosecution a stipulation as to negligence was upheld. The Supreme Court stated that it knew "no rule of public policy which will prevent the United States Attorney from stipulating with the defendant in a case of this character as to the ultimate facts in the controversy."313 While the court is not bound by a stipulation of the parties as to the legal conclusions to be drawn from the facts stipulated, it is bound as to the specific facts recited and the ultimate facts.

In 1942 the Supreme Court seemed in effect to say that the proper construction of a statute and errors of the Government are not proper subjects of stipulation.314 A confession of error by the Government on these subjects, while entitled to great weight, does not bind the Supreme Court.

Where the defendant stipulates testimony which he later attacks as prejudicial, and it is stricken and the jury is instructed to disregard it, there is no reversible error.315

Where the Government was ready to show motion pictures and the defendant only then stipulated the facts about to be portrayed, the trial judge in his discretion could still use the motion pictures.316 There is no obligation to stipulate merely on an allegation of the defendant that the jury will be inflamed by proof of arrests on numerous occasions.317 In general there is no obligation to stipulate, and a party may insist on proving the facts of his case. Under Canon 15 of the Canons of Professional Ethics, the lawyer "must obey his own conscience and not that of his client."


The Government can make no claim based on a stipulation that the defendant had waived his presence in the courtroom, where the defendant has not authorized such a stipulation.\textsuperscript{318}

An oral stipulation which is not clear will be construed against the Government.\textsuperscript{318} The implication is that a clear oral stipulation is binding. Canon 25 of the Canons of Professional Ethics provides: "As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing as required by rules of Court."

A trial judge has instructed as to stipulations: "When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.\textsuperscript{320} A stipulation in open court in a prosecution for unlawful acquisition and possession of marihuana, as to the identity of the suspected substance as marihuana, established proof of such fact without the necessity of further evidence. "The use of stipulations in criminal as well as civil matters has long been recognized as proper.\textsuperscript{321}

Where an indictment alleged that the person whose life was jeopardized by means of a revolver in an attempted mail robbery was an assistant postmaster, and the defendant's trial counsel so stipulated during trial in the defendant's presence, it could not be urged on appeal that there was no such official, since the allegation that such person was an assistant postmaster was surplusage, and since subsequent counsel could not repudiate the stipulation.\textsuperscript{322}

A stipulation obviating the necessity of presence of Government witnesses, made in the interests of time and economy, admitting that certain foreign bonds were stolen but not admitting that the defendants knew the bonds were stolen, is admissible in evidence.\textsuperscript{323} The proof was largely expert and formal. Even in a murder case stipulations as to essential matters made by defendant's counsel were allowed.\textsuperscript{324} This did not violate the right of confrontation. The parties may stipulate through counsel the

\begin{itemize}
  \item \textsuperscript{318} Greenberg v. United States, 280 F.2d 472, 475-76 (1st Cir. 1960).
  \item \textsuperscript{319} Lubin v. United States, 313 F.2d 419, 422 (9th Cir. 1963).
  \item \textsuperscript{320} United States v. Schneiderman, 106 F. Supp. 906, 928 (S.D. Calif. 1952), aff'd sub nom. Yates v. United States, 225 F.2d 146 (9th Cir. 1955).
  \item \textsuperscript{321} United States v. Rodriguez, 241 F.2d 463 (7th Cir. 1957) (per curiam).
  \item \textsuperscript{322} Jones v. United States, 72 F.2d 873 (7th Cir. 1934).
  \item \textsuperscript{323} Sullivan v. United States, 7 F.2d 355, 356 (8th Cir. 1925), cert. denied, 270 U.S. 648 (1926).
  \item \textsuperscript{324} Fukunaga v. Territory of Hawaii, 33 F.2d 396 (9th Cir.), cert. denied, 280 U.S. 593 (1929). The defendant wished to plead guilty, but the trial court entered a plea of not guilty.
\end{itemize}
exact position of a gambling ship.\textsuperscript{325} In a habeas corpus proceeding following court martial proceedings, it was held that the defendant waived his right of confrontation of witnesses by a written stipulation signed by him and his counsel agreeing to the use of written statements of witnesses in lieu of their production in court.\textsuperscript{326} Where a defendant, having obtained a trial separate from that of his codefendants, stipulates with the prosecution for submission of the case against him to the court upon evidence introduced by prosecution and defense, including direct and cross-examination, at a prior jury trial of his codefendants, some of whom were acquitted, there is no violation of the right to confront the witnesses against him.\textsuperscript{327}

In a conspiracy to sell goods at over-ceiling prices there may be a binding stipulation that the maximum price was the price set forth in contracts by the selling corporation.\textsuperscript{328} A stipulation made during trial that a particular roll of cloth was part of the cloth involved in the transaction giving rise to the prosecution and that it was present in the courthouse was equivalent to formal introduction of the roll of cloth in evidence.\textsuperscript{329} The court also instructed as to the effect of such evidence. A stipulation between the defendant and the Government in a prosecution under the Gamblers’ Occupational Tax Act is binding on both parties.\textsuperscript{330} A stipulation of facts as to housebreaking and larcenies may be used in a prosecution for aiding such offense.\textsuperscript{331} In one case a signature card was admitted in evidence, with the stipulation that if the president of the bank were called as a witness, he would testify that the signature on the card was that of the defendant, signed by him in the officer’s presence.\textsuperscript{332}

\textbf{VI. Declarations Against Interest}

In one case the Supreme Court stated:

