

May 1955

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Recommended Citation

Thomas P. Hardman, *The Twilight Zone of Hearsay*, 57 W. Va. L. Rev. (1955).
Available at: <https://researchrepository.wvu.edu/wvlr/vol57/iss2/2>

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WEST VIRGINIA LAW REVIEW

Volume 57

May, 1955

Number 2

THE TWILIGHT ZONE OF HEARSAY*

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IT is generally agreed that the hearsay rule forbids the use of a challenged extrajudicial utterance only when it is offered for an assertive purpose, namely, for the purpose of proving the truth of the matter asserted in the utterance.¹ But, quite apart from the many exceptions to the exclusionary rule, there is great uncertainty in the cases and textbooks as to the extent of the coverage of the rule itself—as to the extent of what may be called the hearsay fringe, the twilight zone of hearsay.² Just when is an extrajudicial utterance offered for the unforbidden nonassertive purpose? Is nonverbal conduct, *e.g.*, silence offered for an assertive purpose, within the hearsay fringe and therefore inadmissible unless it falls within some exception to the rule? If so, to what extent or in what way must an “act” (nonverbal conduct) be assertive in order to be banned as hearsay? Must the actor *intend* his act to be assertive of some pertinent belief of his?

I. *Verbal Conduct as Hearsay*

The basic problem herein discussed is interestingly illustrated in a comparatively recent West Virginia case, *State v. Corbin*,³ in which the prosecution in a homicide case contended *inter alia* that Corbin, the defendant, had placed the victim's gun near the victim's body and had obliterated the fingerprints on the weapon

* Address (written version) delivered at a meeting of the Marion County Bar Association, December 16, 1954.

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¹ See, *e.g.*, *State v. Paun*, 109 W. Va. 606, 155 S.E. 656 (1930); 6 WIGMORE, EVIDENCE § 1766 (3d ed. 1940).

² Cf. McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

³ 117 W. Va. 241, 186 S.E. 179 (1936).

or had caused them to be obliterated in order to prevent proof of the fact that he had placed the gun in such a position—a position favorable to the defendant's theory of the case. The challenged utterance was that, about thirty minutes after the decedent had been shot, Corbin had cautioned certain officers present at the scene of the shooting not to touch the gun until the coroner arrived because he (Corbin) wished to preserve any fingerprints that might be upon it. Does this utterance, offered to prove that the accused had not placed the gun near the victim's body and had not obliterated the fingerprints or caused them to be obliterated, violate the hearsay rule? The trial court excluded the evidence. But the Supreme Court of Appeals, in reversing the lower court, held that the statement was not offered for an assertive purpose. Said the court:

"The evidence was not hearsay, its purpose not being to establish the truth of anything that Corbin said, but merely the fact that he said it.⁴ . . . Where it becomes relevant to show that a certain statement or declaration was made, regardless of the truth or falsity of the statement or declaration itself, such proof is not hearsay and should be admitted. It is evidence of what, in some of the books, is termed a 'verbal fact.'"⁵

A similar question arose in *State v. Cropper*,⁶ decided by the supreme court of Missouri. In that case the accused, charged with murder, had extrajudicially requested the sheriff to have two empty shotgun shells examined for fingerprints. The court held that this request, offered by the defendant, was inadmissible on the ground that it was a self-serving declaration, that is, hearsay—a result apparently *contra* to the holding in the *Corbin* case.

What, then, is the test as to whether extrajudicial verbal conduct is hearsay? "The theory of the Hearsay rule," says *Wigmore on Evidence*,⁷ "is that, when a human utterance is offered as evidence of the truth of the matter asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand subject to the test of cross-examination." If the utterance is not so offered, the hearsay rule does not exclude the evidence for the reason that the rationale of the rule does not apply, to wit, untrustworthiness of the evidence based chiefly on want of cross-examination, want of

⁴ *Id.* at 254.

⁵ *Id.* at 241 (point 4 of syllabus).

⁶ 327 Mo. 193, 36 S.W.2d 923 (1931).

⁷ 6 WIGMORE, EVIDENCE § 1766.

oath and want of confrontation.⁸ As Wigmore puts it, "The prohibition of the Hearsay rule, . . . does not apply to all words or utterances as such. . . . The Hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted."⁹

A good West Virginia example of an extrajudicial utterance offered for the unforbidden nonassertive purpose is *State v. Paun*.¹⁰ In that case, an indictment for unlawfully selling liquor in the defendant's poolroom, it appeared that an officer had requested the defendant to get him some liquor. The defendant claimed that the officer had entrapped him into getting the liquor for him. The officer's explanation for attempting the purchase was that he had information that whiskey was being sold in the poolroom. It was contended that the extrajudicial information thus offered and thus allegedly relied upon by the officer was hearsay. But the court held, and quite correctly, that the evidence, so offered, did not violate the hearsay rule. Here the extrajudicial assertion was relevant without reference to its truth or falsity. Whether true or false, this information could be reasonable ground for the action of the officer in attempting to make the purchase of liquor.

