Admissions

Edmund M. Morgan

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In Greenleaf’s first edition, he adopted the dictum of Mascardus that an admission is not evidence but a substitute for proof. This was repeated in the first fourteen editions following, was copied by Taylor, was accepted by Wharton, apparently acquiesced in by Thayer, and later strenuously insisted upon by Professor Gifford at Columbia. Unless the dictum be given the interpretation put upon it by Gifford, that it takes the place of proof so long as the jury does not disbelieve it, it would seem to mean that an extra-judicial admission stands on the same basis as an admission made in the pleadings or by stipulation in open court: if it once be established that the admission was made, then the matter admitted is beyond the realm of dispute in the case. And there are a few English cases appearing to hold just that. When Mr. Wigmore came to edit the sixteenth edition of Greenleaf, he saw at once that these English cases were no longer law anywhere; but he accepted Greenleaf’s conclusion that an admission is not evidence, by taking from it all its supposed power to establish the matter stated in it and giving it only an impeaching effect. It is, he said, like any unsworn contradictory statement of a witness, which may be admitted to destroy his story on the stand but can not be used to establish the opposite. He, therefore, defined it as a statement inconsistent with the position which the admitter is taking at the trial. It is receivable even if the admitter has not testified, for it is contrary to the statements made or reasonably implied in his pleadings; and no foundation by way of calling his attention to the prior contradictory statement is necessary. In the first edition of Wigmore’s own work, he took the same position; but in the second, he bows to the practically unanimous holding of the courts that an admission is receivable for the truth of the

*Acting Dean and Professor of Law, Harvard Law School.

1 GREENLEAF, EVIDENCE (1st ed. 1842) § 169.

2 Id. (16th ed. 1899) § 169. For Professor Gifford’s criticism of Dean Wigmore’s view, see (1924) 24 Columbia L. Rev. 442-444.
matter asserted in it, and in some instances is, of itself, without corroboration, sufficient to justify a finding. In some cases a few courts have shown confusion. Where a party has testified, so a negligible number of decisions say, the opponent cannot offer a prior contradictory statement without laying the foundation required in the case of an ordinary witness, thus entirely overlooking the fact that such a statement is offered for its truth as well as for its impeaching value.

Whether an admission is hearsay and is received as an exception to the rule, while an interesting speculation, is hardly worth discussion from a practical viewpoint. Certainly it is receivable; its reception is much older than the hearsay rule; it is an unsworn, uncross-examined statement offered for the truth of the matter asserted in it; and often it hasn’t even an attenuated guaranty of trustworthiness. It stands in a class by itself; the theory of its admissibility has not the remotest connection with the jury system and can be explained only as a corollary of our adversary system of litigation. In the first place, the statement of the admittor may be received even though he would be incompetent as a witness. Indeed, admissions were freely received when parties were incompetent and it was believed that they could not be trusted to tell the truth on account of their interest in the outcome. Furthermore, the admission of a child, who after examination by the court was held incompetent because of his inability to understand the nature of an oath, has been admitted against his guardian ad litem in an action for injuries to the child. Admissions and confessions, made while the speaker was in such a condition from intoxicants or in such an hysterical condition that he could not have been permitted to testify in open court, have been held competent. And there is authority for the reception of admissions obtained by duress. Next, the admissions may be self-serving when made. Statements made by the party when he was under a positive motive to misrepresent are admitted against him. Thus, in an action by Doxtator against Cady for injury to Doxtator’s car, Doxtator testified that his brother-in-law was driving the car with Doxtator’s knowledge.

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3See cases collected in Note (1931) 74 A. L. R. 1098, 1102 (intoxication); Friedman v. United Railways Co., 293 Mo. 235, 238 S. W. 1074 (1921) (hysteria); Middle Tennessee R. Co. v. McMillan, 134 Tenn. 490, 505, 184 S. W. 20 (1915) (partial consciousness).