But we are of opinion that the evidence put in by the government, on this question, was not competent. It consisted of statements alleged to have been made by the deceased, in his lifetime to le Flore, the witness, that he did not belong to the Indian country, but had come from Arkansas. Such statements do not come within any rule permitting hearsay evidence. The trial judge appears to have regarded the

\begin{itemize}
  \item \textsuperscript{325} United States v. Carrillo, 13 F. Supp. 121, 122 (S.D. Calif. 1935).
  \item \textsuperscript{326} Burns v. Sanford, 77 F. Supp. 464 (N.D. Ga. 1948).
  \item \textsuperscript{327} Cruzado v. People of Puerto Rico, 210 F.2d 789, 791 (1st Cir. 1954).
  \item \textsuperscript{328} United States v. Monroe, 164 F.2d 471, 476 (2d Cir. 1947), cert. denied, 333 U.S. 828 (1948).
  \item \textsuperscript{329} Gormley v. United States, 167 F.2d 454, 458 (4th Cir. 1948).
  \item \textsuperscript{330} United States v. Kahriger, 210 F.2d 565, 570 (3d Cir. 1954).
  \item \textsuperscript{331} Lockley v. United States, 270 F.2d 915, 918 (D.C. Cir. 1959).
\end{itemize}
testimony as within the rule that declarations of deceased persons made against their interest are admissible—that as a colored person adopted in the Choctaw Nation gets benefits, rights and privileges, a declaration made by him against that interest would be competent. It may be that in a controversy on behalf of a deceased Negro’s right, or that of his representatives, to participate in the property of the nation, such admissions might be competent. But this case is not within any such rule. The object of the evidence here was not to enforce any rights or claims of the deceased against the Choctaw Nation, but was to sustain an allegation in the indictment, upon which the jurisdiction of the United States court depended.333

In 1943 the Second Circuit stated in a dictum with respect to the right of confrontation and declarations against interest, that “declarations against interest . . . have long been recognized as admissible.”334

Before the declaration can come in, it must be shown that the witness is unavailable.335 But other cases involving declarations against penal interest do not let this declaration in even if unavailability is shown.336

In a prosecution for keeping a public gaming house it was held that the Government’s objection against evidence of a declaration of another person that he kept the house should be sustained.337 Even on a trial for murder it was held that evidence will not be admitted that another person confessed that he killed the deceased.338 Such a confession is merely hearsay.339 It may develop that such confession was made for a consideration, and the confessor might deny his guilt at his own trial. In 1913 the Supreme Court followed the majority American rule340 that evidence that a third person had confessed the crime is hearsay and so must be excluded.341

In a liquor prosecution the confession of a third person that he was the

333. Lucas v. United States, 163 U.S. 612, 617 (1896). It is pointed out in 5 Wigmore § 1461, at 267 n.1 that in this case the subject was confused with that of admissions.

On declarations against interest see McCormick §§ 253-57; Morgan 251-59; 2 Jones §§ 295-300; 5 Wigmore §§ 1455-77; Jefferson, Declarations Against Interest: An Exception to the Hearsay Rule, 58 Harv. L. Rev. 1 (1944); Morgan, Declarations Against Interest, 5 Vand. L. Rev. 451 (1952); 21 Minn. L. Rev. 181 (1937); Annot., 162 A.L.R. 446 (1946).

334. United States v. Leathers, 135 F.2d 507, 511 (2d Cir. 1943).


337. United States v. Miller, 26 Fed. Cas. 1255 (No. 15773) (C.C.D.C. 1830). The same rule was applied to larceny from the mails. United States v. Mulholland, 50 Fed. 413, 416 (D. Ky. 1892) (the declarant was deceased).


340. McCormick § 227, at 462; id. § 229, at 473.

In a prosecution for aiding and abetting a murder, evidence showing that another than defendant's principal might have committed the offense is admissible, if the circumstances clearly point to such other person. In 1958, the Tenth Circuit took an enlightened view when it stated: "Assuming, however, that the companion did make a voluntary confession or statement to the narcotic agent exculpating or exonerating the accused, modern and convincing authorities support its admissibility as a statement of a fact against penal interest." But the defendant failed to show that the statement, if made, was voluntary and against the penal interest of the declarant. Rule 63(10) of the Uniform Rules would let in such a declaration even though the declarant was available.

In some cases the declarations are admitted, but not to exonerate the defendant. In a prosecution for conspiracy to commit offenses against the United States by helping to organize the Communist Party, the acts and declarations of third parties were admitted for the purpose of showing their relationships to the conspiracy, but not the relationship of any other persons involved. Judge Mathes stated that:

admitting evidence of acts and declarations of a third person to prove his own membership in a conspiracy permits such evidence to serve merely as proof of the relationship of the third-party actor or declarant himself—and not the relationship of any other person—to the conspiracy. Such acts and declarations thus lack the self-serving character of those which would establish the declarant's relationship to another person, and indeed possesses the trustworthy character of statements against interest.

VII. DYING DECLARATIONS

Dying declarations are an exception to the hearsay rule. In 1851 a court stated:


343. Hale v. United States, 25 F.2d 430, 437 (8th Cir. 1928). No such circumstances were found in this case.


346. On dying declarations see 2 Jones §§ 301-07; McCormick §§ 258-64; Morgan 259-65; 1 Wharton §§ 297-335; 5 Wigmore §§ 1430-52; 2 Underhill 705-762; 46 Iowa L. Rev. 375 (1961); 39 J. Crim. L. 646 (1949).
In a criminal case involving life itself we admit, as testimony, declarations made by a person not under oath, and where the accused was not present. And why? From the supposed necessity of the case, and because declarations made by a person under the danger of impending death, are regarded as if made upon oath in a court of justice. We confine this rule of evidence to cases of homicide.  