The *Paun* case is essentially like the much-cited case of *Trainor v. Buchanan Coal Co.*¹¹ In that case there was an issue as to whether the defendant had reasonable ground to believe that the plaintiff's credit was impaired. The evidence offered to prove this was a report from a mercantile agency organized to secure credit ratings for clients. This report stated that the business record of the plaintiff's concern was not good as the concern had failed to meet its obligations promptly and fairly. In admitting this evidence, the court said, "The defendant offered this report, not as evidencing the truth of the statements it contained, but for the purpose of showing the good faith of the defendant in refusing shipment, and to show the information on which it acted in refusing credit."¹²

Thus, neither in the *Paun* case nor in the *Trainor* case did the evidence, for the purpose for which it was offered, require that the

⁸ 5 WIGMORE, EVIDENCE §§ 1361, 1362, 1365; Morgan, *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481, 541 (1946): "Hearsay is excluded because of potential infirmities with respect to the observation, memory, narration and veracity of him who utters the offered words when not under oath and subject to cross-examination."

⁹ 6 WIGMORE, EVIDENCE § 1766.

¹⁰ 109 W. Va. 606, 155 S.E. 656 (1930).

¹¹ 154 Minn. 204, 191 N.W. 431 (1923).

¹² *Id.* at 206.

credit of the extrajudicial declarant be used as a basis for the inference sought to be drawn from the challenged assertion. If in the *Paun* case the information upon which the officer allegedly relied had been offered to prove that the defendant had sold liquor in the poolroom, the evidence would have been offered for an assertive purpose. Similarly, in the *Trainor* case, if the commercial report had been offered to prove that the plaintiff's credit was not good, it would have been excluded by the hearsay rule.

How, then, about the offer in the first-mentioned West Virginia case, *State v. Corbin*? In that case the challenged statement did not in terms assert the matter sought to be proved by the statement. But was not the credit of the extrajudicial declarant used as the basis of the inference sought to be drawn? It would seem that Corbin, in telling the officers he wanted the fingerprints on the gun preserved, was impliedly saying, "The fingerprints are not mine." And to that extent, at least, did not his statement assert his innocence, and was not his sincerity thereby put in issue?¹³ The utterance was, it would seem, offered for an assertive purpose. Is it necessary, then, that such verbal conduct should purport to be assertive of the matter sought to be proved before it can be classed as hearsay?

A celebrated case in point, and the leading decision on the question, is *Wright v. Tatham*.¹⁴ In that case there was an issue as to whether a testator was of sound mind. The challenged evidence was certain letters written to the testator as to matters of business tending to show the writers' beliefs that the testator was of sound mind. The court held the evidence to be inadmissible hearsay. Yet the excluded evidence, which consisted of ordinary business letters, did not purport to assert even indirectly that the writers believed the testator to be of sound mind.

The recent Virginia case of *Tate v. Chumbley*¹⁵ is in point. In that case there was an issue as to whether the testatrix of an attested will was of sound mind. One item of evidence offered to prove this was an attestation clause of an unavailable subscribing witness. The clause did not purport to assert anything whatever

¹³ Another value (probably not the dominant one) may be assigned to the offer of Corbin's statement, in that it may also have meant, "I do not intend to obliterate the fingerprints on the gun." As such, it is likewise assertive, and therefore hearsay, although it might nevertheless be admissible under the hearsay exception for Declarations Evidencing Mental Condition. As to possible admissibility under that exception, see *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892); *Shepard v. United States*, 290 U.S. 96 (1933); 6 WIGMORE, EVIDENCE § 1714 *et seq.*

¹⁴ 5 Cl. & F. 670 (H.L. 1838).

¹⁵ 190 Va. 480, 57 S.E.2d 151 (1950).

as to the testatrix's sanity. Does such an attestation clause, then, constitute an extrajudicial assertion that the testatrix was sane at the time of executing the will? The court held that the signature of an attesting witness was, in effect, an assertion by such witness that the testatrix was sane at the time the will was executed and was admissible to prove sanity.¹⁶ The evidence is admissible under the exception to the hearsay rule known as "Attestation of a Subscribing Witness."¹⁷ If the attester were available, the evidence of course would be inadmissible hearsay.¹⁸ Although some courts do not consider that an ordinary attestation clause constitutes an implied assertion that the testator is sane, the view of the Virginia court is commonly followed.¹⁹ Thus, where this view prevails, it seems clear that extrajudicial verbal conduct need not purport to refer even indirectly to the matter allegedly asserted in order to be classed as a hearsay assertion with respect to such matter. The test is, rather, whether the utterance is *offered* for an assertive purpose.

