Evidence--Adoptive Admissions--Failure To Deny Incriminatory Statement Made in Presence of Accused

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that he believed the property to have been abandoned. The court held that, although this statement could not be admitted as a confession of guilt, it, however, in essential details contradicted the defendant's testimony as to certain essential matters and there was no error in reading the statement to the jury. Also see, State v. Sheppard, 49 W. Va. 582, 39 S.E. 676 (1901), where the court distinguished between an admission and confession, but held that an extra-judicial admission voluntarily made was admissible.

In the principal case, the defendant denied having made certain statements contained in the writing. The West Virginia court dealt with this question in State v. Kinney, supra, where it held that, if the accused denies that he executed the written statement, then it is competent evidence for him to contradict the statement; however, the whole evidence, that is, the statement and the contradictory testimony should go to the jury.

It is therefore submitted that the label which is applied to such statement is unimportant when the introduction of the evidence has the same effect. The problem in the principal case is merely one of semantics, and the court correctly recognized that it makes no difference what the statement is called. Comment, 39 Minn. L. Rev. 902 (1955).

J. E. J.

Evidence—Adoptive Admissions—Failure to Deny Incriminatory Statement Made in Presence of Accused.—D was convicted of murdering his wife. The prosecution's evidence included testimony of a witness received by the court on the basis of adoptive or implied admission by D. The witness stated that he had asked D's father, who was in the room in which D was seated, what D said when he came over to the parents' home after the wife's death. Witness stated that the father replied D said, "I killed Jeannette," and that D did not make any denial of or other challenge to this statement. D's motion to strike this testimony was denied by the court. Held, that denial of D's motion to strike the statement was reversible error since the facts did not disclose that there were circumstances present which called for a denial by D. Arpan v. United States, 260 F.2d 649 (8th Cir. 1958).
The principal case presented the problem of the admissibility of an incriminatory statement made in the presence of the accused which was not contradicted or denied by the accused. The rules of evidence recognize admissions which are implied from conduct, such as by silence in the face of an accusation of crime, which indicates a consciousness of guilt. Mudd v. Cline Ice Cream Co., 101 W. Va. 11, 13, 131 S.E. 865, 866 (1926); Reall v. Detriggi, 127 W. Va. 662, 34 S.E.2d 253 (1945); 2 Wigmore, Evidence §§ 292, 1071, 1072 (3d ed. 1940).

The court in the principal case took the position that the facts as stated in the record, that the witness was undertaking to hold a private conversation with D's parent and that D was sitting on the far side of the room in a state of shock or depression, were circumstances which in their normal implication did not present a situation naturally requiring D to respond to some statement which might have drifted to his hearing.

In so holding the court adhered to a policy which has required the prosecution to show that the accusatory statement has met all the conditions necessary to give it capacity as an adoptive admission. The burden is not on the accused to show the impropriety of the evidence merely because it prima facie appears that it was made in his presence or hearing. Anderson v. State, 171 Miss. 41, 156 So. 645 (1934). 4 Wigmore, Evidence §1071.

The court noted the general rule that, when a statement which tends to incriminate one accused of committing a crime is made in his presence and hearing and such statement is not denied by him, both the statement and the fact of his failure to object are admissible as evidence showing his assent to its truth. Sparf v. United States, 156 U.S. 51 (1895). This is true, however, only if the statement was made under such circumstances as would warrant the inference that the accused would naturally deny it if he did not acquiesce in its truth. Egan v. United States, 137 F.2d 369, 380-81 (8th Cir. 1943).

The test for admissibility is whether a reasonable person under similar circumstances would have felt himself called upon to deny such statement in the event he did not intend to express acquiescence by his failure to so deny. People v. Kozlowski, 368 Ill. 124, 13 N.E.2d 174 (1938).
The limitations on whether there is a tacit admission by an accused who remains silent depends on: (1) whether he hears and understands the statement; (2) whether he comprehends its bearing; and (3), whether the statement is made under such circumstances and by such persons as naturally to call for a denial or reply by him if he did not intend to admit it. State v. Wilson, 205 N.C. 376, 171 S.E. 338 (1933); Commonwealth v. Kenny, 12 Met. (Mass.) 235, 46 Am. Dec. 672 (1847); McCormick, Evidence 530 (1954); Note, 29 N.Y.U.L. Rev. 1266 (1954).