Dying declarations are admissible in favor of the defendant as well as against him. The defendant is entitled to such protection. Admission of dying declarations does not infringe the right of the defendant to confront the witnesses against him. In 1943 the Second Circuit stated by Judge Augustus Hand that “most important of all in criminal trials, dying declarations, have long been recognized as admissible.”

Dying declarations are admissible only in homicide cases. They are not admissible in a prosecution for using the mails to defraud and for conspiracy to use the mails to defraud. They are not admissible in admiralty cases.

On the trial of a husband for murdering his wife, her dying declarations are not excluded because of their relation as husband and wife.

The dying declaration must be that of the victim of the homicide and not that of a third person, even though such third person was at the point of death and himself confessed to the crime.

The declaration should be limited to the transactions causing the death.

The repetition of a dying declaration made when hope of recovery has been regained is not admissible.

If the dying declaration is not made in extremis, it is not admissible.

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349. McCormick § 261, at 558.


351. United States v. Leathers, 135 F.2d 507, 511 (2d Cir. 1943).


353. Holt v. United States, 94 F.2d 90, 92 (10th Cir. 1937).


357. Freihage v. United States, 56 F.2d 127, 132 (9th Cir. 1932). See 5 Wigmore § 1434.


359. Mattox v. United States, 146 U.S. 140, 151 (1892); United States v. Woods, 28
The fact that the deceased had received extreme unction tends to show that the deceased was in articulo mortis, and the defendant cannot object to such evidence. Mr. Justice Cardozo, speaking for the Supreme Court, has stated: "There must be a settled hopeless expectation... that death is near at hand, and what is said must have been spoken... with the consciousness of a swift and certain doom." The deceased need not have made a statement of settled hopeless expectation. "There is no unyielding ritual of words to be spoken by the dying." The mere use of the words "if I die" in the declaration does not bar its admission. It is a question for the jury whether this language manifested doubt as to impending death. Evidence of duration of life after the declaration was made is one element to consider.

A disbelief in a future state of rewards and penalties does not exclude the declaration, but may be used to impeach it.

The character of the dying declarations, their consistency with established facts, and all the circumstances of the dying man should be considered by the jury in determining the weight of such declarations. Extreme youth of the declarant may be a bar; the declaration may also be discredited by proof of the character of the deceased, his making of prior inconsistent statements, or his lack of belief in a future state of rewards or punishments. The declarant must have had an opportunity to know the facts, and should state facts, not opinion. The mere fact of asking leading questions will not exclude the declarations.

On principle the opinion rule should not apply to dying declarations. But many courts apply it. On a prosecution for murder of his wife, her...
dying declaration that the defendant "poisoned me" was excluded.\textsuperscript{871} An expression of opinion favorable to the defendant has been admitted. The declaration that the defendant would not have struck the deceased if the latter had not provoked him was admitted.\textsuperscript{872}

The declaration is not inadmissible because it was made under oath.\textsuperscript{873}

If a part of the declaration only is proved, the opponent may prove the remainder.\textsuperscript{374} If there are several dying declarations the jury should give consideration to any inconsistency between them.\textsuperscript{876}

Upon request of the defendant the trial judge must give appropriate instructions as to the status of dying declarations.\textsuperscript{370}

VIII. **SPONTANEOUS DECLARATIONS**

A. **Declarations of Bodily Condition**

Statements of external circumstances causing the injury are not admissible as declarations of bodily condition.\textsuperscript{877} On a prosecution for wife-murder, the wife’s statement during illness that her husband "has poisoned me" was not admissible.\textsuperscript{378}

B. **Declarations of Mental State**

An exception to the hearsay rule admits statements or declarations of a presently existing mental state of the declarant.\textsuperscript{870} But the courts do not extend this exception to admit a declaration that the declarant remembers or believes a certain matter as evidence that the matter so remembered or believed is true. Mr. Justice Cardozo, speaking for the Supreme Court has stated: "Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory,


\textsuperscript{\footnotesize 373.} Freihage v. United States, 56 F.2d 127 (9th Cir. 1932); In re Orpen, 86 Fed. 760 (C.C.N.D. Calif. 1898).

\textsuperscript{\footnotesize 374.} Mattox v. United States, 146 U.S. 140 (1892). See 5 Wigmore § 1448.


\textsuperscript{\footnotesize 376.} Freihage v. United States, 56 F.2d 127 (9th Cir. 1932); Armstrong v. United States, 41 F.2d 162 (9th Cir. 1930). See 49 Colum. L. Rev. 274 (1949); 32 Neb. L. Rev. 461 (1953).

\textsuperscript{\footnotesize 377.} 6 Wigmore § 1722.