A recent federal case, much like the West Virginia case of *State v. Corbin* but reaching a contrary conclusion, is *Herman v. United States*.²⁰ In that case, a prosecution for liquor violation, the defendant attempted to show that he had told the sheriff that he did not want any liquor on his premises and that he requested the sheriff to come and get it. The court excluded the evidence—and justifiably, it is believed—on the ground that it was a self-serving declaration. To be sure, as this commentator has heretofore attempted to prove in an article in the *West Virginia Law Review*,²¹ there is no special rule excluding extrajudicial self-serving declarations. But such evidence does violate the hearsay rule when it is offered to prove the truth of the matter asserted in it, and therefore is inadmissible unless it falls within some exception to the rule.

Although there are innumerable other examples of verbal conduct which have been held to be indirect assertions and inadmissible when offered for their assertive value unless they come within some exception, the following additional illustrations must suffice for

¹⁶ Obviously the problem does not arise where the attestation clause (as is often the case) contains words asserting in more or less appropriate terms that the witnesses believe the testator to be of sound mind.

¹⁷ See 5 WIGMORE, EVIDENCE §§ 1505, 1513.

¹⁸ *Id.* § 1506.

¹⁹ *Id.* § 1511. See dictum in *Webb v. Dye*, 18 W. Va. 376, 388 (1881).

²⁰ 48 F.2d 479 (1931).

²¹ Hardman, *Hearsay: "Self-Serving" Declarations*, 52 W. VA. L. REV. 81 (1950).

present purposes: (1) a statement to an officer showing willingness to surrender;²² (2) a statement by the defendant that he had shot the deceased in self-defense;²³ (3) a statement by the defendant that another person had killed the deceased;²⁴ (4) an extrajudicial complaint to an officer seeking to have someone else arrested for the offense.²⁵

The last-mentioned example, *State v. Teitle*,²⁶ deserves brief comment. In that case, an indictment for arson, it was contended that the complaint to an officer, accusing another person of the crime and requesting his arrest, was competent evidence to show that the defendant was not a particeps—that it was admissible to show his “consciousness of innocence.”²⁷ The supreme court of Vermont held the evidence inadmissible, apparently on the ground that it was a self-serving declaration. The court relied largely on Wharton’s *Criminal Evidence*²⁸ which treats such evidence as hearsay—as “a self-serving declaration” not coming within any exception to the hearsay rule. Said the court:

“[Wigmore on Evidence²⁹] admits . . . that a majority of the courts exclude such evidence in favor of the accused, and the cases cited seem to show much more than a majority so holding. Wharton’s *Criminal Evidence* . . . states that ‘if such evidence were competent anyone guilty of a crime could supply himself with evidence by making statements in his favor or for that matter, commit overt acts in his favor, which he could introduce in the trial of a crime with which he is charged to show his innocence.’ ”³⁰

II. *Nonverbal Conduct As Hearsay*

When an extrajudicial act (nonverbal conduct) of a person is offered for an assertive purpose, that is, for the purpose of proving the belief of the actor as to a pertinent matter and hence for the purpose of proving the existence of the occurrence or condition thus evidenced, does not such conduct, so offered, have the same major hearsay vices, namely, want of cross-examination, want of oath and want of confrontation, as would an extrajudicial utterance asserting such occurrence or condition? Now, if an extrajudicial verbal assertion having the same assertive quality as such nonverbal con-

²² *Patton v. Com.*, 235 Ky. 845, 32 S.W.2d 405 (1930).

²³ *Vandorff v. State*, 116 Tex. Crim. Rep. 448, 32 S.W.2d 468 (1930).

²⁴ *McIntosh v. Com.*, 234 Ky. 192, 27 S.W.2d 971 (1930).

²⁵ *State v. Teitle*, 117 Vt. 190, 90 A.2d 562 (1952).

²⁶ *Ibid.*

²⁷ *Id.* at 201.

²⁸ WHARTON’S CRIMINAL EVIDENCE § 505 (11th ed. 1935).

²⁹ 1 WIGMORE, EVIDENCE § 174; 2 WIGMORE, EVIDENCE § 293.