In the Wilson case, supra at 339, the court said "silence alone, in the face or hearing of an accusation, is not what makes it evidence of probative value, but the occasion, colored by the conduct of the accused or some circumstance in connection with the charge, is what gives the statement evidentiary weight." Failure to deny the statement may be explainable on some inference other than that of belief in the truth of the statement. People v. Simmons, 28 Cal. 2d 699, 713, 172 P.2d 18, 26 (1946). Caution should be exercised in the receipt of such evidence, since it is liable to misinterpretation. State v. Jackson, 150 N. C. 881, 64 S.E. 376 (1909). Obviously, if there is no showing that the statement was communicated to the accused, as in the principal case, an adoptive admission does not exist.

The court in the principal case observed that the question of whether the accused actually heard and understood the incriminatory statement was properly a question for the jury. Thurmond v. State, 212 Miss. 36, 55 So. 2d 44, 46 (1951); State v. Lambertino, 18 N. J. Misc. 687, 180 Atl. 426 (1935). However, the court determines preliminary questions of fact as to whether the circumstances of the offered statement present proper bases for its admission in evidence. Pulver v. Union Investment Co., 279 Fed. 699, 705 (8th Cir. 1922); Freidman v. Forest City, 239 Iowa 112, 30 N.W.2d 752 (1948); McCormick, Evidence § 247 (1954).

The majority of the courts have held that both the question whether the accused heard and understood the statement, and the question whether it was one calling for a reply by the accused under the circumstances are for the jury to decide. Commonwealth v. Detweiler, 229 Pa. 304, 78 Atl. 271 (1910); Note, 29 N.Y.U.L. Rev. 1266, 1279 (1954).

The better procedure would seem to be to keep the question from the consideration of the jury unless and until the judge has
found the statement to be admissible. In determining whether the accused heard and understood the incriminatory statement, the surrounding circumstances and the ability of the accused to hear the statement are proper matters for the court to consider. Furthermore, every effort should be made to show how near the defendant was to the accuser so that it will clearly appear whether the statement was heard by the defendant. Leaving the question for a jury to decide would be to permit the jury to hear statements which may be highly prejudicial to the accused. Note, 29 N.Y.U.L. Rev. 1266, 1279 (1954). It is submitted that there should be a more responsible assumption by the trial judge of the duty to decide preliminary questions of fact, as in the principal case, to determine whether the statement and the accused's conduct in response thereto are admissible in evidence, in order to better protect the accused against a misinterpretation of his silence.

A. G. H.

Evidence—Prohibition of Spousal Testimony in Criminal Trials—Common Law Rule Upheld.—D was convicted under the Mann Act for transporting a girl from Arkansas to Oklahoma for immoral purposes. D contended that he took the girl on the trip as an accommodation to her, and not to facilitate her practice of prostitution in Oklahoma. The Mann Act requires immoral purpose as a dominant motive for conviction, so that this defense, if accepted by the jury, would have prevented D's conviction. After D's conviction in the state court, he appealed and assigned as grounds that he was prejudicially affected by the state court allowing his wife to testify as to her prostitution before and after marriage, and as to her prostitution in Oklahoma at the time of the alleged act. D's conviction was upheld by the United States district court and by the court of appeals. On certiorari, United States Supreme Court reversed, refusing to modify the common law rule which forbids one spouse from testifying for or against the other. The court said that, since the factual issue of the case depended upon the purpose of the trip, the testimony of D's wife was prejudicial to him. Hawkins v. United States, 79 Sup. Ct. 136 (1958).

The principal case represents the latest attempt to modify one of the most cherished rules of common law, the rule forbidding a wife to testify against her husband in a criminal trial. 8 Wigmore, Evidence § 2227 (3d ed. 1940). Professor Wigmore and most