\textsuperscript{\footnotesize 379.} See McCormick § 268. On declarations of mental state, see 2 Jones § 325; McCormick §§ 268, 272; Morgan 289-96; 1 Wharton § 289; 1 Wigmore §§ 110-11, 140; 2 id. § 247; 6 id. §§ 1714-15, 1725-40; Slough, supra note 378, at 230-40.
pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.\textsuperscript{380}

Testimony that at luncheon the corporate employer’s president informed his son, who was secretary and treasurer, that the president had agreed to send money to the union business agent who had requested it was admissible in a prosecution against the agent for illegally receiving money from the employer, as a declaration of the president’s intention. Judge Friendly stated:

Shepard v. United States, 1933, 290 U.S. 96, 103-106 . . . does not hold that a declaration of design is rendered inadmissible because it embodies a statement why the design was conceived. In that case there was no relevant declaration of design; the statement, “Dr. Shepard has poisoned me,” was wholly of past fact and was offered and received as a dying declaration, erroneously as the Supreme Court held.\textsuperscript{381}

A writer has pointed out that the issue as to state of mind may sometimes be whether the defendant’s acts caused the state of mind.\textsuperscript{382} The declarations will often describe inseparably the acts and their effect on the mind of the declarant. In such case the normal practice is to admit the declaration and instruct the jury to consider it only in proof of the declarant’s mental state, and to disregard it as evidence of the offending conduct. For example, in a prosecution for conspiracy in restraint of interstate trade in poultry, declarations of receivers as to why they refused to sell to recalcitrant marketmen were held admissible to show the state of mind of the declarants, but not to show the external facts declared as reasons.\textsuperscript{383} The defendants would have been entitled to instruction to that effect if requested. But all this will be hard for the jury to understand. If the mental state can be proved by other evidence, and the danger of prejudice to the defendant is great, the judge in his discretion might well exclude the declaration.\textsuperscript{384}

There has been a reluctance in American criminal cases to accept the threats of a third person to commit the act with which the defendant is charged as evidence that the crime was committed by the third person


\textsuperscript{381} United States v. Annunziato, 293 F.2d 373 (2d Cir. 1961), cert. denied, 368 U.S. 919 (1961).

\textsuperscript{382} McCormick §§ 269.


\textsuperscript{384} See McCormick §§ 59, 269.
and not by the defendant. While some cases exclude such threats altogether, the better practice is to admit them when the trial judge in his discretion finds that there is sufficient accompanying evidence of motive, overt acts, opportunity or like confirming circumstances to give substantial significance to the threats.

In homicide and assault cases when the defendant claims self-defense, threats of the victim known to the defendant are provable to show his apprehension of danger and the reasonableness thereof. For these purposes they have no element of hearsay.

Uncommunicated threats, that is to say threats not known to the defendant, are received to show the intention, and hence to ground the first act of aggression in the altercation with the defendant. A threat to do harm to the defendant’s father or near relative is sufficient.

In one case the defendant was convicted of a murder committed during a card game. The defendant testified that the deceased attacked him first, but all the other witnesses swore that the defendant was the aggressor. After the trial there was newly discovered evidence that an open pen knife was found in the pocket of the deceased, but not in his hand. On appeal it was held that the defendant was entitled to a new trial. When a defendant claims self-defense and there is substantial evidence, though it be his own testimony, that the deceased attacked him, evidence of uncommunicated threats of the deceased against the defendant is admissible, though there are eye-witnesses. The case seems to be the first in which a concealed weapon has been classified as an uncommunicated threat. But nonverbal threats may tend to explain an act by the deceased or to corroborate other evidence of aggression by the de-

385. McCormick § 270 (1954); 1 Wigmore § 140.
386. Alexander v. United States, 138 U.S. 353 (1891). As the Court reversed on another ground, it found it unnecessary to determine whether there was reversible error in ruling out such testimony. See also Marrone v. State, 359 P.2d 969 (Alaska 1961).
389. Trapp v. Territory of New Mexico, supra note 388, at 969.
ceased. The Government knew of the evidence at the first trial, but failed to disclose it to the defendant.

In 1892 in a civil case the Supreme Court held that declarations of intention are receivable to show later acts. A possible implication was that declarations of memory and belief to show the truth of the facts believed are also receivable. But in 1933 the Supreme Court denied this. It declined to admit, in a case of murder of a wife by poisoning, the declaration of the wife while suffering from the poison, "[My husband] has poisoned me," offered to rebut the defense of suicide. It was not possible effectively to limit the evidence to proving her state of mind. A leading writer has pointed out that subsequent decisions of American and English courts reveal an inclination to admit declarations of deceased persons about previous happenings where justice requires it.

C. *Excited Utterances*

As early as 1869, in a civil case in which the deceased described his alleged injury shortly after its occurrence, the Supreme Court, in an opinion by Mr. Justice Swayne, stated:

The *res gestae* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. . . . Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. . . . In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned.

The Court cited, favorably, a Massachusetts case on manslaughter where the deceased's statement that the defendant had stabbed her was

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391. Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892). This was followed in a federal criminal case, Bryson v. United States, 238 F.2d 657 (9th Cir. 1956), cert. denied, 355 U.S. 817 (1957), as to making false noncommunist affidavits.


393. McCormick § 271.


held properly admitted, and thought the latter case involved the same principle as the case before it. On a homicide prosecution in the District of Columbia a declaration of the deceased immediately after he was stabbed, "I've been struck," was admitted.\(^{396}\) On a murder prosecution the statement of the victim, seriously injured, on regaining consciousness was admitted.\(^{397}\)

On a robbery prosecution the trial judge may submit testimony of officers who arrived at the scene of the alleged offense after hearing pistol shots that they heard the victim yelling, "You robbed me; you robbed me" to the defendant who was found at the place.\(^{398}\) Where the wife of a deputy marshal was with him when he attempted to serve process and was assaulted by the defendant, and the wife ran next door to use the telephone, telling residents next door that her husband was being assaulted with a butcher knife, such remarks were part of the \textit{res gestae} and admissible.\(^{399}\)