³⁰ 117 Vt. 190 at 202. Emphasis supplied.

duct would be admissible as an exception to the hearsay rule or because it is not offered to prove the truth of the fact asserted, the equivalent nonverbal conduct should of course be admissible—and in such situations such conduct is generally admitted.³¹ All relevant evidence is admissible unless there is some legal rule or principle excluding it.³²

But suppose such conduct (act), when offered for the purpose of proving a pertinent belief of the actor and hence for the purpose of proving the occurrence or condition so believed, is such that an equivalent verbal assertion would be excluded by the hearsay rule. Is such conduct, so offered, hearsay? Is it admissible? Wigmore on *Evidence* seems, in general, to take the position that such nonverbal conduct is not hearsay.³³

"A possible objection [to admitting such conduct]," says Wigmore, "is found in the *Hearsay rule*; i.e. in looking to a person's conduct as evidencing the material cause of the conduct, are we not virtually receiving the person's hearsay assertion as to the cause? The Hearsay rule excludes extrajudicial assertions only, i.e. deliberate utterances in terms affirming a fact . . .; and, although in effect an inference from conduct may be the same in result as an inference from assertion, nevertheless the two are distinct. Nor does the policy or spirit of the Hearsay rule apply; for that policy is to test the assertion of persons regarded as witnesses, by learning the source of their knowledge and by exposing its elements of weakness and error, if possible; so that where the evidence is not dealing with a person's assertion as deriving force from his personal character, knowledge, or experience, it is not within the scope of the policy of the Hearsay rule. No doubt the line is sometimes hard to draw between conduct used as circumstantial evidence and assertion used testimonially. Nevertheless the difference is a real one. . ."³⁴

"In a few specific instances," says Wigmore in another section,³⁵ the courts commonly admit such conduct as circumstantial evidence. Among these instances, he says, the following are to be particularly noted: "(1) a *Belief in a Marriage*, as evidenced by the conduct of a pair living and treating each other as husband and wife. . .;³⁶ (2) A *Belief in Legitimacy*, as evidenced by the treatment of a child

³¹ See, e.g., *State v. Mayle*, 69 S.E.2d 212 (W. Va. 1952) (escape of defendant from jail). See, generally, 2 WIGMORE §§ 265-293.

³² Cf. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 265, 530 (1898).

³³ 2 WIGMORE, EVIDENCE § 459. But cf. §§ 267-273.

³⁴ 2 WIGMORE, EVIDENCE § 459. Cf. §§ 266, 267.

³⁵ *Id.* § 267.

³⁶ Wigmore continues thus: ". . . this has been from time immemorial received, whether or not the persons are parties or privies to the suit, and is a plain use of the double circumstantial inference."

by its alleged parents. . . ;³⁷ (3) A *Belief in Personal Name, Family History, and the like*, as evidenced by conduct and language, and as tending to prove identity with a person in issue. . . ;³⁸ (4) a *Belief in a Testamentary or Contractual Act*, as evidenced by the alleged testator's conduct and utterances. . . .³⁹

In some of these instances, notably, groups (1) and (2), the circumstantial or nontestimonial value of such conduct often outweighs its assertive value so that, dominantly, the evidence is not offered for an assertive purpose, that is, the evidence may be justifiably regarded as not running afoul of the hearsay ban. But in other situations, some of which are herein discussed, attempts to justify admission of such conduct as nonhearsay often seem quite specious.⁴⁰

The simplest type of nonverbal human behavior which courts ordinarily treat as hearsay is found in the West Virginia case of *Starcher v. South Penn Oil Co.*⁴¹ In that case there was an issue as to how one X (deceased) was hurt: whether he was injured by a broken high-pressure pipeline. X, who was found seriously injured, lying near a severed pipeline, was asked what hurt him. By way of reply, he (1) pointed to the severed pipeline and (2) also uttered some words bearing on the question asked. The West Virginia court held that the act of pointing was admissible as a Spontaneous Declaration (as a part of the *res gestae*), i.e., as an exception to the hearsay rule. It seems fairly inferable from the language of the court that such a physical act would have been excluded if it had not come within that exception to the hearsay rule.⁴² The inference seems sound, although there is some authority *contra*.⁴³ Man does not speak by words alone: actions speak louder than words. And actions like words often tell lies. Hence, where as in the *Starcher* case it appears that the challenged extrajudicial nonverbal act was *intended* by the actor to be an expression of his belief, such conduct, if offered to evidence that belief, and hence to evidence the matter believed, is assertive: it is hearsay: it has the same sort of untrustworthiness as if the actor had said

³⁷ Wigmore continues thus: ". . . this, again, is a tradition of long standing, and can be justified only on circumstantial grounds;"

³⁸ Wigmore continues thus: ". . . this is recognized in a few instances only, but seems nevertheless orthodox;"

³⁹ Wigmore continues thus: ". . . This use of like evidence has been sanctioned by a few judges, but there is a decided repudiation of it by others."

⁴⁰ See 2 WIGMORE, EVIDENCE § 271.

⁴¹ 81 W. Va. 587, 95 S.E. 28 (1918).

⁴² See particularly point 4 of syllabus (by court).

⁴³ See, e.g., *Johnson v. State*, 254 Wis. 320, 36 S.W.2d 86 (1949), admitting such an act of pointing as nonhearsay.

in so many words that the severed pipeline (the thing to which he had pointed) was what had hit him. It is like sign language, which is clearly hearsay when offered for its assertive value.

But suppose it does *not* appear that the challenged conduct was *intended* by the actor to be assertive of the matter which is sought to be proved. An excellent example of such conduct is to be found in the West Virginia case of *Crookham v. State*.⁴⁴ There evidence of the flight of a third party from the scene of a crime was offered for the accused for the purpose of proving that someone other than he had committed the offense. This physical act was, it would seem, offered for its assertive value, namely, to show the belief of the actor that he was guilty and hence to show the fact believed. And such evidence, so offered, has commonly been regarded as having all the major vices of hearsay. The West Virginia court, like most courts, excludes such conduct when so offered.⁴⁵ The West Virginia court did not, however, assign a reason for the exclusion; but an Iowa court, in reaching the same conclusion as the West Virginia court, explained its decision thus: "flight, if proved, is nothing more than a confession by another."⁴⁶ And most courts, including the West Virginia court, exclude such a verbal confession of a third party as inadmissible hearsay.⁴⁷

Quaere, then: Should such nonverbal conduct be considered as coming within the hearsay fringe? But, first, what is hearsay? Although a great deal can hardly be expected from any legal definition, it would seem that, according to the orthodox decisions, hearsay may be defined adequately enough for present use, as any extrajudicial assertion, verbal or nonverbal, which is offered for the purpose of proving the truth of the matter asserted therein, thus depending for its value upon the credibility of the extrajudicial asserter.⁴⁸ However, as in nearly all definitions which are simple enough to be useful, most of the terms are apt to need further defining—and the term "assertion" is believed to be sufficiently broad to include nonverbal conduct assertively offered.

The West Virginia case of *State v. Martin*⁴⁹ raises some interesting angles of the problem. That case was a prosecution for statutory rape, which does not involve an issue as to consent; and evidence was offered for the accused that the prosecutrix, aged

⁴⁴ 5 W. Va. 510 (1871).

⁴⁵ See *Crookham v. State*, 5 W. Va. 510 (1871); Falknor, *Silence as Hearsay*, 89 U. OF PA. L. REV. 192 n.13 collecting cases (1940).

⁴⁶ *State v. Piernot*, 167 Iowa 353, 149 N.W. 446 (1914).

⁴⁷ *State v. Poe*, 69 W. Va. 260, 71 S.E. 177 (1911); 5 WIGMORE, EVIDENCE § 1476

⁴⁸ Cf. McCORMICK, EVIDENCE § 225 (1954).

⁴⁹ 102 W. Va. 107, 134 S.E. 599 (1926).

fifteen, had not made any complaint to anyone until eight months after the alleged attack. Does this failure to complain speedily—this extrajudicial silence of the prosecutrix, who testified in the case—violate the hearsay rule? Suppose the evidence offered had been that the prosecutrix, eight months after the alleged assault, had told a confidant that there had been no assault. The statement would of course be admissible as a prior self-contradiction if offered to impeach her testimony to the effect that she had been attacked, for then the evidence would not violate the hearsay rule. But it is almost unanimously held that extrajudicial prior self-contradictions are hearsay and inadmissible when offered as substantive evidence.⁵⁰

Analogously, failure of the prosecutrix to complain speedily of an attack, like the verbal equivalent that there was no attack, would be admissible as a virtual self-contradiction for purposes of impeaching her testimony.⁵¹ Would such failure to complain—such silence—violate the hearsay rule when it is offered as substantive evidence for the purpose of proving that there was no attack? The West Virginia court treated the evidence as admissible, apparently as substantive evidence although the court did not clearly indicate whether it was so using the silence. In any event, verbal prior self-contradictions should, upon principle, be admissible as substantive evidence since the witness is present in court subject to cross-examination, thus practically eliminating the major vices of hearsay (although most courts hold otherwise⁵²), and therefore, upon principle, the equivalent nonverbal conduct, when assertively offered, should also be admitted. Hence it is easy enough to justify the use of the silence apparently sanctioned in *State v. Martin*.