Where the excited utterance occurs three hours after the startling event, the utterance was held properly excluded.\(^{400}\) Assault on a child was involved. Another testified what the child victim said, the child being excluded as a witness. On a prosecution after rape of a child five and a half years old, her statement made to her grandmother, more than an hour later, was admitted. The grandmother testified. As to cases of abuse of female children "the principle of what is called the \textit{res gestae} has been, from necessity of the case, extended beyond the limits that obtain generally in civil cases."\(^{401}\) Where an indecent act was unattended by physical injury, the statement of the six-year-old girl to her mother shortly after leaving the defendant's taxicab was admitted.\(^{402}\) But in 1956, the same court held that in the absence of injury to the child, the statement of the child to the mother was not sufficient to establish the corpus delicti.\(^{403}\)

Such evidence is no more convincing than a confession. The problems of

\begin{itemize}
  \item \(^{396}\) United States v. Edmonds, 63 F. Supp. 968 (D.D.C. 1946), citing (at 972) 6 Wigmore § 1747. See also Grant v. United States, 28 App. D.C. 169 (1906).
  \item \(^{397}\) Lampe v. United States, 229 F.2d 43 (D.C. Cir. 1956).
  \item \(^{398}\) McQueen v. United States, 262 F.2d 455 (D.C. Cir. 1958).
  \item \(^{399}\) Pietrzak v. United States, 188 F.2d 418 (5th Cir.), cert. denied, 342 U.S. 824 (1951).
  \item \(^{400}\) Brown v. United States, 152 F.2d 138 (D.C. Cir. 1945). The court cited (at 139) 6 Wigmore §§ 1747, 1750, 1754, 1761. See also Smith v. United States, 215 F.2d 682 (D.C. Cir. 1954).
  \item \(^{402}\) Beausoliel v. United States, 107 F.2d 292 (D.C. Cir. 1939).
  \item \(^{403}\) Jones v. United States, 231 F.2d 244 (D.C. Cir. 1956).
\end{itemize}
hearsay and double hearsay may arise, and bar the spontaneous statement.404

The spontaneous statement of the defendant is admissible in his favor.405 In one case the court so held, stating that it probably strained the law in admitting statements of the defendant on the way to the guardhouse or after arrival there.406

The spontaneous statement of the victim is admissible.407 So are spontaneous statements of third persons.408

A wife's statement may be used against her husband in a murder prosecution where she was the victim.409 Spontaneous statements can be used against a defendant as most of the cases here discussed show.

A statement by a victim of violence may be spontaneous even though it is in answer to a question. It was held proper to admit the testimony of a police officer that the victim had said that the defendant "did it," even eleven hours after an assault on her and several days before her death.410 It should be noted that in cases such as these, employment of the spontaneous declaration exception circumvents the limitations of the dying declaration exception.

A letter of explanation sent by the defendant to the collector of internal revenue after indictment for income tax evasion is not admissible as a spontaneous declaration.411 A "declaration, to be admissible as part of the res gestae, must have been a spontaneous utterance of the mind while under the influence of the transaction."412

D. Declarations of Present Sense Impressions

A statement made in immediate response to an external stimulus which produced no shock or nervous excitement whatever may be highly trustworthy. The guarantee of trustworthiness is the contemporaneousness. No criminal cases have been found applying this proposed exception,

405. Stroud v. United States, 2 F.2d 658 (6th Cir. 1924) (defendant's spontaneous statement of innocence at time of arrest admitted).
408. Pietrzak v. United States, 188 F.2d 418 (5th Cir.), cert. denied, 342 U.S. 824 (1951); Barnard v. United States, 162 Fed. 618 (9th Cir. 1908); United States v. Schneider, 21 D.C. 381 (1893).
409. United States v. Schneider, supra note 408.
but there are federal civil cases applying it. In a personal injury action pertaining to a fatal accident at a railroad crossing, a question of fact was presented as to whether or not the crossing signals were given, the bell rang, or whether any signal of the approach of the train was given. A witness was asked to state whether his wife had made any remarks as to the signals. In answer to this question he testified that his wife stated: "Why don’t the train whistle?" This calm though spontaneous declaration was admitted as a part of the res gestae.\(^4\) In 1962, a court stated that among the "distinct exceptions to the hearsay rule encompassed by the term res gestae" are "declarations of the present sense impression."\(^4\) Rule 63(4) of the Uniform Rules of Evidence admits a statement which the judge finds was made "while the declarant was perceiving the event or condition which the statement narrates, describes or explains."

E. Res Gestae

In a prosecution under the slave-trade act against the owner of a ship, testimony of the declarations of the master, being part of the res gestae, connected with acts in furtherance of the voyage and within the scope of his authority as agent of the owner, in the conduct of the guilty enterprise, is admissible against the owner.\(^4\) The Court declined to give an opinion whether mere declarations, under other circumstances, would have been admissible.

In 1829, Justice Washington stated: "For we hold the law to be, that where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the res gestae, may be given in evidence against the others."\(^4\) In a case in which the defendants were jointly charged with the murder of the deceased, the acts, appearances


\(^{414}\) Wabisky v. D.C. Transit Sys., Inc., 309 F.2d 317, 318 (D.C. Cir. 1962). See also Norfolk & W. Ry. Co. v. Gesswine, 144 Fed. 56 (6th Cir. 1906) (statement as to speed of train as it was going by).


and declarations of each as to how the homicide occurred were admitted as a part of the res gestae. Each person against whom evidence was offered was present at the time the unlawful acts were committed and the declarations were made.