Perhaps it should be noted here that of course relevant extrajudicial silence of a party to a suit, when the party is under a so-called duty to speak, is admissible as an admission by conduct and that according to the better view admissions are admitted as substantive evidence and as an exception to the hearsay rule.⁵³ But the failure of a prosecutrix in a rape case to complain speedily could not be admitted as an admission, for the prosecutrix is not a party to such a criminal proceeding.⁵⁴

⁵⁰ See 3 WIGMORE, EVIDENCE § 1018, citing cases.

⁵¹ 4 WIGMORE, EVIDENCE § 1135.

⁵² 3 WIGMORE, EVIDENCE § 1018.

⁵³ See e.g., *Morrison v. Judy*, 123 W. Va. 200, 13 S.E.2d 751 (1941); *Reall v. Deiriggi*, 127 W. Va. 662, 34 S.E.2d 253 (1945); *Morgan, Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355 (1921).

⁵⁴ *Brown v. State*, 127 Wis. 193, 106 N.W. 536 (1906); 4 WIGMORE, EVIDENCE § 1076.

The situation presented in *State v. Martin* is not unlike those instances in which there is an issue as to whether there has been an injurious occurrence or condition. In that class of cases, does evidence of absence of complaint by other persons affected by the occurrence or condition violate the hearsay rule? There is a square conflict of authority as to the admissibility of such silence, and in general the judicial opinions are not very enlightening as to the hearsay quality of such evidence.⁵⁵

Another example of extrajudicial silence which many courts treat as hearsay is where, on an issue as to defects in goods or as to unwholesomeness of food served, evidence is offered to show that there had been no complaints from other customers who had made similar purchases or had been similarly served.⁵⁶ Is such silence hearsay? Here again there are cases pro and con as to whether such conduct is admissible; and the evidence is perhaps more frequently excluded than admitted, sometimes on the theory that it violates the hearsay rule.⁵⁷ More or less typical of the cases condemning such evidence is the comparatively recent federal case of *United States v. 11¼ Doz. Packages*,⁵⁸ in which the court excluded the silence as "clearly hearsay."

A somewhat similar example is found in what Wigmore, as heretofore mentioned, refers to as that group of instances in which an alleged testator's conduct (act), or an alleged contractor's conduct, is offered for the purpose of proving the actor's "*Belief in a Testamentary or Contractual Act*,"⁵⁹ and hence for the purpose of proving the matter so believed. For example, suppose that there is an issue as to whether T made a will. Would failure of the alleged testator to tell either the family lawyer, or any member of his family, or any one else, that he had made a will be admissible to prove that he had not made a will?⁶⁰ Of course relevant pretestamentary conduct would usually be admissible, for the equivalent pretestamentary utterance would generally come in under the hearsay exception for Declarations Evidencing Mental Condition. But would post-testamentary nonverbal conduct be admissible if the equivalent post-testamentary utterance would be inadmissible

⁵⁵ See McCORMICK, EVIDENCE § 229 n.27, citing cases; 2 WIGMORE, EVIDENCE § 461.

⁵⁶ See McCORMICK, EVIDENCE § 229.

⁵⁷ *Id.* § 229, n. 26, collecting numerous cases pro and con. See also Note by Wallace C. Murchison, *Negative Testimony—Silence as Hearsay*, 24 N.C.L. REV. 274 (1946).

⁵⁸ 40 F. Supp. 208 (1941).

⁵⁹ 2 WIGMORE, EVIDENCE § 267.

⁶⁰ See, e.g., *Gilbert v. Gilbert*, 22 Ala. 529 (1853).

hearsay? As to this general group of instances, Wigmore claims that the "circumstantial" nature of the inference sought to be drawn "strongly dominates the testimonial aspect" and that therefore the hearsay rule does not apply.⁶¹

Fortunately there is a very recent West Virginia case in point. In that case, *Rice v. Henderson*,⁶² there was an issue as to whether a nondescript holographic writing signed by one Ross was intended by him to be a will. The alleged testator's housekeeper was asked whether Ross showed her the will; and she answered, "He showed me these papers [the alleged will] . . . and, he said, 'If don't have another will made—don't get Joe Hite to make no other will—you see that Georgia gets these [papers] at my death' ". Then, she said, "He put them in his trunk." The evidence offered would seem to consist of: (1) nonverbal conduct of the alleged testator in exhibiting as a will a paper which tended to prove that he meant the paper to be a will; and (2) words tending to prove the same thing. Is this conduct, nonverbal and verbal, hearsay? The words alone, being post-testamentary declarations of an alleged testator offered for an assertive purpose, would be inadmissible hearsay in West Virginia⁶³ and in most jurisdictions.⁶⁴ Is such post-testamentary nonverbal conduct, when offered to prove the same thing, admissible if the equivalent utterance is inadmissible? Suppose that the housekeeper had asked Ross to show her his will, and Ross, without saying a word, had shown her the paper for her to read, and had then put the paper back in his trunk for safekeeping. Would this conduct be hearsay if offered to prove that Ross had intended the exhibited paper to be his will? The court lumped all this evidence together and discussed its admissibility at considerable length. But the court refused to pass squarely on the question of admissibility for the reason that the evidence was not objected to in the trial court. The tenor of the court's argument, however, would seem to indicate that under the West Virginia cases cited the court would probably have excluded both the conduct and the words if the evidence had been properly objected to in the trial court and an exception taken.⁶⁵ And, interestingly, Wigmore concedes that most cases (the orthodox decisions) exclude such post-testamentary conduct and utterances.⁶⁶ Further-

⁶¹ 2 WIGMORE, EVIDENCE § 267.

⁶² 83 S.E.2d 762 (W. Va. 1954).

⁶³ See *Swann v. Swann*, 131 W. Va. 555, 48 S.E.2d 425 (1948).

⁶⁴ See 6 WIGMORE, EVIDENCE § 1736, citing cases pro and con.

⁶⁵ See 83 S.E.2d at 768, 769.

⁶⁶ See 2 WIGMORE, EVIDENCE §§ 271, 272.

more, Wigmore concedes that, apart from a few groups of instances, the common law has generally "insisted on the application of the Hearsay rule to conduct which was equivalent to an extra-judicial assertion."⁶⁷ Also Jones on *Evidence* defines hearsay as "that kind of evidence which derives its value, not solely from the credit to be attached to the witness himself, but also in part because of the veracity and competency of some other person from whom the witness may have received his information."⁶⁸ Jones then states flatly that such evidence is "to be rejected without regard to its character, as being oral or written statements *or acts*."⁶⁹

While many additional illustrations of such conduct, offered apparently for its assertive value, could be cited, one further example must suffice; and the West Virginia case of *State v. Bickle*⁷⁰ furnishes an interesting concluding illustration. That case raised a question as to whether the failure of the accused to escape from jail when he had the opportunity to do so is admissible to prove his innocence. Such conduct, offered for that purpose, is relevant as impliedly asserting a belief or consciousness of innocence. The West Virginia court, and most courts, exclude such conduct. Wigmore argues in favor of admissibility,⁷¹ largely no doubt for the reason that he does not, for the most part, seem to regard extra-judicial nonverbal conduct offered for such a purpose as hearsay. And, indeed, the Wigmorean theory by and large has more to commend it, it would seem, than does the orthodox approach; for, as herein sketchily indicated in part, there can be little doubt that the orthodox common-law concept of hearsay excludes a great deal of evidence which common sense if not judicial experience tells us should be considered in a modern court of justice.

From this rather cursory discussion it would seem to be evident enough that the authorities are in such chaotic conflict as to the coverage of the so-called hearsay rule that it is often impossible to predict with any degree of assurance as to what a given court will decide. Various remedies have been suggested. It is believed, however, that the following highly salutary proposal advanced in the latest textbook on *Evidence*⁷² is on the whole an approach which lawyers may laudably advocate and judges justifiably adopt:

⁶⁷ 2 WIGMORE, EVIDENCE § 267.

⁶⁸ 1 JONES, EVIDENCE IN CIVIL CASES § 297 (4th ed. 1938).

⁶⁹ *Id.* § 298. Emphasis supplied.

⁷⁰ 53 W. Va. 597, 45 S.E. 917 (1903).

⁷¹ See 2 WIGMORE, EVIDENCE § 293.

⁷² MCCORMICK, EVIDENCE § 229.