In a ruling in favor of the defendant, a court held that anything that is said and done by the defendant and the prosecuting witness at the time of the larceny was directly connected with the transaction and admissible. Such evidence may be used to explain the motives and intent of the defendant and to impeach the credibility of the prosecuting witness. Declarations of the defendant accompanying and explaining the res gestae may be proved, but such declarations are not admissible as part of the res gestae unless they in some way elucidate or tend to characterize the acts which they accompany, or may derive a degree of credit from the fact itself. If the declaration depends entirely for its effect on the credit of the person making it, it is inadmissible.

What the defendant said or did at a date subsequent to the offense is not admissible as it is not a part of the res gestae. The defendant cannot thus make himself a witness, nor use his unsworn statements to exculpate himself.

In general, acts and statements of a third person, not shown to have been an agent of the defendant, are inadmissible, even though they do not violate the hearsay rule, unless they are part of the res gestae of the transaction, or are acts of a conspirator in furtherance of the conspiracy, or are the declarations of the victim of rape to the first person to whom she talks.

In a trial for assaulting the persons in charge of a mail car and robbing them of mail, testimony that defendants also robbed them of their personal possessions is not inadmissible because such act was a state offense, but was competent as a part of the res gestae.

Conversation which was a part of the res gestae is admissible.

Cases in which the utterances are contemporaneous with a nonverbal

417. St. Clair v. United States, 154 U.S. 134, 149 (1894). See also Harrison v. United States, 200 Fed. 662 (6th Cir. 1912); Keliher v. United States, 193 Fed. 8 (1st Cir. 1912); Sprinkle v. United States, 150 Fed. 56, 60 (4th Cir. 1906) (dissenting opinion).
422. Dixon v. United States, 7 F.2d 818 (8th Cir. 1925).
423. United States v. McCartney, 264 F.2d 628 (7th Cir.), cert. denied, 361 U.S. 845 (1959); United States v. Tuffanelli, 131 F.2d 890 (7th Cir. 1942); United States v. Sebo, 101 F.2d 889 (7th Cir. 1939).
act, independently admissible, relating to that act and throwing some light upon it are an exception to the hearsay rule.\footnote{United States v. Annunziato, 293 F.2d 373 (2d Cir.), cert. denied, 368 U.S. 919 (1961), citing (at 377) McCormick § 274, at 586-87 and Morgan, A Suggested Classification of Utterances Available as Res Gestae, 31 Yale L.J. 229, 236 (1922). Accord, Wilson v. United States, 313 F.2d 317 (9th Cir. 1963).}

In 1944 Judge Learned Hand, in cutting short the argument of government counsel that certain out-of-court statements were not admissible because not a part of the res gestae, stated that "it is a phrase which has been accountable for so much confusion that it had best be denied any place whatever in legal terminology; if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms."\footnote{United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944). See McCormick § 274, at 587; 6 Wigmore § 1767. But see Annot., 163 A.L.R. 15 (1946).} A court stated, in a 1962 civil case that: "There are at least four distinct exceptions to the hearsay rule encompassed by the term res gestae: (1) declarations of bodily present condition; (2) declarations of present mental state and emotion; (3) excited utterances; (4) declarations of the present sense impression."\footnote{Wabisky v. D.C. Transit Sys., Inc., 309 F.2d 317, 318 (D.C. Cir. 1962). See McCormick § 274, at 586.}

F. Self-Serving Declarations

According to the earlier cases self-serving declarations of the defendant ordinarily are not admissible.\footnote{Nielsen v. United States, 152 Fed. 87 (9th Cir. 1907). On self-serving declarations see generally McCormick § 275 (1954); 6 Wigmore § 1732; Comment, 61 Mich. L. Rev. 1306 (1963); Note, 40 Minn. L. Rev. 844 (1956); Note, 22 Minn. L. Rev. 391, 402 (1938).} A defendant's declaration, in a liquor prosecution to the sheriff's wife, that he did not want liquor on his premises, but desired to have the sheriff come and get it, is inadmissible.\footnote{Herman v. United States, 48 F.2d 479 (5th Cir. 1931).}

Where a woman was prosecuted for falsely claiming that she was a widow and thus entitled to a veteran's pension, it was proper to exclude evidence that she had denied publicly entering into any new marriage, as it was self-serving and no part of the res gestae.\footnote{Lane v. United States, 142 F.2d 249 (9th Cir. 1944) (one judge dissenting).}

The expression of plan, by the defendant, not to do the thing charged is admissible.\footnote{6 Wigmore § 1732.} A defendant was arrested at a compromising place. His declaration made beforehand that he was going to the place to obtain bail for his brother-in-law was admitted.\footnote{United States v. Craig, 25 Fed. Cas. 682 (No. 14883) (C.C.E.D. Pa. 1827).} On an income tax prosecution, a letter containing written instructions for the preparation of the return was
The defendant sent forms signed in blank to an accountant giving instructions for him to file a return which they would correct when he returned to his office. The letter was admissible as bearing on his intent. But on a prosecution for violation of the Sherman Anti-Trust Act, declarations and conduct negativing misconduct were excluded.

Statements of intent or motive by the defendant at the time of the act charged should be admissible. But in one case, this view was not followed completely. On a prosecution for fraudulent entries under the homestead laws by false representations to entrymen, true representations to other entrymen were excluded. However, four years later, the same court held that a letter of one defendant to another was admissible to show good faith. Prosecution was for use of the mails to defraud. In a prosecution for obtaining and disposing of goods in violation of the bankruptcy law, the statements of a defendant charged with absconding, made on his way from the place of his residence, as to his intentions of returning, are competent evidence to disprove the charge.