"The existing practice, it seems, should be modified in one of two ways," says McCormick on *Evidence*.⁷³ "If according to present orthodoxy, we are to continue to classify as hearsay, acts to show the actor's belief to show the truth of the fact believed, then an exception to the hearsay rule should be recognized for such evidence, under reasonable safeguards for its reliability."⁷⁴

"The taboo of hearsay is strong, however, and securing recognition for a new exception in this ill-explored area, would be an uphill task. The present writer believes, accordingly, that much the more viable path to improvement is the alternative theory which would limit hearsay to assertions, namely to statements, oral or written, or acts intended to be communicative, such as signals and the sign-language, when offered to prove the truth of the facts asserted. Other acts and conduct, including silence, when offered to show belief to prove the fact believed, would be classed (as many decisions have classed it) as circumstantial evidence."⁷⁵ The debate, then, upon the admission of any particular item of conduct-evidence offered for this purpose, would be upon the question whether it meets the standard of relevancy by which all circumstantial evidence is tested. This standard, applied by the trial judge, is whether the probative value of the evidence, upon the inference for which it is offered, is sufficiently substantial to justify the time involved in receiving it, and to outweigh any dangers of confusion and prejudice."⁷⁶

⁷³ *Ibid.*

⁷⁴ "Among the most practical proposals for such safeguards are the following by Dean Falknor: ". . . The suggestion, then, is that while hearsay should be defined so as to include not only utterances but also non-assertive conduct, where relevancy depends upon inferences from the conduct to the belief of the actor to the fact believed, evidence of such non-assertive conduct should be exceptionally admitted if, but only if, the trial judge first finds that (a) the actor had personal knowledge of the fact (i.e., the occurrence of the event or the existence of the condition) to the proof of which the evidence is offered; more precisely, that it fairly appears that the actor observed or had the opportunity to observe such event or condition and that nothing appears to cast substantial doubt upon the quality of his recollection at the time of the conduct; and (b) that the conduct was important or significant to the actor in his affairs and so vouched his belief "as to give reasonable assurance of trustworthiness", and (c) in the case of negative conduct (i.e., inaction) or silence, that such negative conduct or silence was a detriment to the actor." Silence as Hearsay, 89 U.Pa.L.Rev. 192, 216 (1940)." McCORMICK, EVIDENCE § 229 n.31.

⁷⁵ Here the author inserts this footnote: "This approach is adopted by the decisions, forming a numerous though a minority group, which decline to treat conduct as hearsay, see notes, 16-25, *supra*. It is persuasively advocated by Murchison, 24 N.C.L. Rev. 274, 282 (1946). This seems also to be the view adopted in Uniform Rule 62(1) which includes in the definition of statement 'non verbal conduct . . . intended . . . as a substitute for words in expressing the matter stated,' and Rule 63, which limits 'hearsay' to 'statements.'"

⁷⁶ As to the kind of questions which the trial judge may well consider in passing on the admissibility of such conduct, see Falknor, *Silence as Hearsay*, 89 U. OF PA. L. REV. 192, 216, 217 (1940); McCORMICK, EVIDENCE 479.

Moreover, the trial judge should be accorded a wide margin of discretion in applying this general standard to nonverbal conduct offered for a purpose forbidden by the orthodox rule.⁷⁷ Furthermore, in borderline cases of doubt as to whether challenged conduct, nonverbal or verbal, falls within the hearsay fringe, the doubt should be resolved in favor of admissibility as the modern policy of the law is to admit all relevant evidence unless it positively appears that some rule or principle of law excludes it.⁷⁸

In conclusion, it should be emphasized that this discussion is not intended to be exhaustive: it is intended, for the most part, to be merely suggestive. And one suggestion which should perhaps be further stressed is the fairly obvious one that many if not most cases falling within or near the hearsay fringe contain little or no analysis, and often no mention, of the hearsay problem involved. This lack of analysis is no doubt largely responsible for the fact that there is so much conflict and uncertainty in the decisions and in the textbooks as to the exact location of the border line between hearsay and nonhearsay.⁷⁹ This fringe area—this twilight zone of hearsay—is therefore a fertile field which affords great opportunity for the practitioner in presenting his case in court—an opportunity which, more frequently than otherwise, seems to be unduly neglected. And it is a field which, it is submitted, could be profitably cultivated.

⁷⁷ *Sullivan v. Minneapolis St. Ry.*, 161 Minn. 45, 200 N.W. 922 (1924); *Menard v. Cashman*, 94 N.H. 428, 55 A.2d 156 (1947).

⁷⁸ See *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 479 (1951); THAYER, *A PRELIMINARY TREATISE ON EVIDENCE* 265, 530 (1898).

⁷⁹ See, generally, McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930); Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138 (1935); Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1 (1937); Morgan, *Some Suggestions for Defining and Classifying Hearsay*, 86 U. OF PA. L. REV. 258 (1938); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948); Falknor, *Silence as Hearsay*, 89 U. OF PA. L. REV. 192 (1940); Ladd, *The Hearsay We Admit*, 5 OKLA. L. REV. 271 (1952).