With respect to a type of spontaneous declaration, namely the declarant’s declaration of his present state of mind, a federal court has adhered to the view that the self-serving character of a declaration is not of itself a ground of exclusion. On a prosecution for misapplication of money of a bank, the defendant’s declaration to the president of the bank showing a want of intention to defraud should have been admitted. “What else but ‘self-serving’ the testimony of an accused person on his direct examination is likely to be, we find it difficult to understand . . . .” On a prosecution for conspiracy it is reversible error to exclude, as self-serving, testimony by the defendant and witnesses in his behalf as to

432. White v. United States, 216 F.2d 1 (5th Cir. 1954), citing (at 6) 6 Wigmore § 1732. See Wolcher v. United States, 218 F.2d 505 (9th Cir. 1954). See also Falknor, Evidence, 30 N.Y.U.L. Rev. 927, 933 (1955); Note, 40 Minn. L. Rev. 844, 848 (1956).
433. American Tobacco Co. v. United States, 147 F.2d 93, 120 (6th Cir. 1944), aff’d, 328 U.S. 781 (1945).
434. See 6 Wigmore § 1732, at 102. See also id. § 1772.
435. Huntington v. United States, 175 Fed. 950 (8th Cir. 1909) (one judge dissenting), citing (at 956-57) 3 Wigmore, Evidence § 1732 (1st ed. 1907).
declarations made by the defendant indicating a good faith severance from the conspiracy on learning of its illegal character. 439

The self-serving declaration rule does not apply in an income tax prosecution where the issue involved the terms of an alleged contract between the taxpayer and an employee. Their conversations "fixed" the terms of the employment, hence were admitted. 440 A letter by the defendant to the collector of internal revenue explaining his income tax return was regarded as self-serving. 441 But the trial court permitted the defendant to testify as to the facts stated in the letter.

Wigmore has pointed out that statements of political opinion should be admitted in favor of the defendant on trials for sedition and treason. 442 But on a prosecution for attempting to cause insubordination in military forces in the United States the defendant's offer to show utterances at a prior time "in favor of the war with Germany" were held inadmissible because irrelevant. 443

Where a confession is received in evidence, the defendant is entitled to have all those parts which are exculpatory and in his favor come in, on the principle of completeness. 444

On principle, the statements of a defendant made before or upon accusation and before a motive for deliberate contrivance could have operated should be receivable, whether or not he becomes a witness. 445 But on a prosecution for murder, denials when arrested were excluded. 446 However, in a subsequent case, the defendant's spontaneous statement of innocence made at the time of the arrest was received. 447

IX. RECORDS OF PAST RECOLLECTION

The Third Circuit has stated in a scholarly opinion by Judge Kalodner:

Professor Wigmore separated, broadly, what he called "past recollection recorded" from "present recollection revived," attributing much of the confusion in the cases to a failure to make this distinction and to the use of the phrase "refreshing recollection" for both classes of testimony. The primary difference between the two

440. Paddock v. United States, 79 F.2d 872, 874 (9th Cir. 1935).
442. See 6 Wigmore § 1732.
443. United States v. Krafft, 249 Fed. 919 (3d Cir. 1918). In Wells v. United States, 257 Fed. 605 (9th Cir. 1919), utterances by other than the defendant were involved. Hence, the case is not in point on the present issue.
445. See 4 Wigmore § 1144; 6 id. § 1732.
447. Stroud v. United States, 2 F.2d 658 (6th Cir. 1924).
classifications is the ability of the witness to testify from present knowledge: where
the witness’ memory is revived, and he presently recollects the facts and swears to
them, he is obviously in a different position from the witness who cannot directly state
the facts from present memory and who must ask the court to accept a writing for
the truth of its contents because he is willing to swear, for one reason or another, that
its contents are true.448

In 1957, a court stated:

Courts have long recognized the propriety of a witness adopting a recollection re-
corded in the past where his, once existing, recollection has vanished. The chief
difficulty precluding the use of past recorded recollections has been the need to “insure
the accuracy and identity of the record,” i.e., that the memorandum or document
reflects the witness’ past recollection . . . . To this end the courts have formulated
rules designed to guarantee that the recorded knowledge was clearly and accurately
remembered by the witness when the record was made or verified . . . . If these
requirements of reliability are met, the nature of the record as well as the mode of
its preparation should be immaterial.449

The use of a judicial transcript of a former trial of the same case,
recorded by an official court reporter at a time when the events to which
the witness testified were fresh in his mind, satisfied the tests of reliability
necessary to allow a witness to adopt a recollection recorded in the past,
where his once existing recollection had vanished.450 Notes of an unofficial
stenographer of bankruptcy proceedings have been held admissible.451

Where postal inspectors themselves testified as to inspections made
immediately after post office burglaries, use of their contemporaneous
notes of the inspections presented no hearsay problem.452 It was un-
necessary to consider whether the notes would be admissible under the
business records statute.453

There are cases in the New York courts and federal civil cases which
appear to hold that loss of testimonial memory must be shown.454 In a

(1949); 1950 Wash. U.L.Q. 146. On records of past recollection see generally 4 Jones §§ 972-
74; McCormick §§ 276-80; 2 Underhill § 500; 3 Wharton §§ 850-54; 3 Wigmore §§ 734-55;
Maguire & Quick, Testimony: Memory and Memoranda, 3 How. L.J. 1 (1957); Morgan,
The Relation Between Hearsay and Preserved Memory, 40 Harv. L. Rev. 712 (1927); Note,
28 Iowa L. Rev. 530 (1943); Comment, 3 U.C.L.A. L. Rev. 616 (1956); Annot., 125 A.L.R.
19 (1940).
449. Tatum v. United States, 249 F.2d 129, 131 (D.C. Cir. 1957), cert. denied, 356 U.S.
943 (1958).
450. Id. at 131, citing 3 Wigmore § 734. Annot., 125 A.L.R. 246 (1940).
452. United States v. Kramer, 289 F.2d 909, 921 n.10 (2d Cir. 1961), citing 3 Wigmore
§ 737(2).
453. See McCormick § 280; Laughlin, Business Entries and the Like, 46 Iowa L. Rev.
276, 278-82 (1961); Note, 28 Iowa L. Rev. 530, 536-38 (1943).
454. See McCormick § 277; 3 Wigmore § 738.
federal criminal case the court stated: 'In the instance of past recollection recorded, the witness, by hypothesis, has no present recollection of the matter contained in the writing.' But later on the court stated: 'Of course, the categories, present recollection revived and past recollection recorded, are clearest in their extremes, but they are, in practice, converging rather than parallel lines; the difference is frequently one of degree.'

A court has stated: 'The difference between present recollection revived and past recollection recorded has a demonstrable effect upon the method of proof.' The recollection must have been fairly recent when recorded. The witness must state that the matter was recorded truthfully. The original must be produced if possible.

As to records of past recollection the witness must have had first-hand knowledge of the facts. Thus, the record is not admissible where the witness testified to information not known to him, contained in a memorandum of another. The memorandum must have been made 'while the occurrences mentioned in it were recent, and fresh in his recollection.' The recording in 1948 of something happening in 1943 is not sufficiently fresh to be accurate. Moreover, the statement must be properly verified by the witness. He must testify that at the time he made the written statement he then knew it to be true.

The witness need not himself be the writer, so long as he can speak of the facts from his own recollection. One decision held that the memorandum must be made by the witness or under his direction. The original record itself must be used in testifying if it can be procured.

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456. Id. at 889.
459. United States v. Keppler, 1 F.2d 315 (3d Cir. 1924).
460. Wolcher v. United States, 200 F.2d 493, 497 (9th Cir. 1952), cert. denied, 350 U.S. 822 (1955). The court (at 496) cited Maxwell's Ex'rs v. Wilkinson, 113 U.S. 656 (1885); 3 Wigmore § 745. Wigmore's test is that the events were "fairly fresh." This test is favored by McCormick § 277. See Maguire & Quick, supra note 448, at 5 n.12.
462. Delaney v. United States, 77 F.2d 916 (3d Cir. 1935).
463. See 3 Wigmore § 749.
prociable. Hence, a bookkeeper's memorandum of total sums represented in a document given to the defendant is admissible. On a prosecution for burglary of a freight car, the train auditor's record, made up from temporary memoranda, was admitted. A transcript of stenographic notes was held admissible when the original notes were lost. A memorandum of conversations overheard is admissible. The memorandum may be copied from another. In a liquor prosecution the witness' note book was required to be produced. In a prosecution for conspiracy to violate liquor laws, it is proper to admit an authenticated copy of the original list of automobile license dealers observed by the witness to be coming and going from a garage, where the original list was unavailable.

On a prosecution for embezzlement certain corporate records were admitted on the testimony of all participants, each to his share. Should the record be produced where the witness is testifying? A court has stated: "Perhaps a more orderly judicial procedure in this situation would recommend that the witness produce and use the transcript while testifying." But this may be excused when the record is available to the opponent (here the defendant) as a public record, such as a transcript of a former trial. In an earlier case the court stated: "The general rule is that, when a record is used . . . opposing counsel may demand inspection of it, and, if it exhibits erasures, alterations, or other irregularities, the jury's attention may be called to them." Only the parts of the record relating to the subject of his testimony may be inspected.

According to one approach, the verified and adopted record, on principle, becomes a present evidentiary statement of the party offering it. In one case, the federal court confused the subject by ignoring the two kinds of memoranda. In a subsequent case the "court received

465. Caudle v. United States, 278 Fed. 710 (8th Cir. 1921).
467. Jewett v. United States, 15 F.2d 955 (9th Cir. 1926), citing (at 956) 2 Wigmore, Evidence § 749 (2d ed. 1923).
468. Papalia v. United States, 243 F.2d 437 (5th Cir. 1957).
471. Jewett v. United States, 15 F.2d 955, 956 (9th Cir. 1926).
472. Brownlow v. United States, 8 F.2d 711 (9th Cir. 1925).
473. See 3 Wigmore § 754.
in evidence” a dictograph operator's notes. On a prosecution for conspiracy to violate liquor laws, a list of cars observed by the witness coming to and from a garage was admitted “as a part of the testimony of this witness.” On the other hand, McCormick suggests that admitting the memorandum as an exception to the hearsay rule is “the more realistic classification.”

Courts have considerable discretion in applying the foregoing rules. A court has stated: “Keeping in mind that the rules governing the use of past recorded recollection were developed 'to secure the best available memory of the witness, while guarding against imposition by false use of purporting memoranda,' we are not willing to say that the trial judge abused his discretion in admitting this testimony.”


476. Papalia v. United States, 243 F.2d 437, 441 (5th Cir. 1957), citing McCormick § 278 (1954), and 3 Wigmore § 754.

477. See McCormick § 278. See generally Maguire & Quick, supra note 448, at 22; Morgan, supra note 448, at 718-19.