3Fidler v. McKinley, 21 Ill. 308, 310, 317 (1859). Contra: Tilley v. Damon, 11 Cush. (Mass.) 247 (1853). See 2 Wigmore, Evidence (2d ed. 1923) §1050: "Since the Confessions-rule is peculiar to the situation of the accused in a criminal case, an admission made under duress by a party-opponent in a civil case is admissible, subject of course to comment on its weight".
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and consent. Later when Cady sued him for damage done in the collision, his former testimony, as well as the pleadings in the former action, were held to be competent on the issue of the brother-in-law's authority to drive the car. In like manner where, in order to regain liquor taken in an allegedly unlawful search and seizure, defendant swore that prohibition agents had taken forty gallons of alcohol from the automobile which he was driving, the court admitted the affidavit as evidence of defendant's guilt in a prosecution for illegal transportation of the alcohol.

And, finally, the admission of a party cannot be excluded because he was not testimonially qualified as to the subject matter of the admission. In a New York case a defendant had told the coroner that the accident was caused by the operator's inability to stop the machine because the dog was out of position. In an action for wrongful death, when this statement was offered against him, the defendant proved that he was not present when the accident occurred and had no personal knowledge as to its cause. The statement was nevertheless held admissible. Clearly, then, the courts cannot be thinking of protecting the jury from being misled, and they must be thinking solely of the adversary theory when they receive unsworn and uncross-examined statements in the face of a showing that the admitter has not the qualifications that would permit him to be sworn as a witness, that he was under a positive temptation to falsify rather than under an urge to tell the truth, and that he had no opportunity to observe the things he described in his admission. Every danger that cross-examination tends to guard against is positively shown to be present in full force. Yet the admitter is in effect told that he can not object, for he can hardly be allowed to urge that he had no opportunity to cross-examine himself.

It must be noted that these cases deal with admissibility, and not with the weight to be given to the evidence. Admissions not based on personal knowledge, or in the form of unfounded opinion, are frequently held insufficient of themselves to sustain a verdict or finding. A somewhat similar problem is raised where so-called admissions by conduct are involved. For example, in Harmon v. Haas, and in Chaufy v. DeVries, shortly after an automobile accident which occurred while defendant's child was driving, and while defendant was absent so that he could have had no knowledge

See e. g. cases collected Note (1908) 15 L. R. A. (N. S.) 1096.  
41 R. I. 1, 12, 13, 102 Atl. 612 (1918).
of the circumstances, defendant transferred his property. This was admitted against him in an action for injuries received by plaintiff in the accident. The North Dakota Court accepted the Rhode Island ruling and reasoning: “The transfer of defendant’s property so soon after the accident was a fact from which the jury could draw an inference, based upon the defendant’s conduct, taken in connection with other evidence and circumstances in the case, unfavorable to the honesty and sincerity of the defense put forward by him at the time of the trial.” Now, does this mean that the inference from the defendant’s conduct is to his belief that all his available evidence will be weak and ineffective, and that from his belief the deduction may be made that his evidence is so? If it means no more, the effect of this evidence of transfer will not be to erect a case for the plaintiff. He must first do that himself. Then evidence of the transfer may help him as the basis for an inference of the weakness or invalidity of the defendant’s testimony. Its utmost effect can be corroborative of plaintiff’s case. But the court did not stop here. It went on and stated that acts of this character by defendant “would operate like an admission of liability, and be equally competent. ‘Admissions may be by acts, as well as by words’.” Now this must mean that such conduct would have a substantial affirmative effect. Of course, where the admitter had no personal knowledge, it could not, of itself, support a verdict.

Again, there are numerous cases where testimony has been admitted that a party has sought either to bribe a witness to testify in his behalf, or to refrain from testifying for the opponent, or has destroyed evidence. It is almost universally held that testimony as to such conduct is competent; but what is its function? Just what inference may be drawn from it? Will it establish an affirmative case for the opponent? In the famous case of Pomeroy v. Benton,12 Pomeroy sought an accounting from his former partner for profits made by Benton by the investment of partnership funds in private ventures. It was shown that Benton kept a full account of these in a private account book. After the action was brought, he destroyed the pages of the book on which the items concerning some of them were written. The court first found that defendant destroyed the book for the purpose of concealing “the magnitude of his operations in whisky.” It then indulged in the following rhetoric: “. . . the law, in hatred of the spoiler, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus

1277 Mo. 64, 85, 86, 90 (1882).
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defeats the wrong-doer by the very means he had so confidently employed to perpetrate the wrong." It had no evidence of the amount of defendant’s profits and at first took as their measure the amount of plaintiff’s claim, namely, $200,000. Later, on a showing that the destroyed pages affected not all the accounts but only those concerning the whisky, it reduced the sum to $100,000, fixing it at this figure because the several witnesses had testified that they understood from the defendant that “his profits... would be $100,000”, from the whisky on hand. No other cases go quite to this extent; and it is almost, if not quite impossible to make any accurate generalization as to the effect to be given such evidence. It does impeach the case put forward by the party in question; there are indications that it may act as positive corroboration of his opponent’s case; but there is almost no real authority and no decision which necessarily holds that it will serve of itself to set up an essential element of the opponent’s case.

We are almost equally in the dark as to the exact effect to be accorded a positive disbelief of testimony given by a party himself upon the stand. In some criminal cases in Pennsylvania and New York the court has said that where the defendant put forth a false theory of defense, or put in evidence, even by other than himself, of an alibi which the jury found to be false, this could be used as positive evidence of guilt. Last year the New York Court of Appeals held that this was true only where there was positive evidence that the alibi had been fabricated. A mere disbelief is not enough. The language in other cases is generally to the purport that it can be used only for impeachment, but the decisions are few. In civil cases there are a goodly number of square decisions that mere disbelief of a party’s evidence will not of itself sustain a finding of fact to the contrary. Thus, where a divorced wife sought to set aside a judgment against her husband in favor of his father as having been founded upon a fictitious debt and entered in order to avoid the payment of alimony which had been awarded, she called both defendants for cross-examination under the statute. Each testified there was a debt. The trial judge found that there was no debt. In reversing, the court said: "In their cross-examination under the statute the

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2See generally Maguire and Vincent, Admissions Implied from Spoliation or Related Conduct (1935) 45 Yale L. J. 228; Pomeroy v. Benton is discussed on pp. 240-243.
5People v. Russell, 266 N. Y. 147, 194 N. E. 65 (1935).
stories of the defendants were such that a jury might think them untrue; but there was no evidence that there was no debt. The court could not find a fact necessary to be proved, namely, that there was no debt, as to which there was no affirmative testimony, by a claim that the negative testimony was unworthy of belief. This is the holding of the cases throughout. 11 Whether, however, disbelief of such testimony may serve as positive corroboration of evidence to the contrary is not clear. There are at least a few cases which say that it may. Here, then, is a subdivision of the law of admissions wherein the courts have not yet gone far enough to determine the exact effect that may be given to testimony which is clearly admissible and to which the ordinary trier could scarcely avoid giving some effect. The use of conduct of a party as circumstantial evidence of his state of mind, which, when found, is to be used in turn as the basis for an inference to the facts which produced it, is constant and common, and is pertinent in situations too numerous to catalogue.

A more limited but constantly expanding field is that of admissions by adoption, which tends to coincide on one border with the admissions by such conduct as has just been discussed and on the other with admissions by authorization. Of course, no objection could be made to treating as an admission a statement made by a third person if it is expressly adopted by a party. A certificate of a physician as to the cause of death of an assured is normally inadmissible against the beneficiary in an action on the policy, for it is pure hearsay. If in making proof of loss, however, the beneficiary, in answer to the question as to the cause of death, writes: "As stated in the attached certificate of Dr. X," it is exactly as if she had written the certificate herself. Under the generally accepted rule, the fact that the admission is in the form of opinion is immaterial. 18 Suppose, however, that the party who is alleged to have adopted as an admission a statement made by another, has

17Moulton v. Moulton, 178 Minn. 568, 569, 227 N. W. 896 (1929).
18In some cases the courts seem to have gone to absurd lengths. For example, in a Missouri case the beneficiary attached the certificate of a Dr. Schultz, who wrote: "All evidence indicated a holdup murder." The insurance company offered this as evidence that the assured was murdered, for the policy did not cover death by murder. The Court of Appeals reversed the trial judge for excluding it, treating the statement exactly as if it had been made by plaintiff herself, since she warranted the truth of the statements in the proof of loss. Mayhew v. Travelers' Protective Ass'n. of America, 52 S. W. (2d) 29, 31 (Mo. App. 1932). See generally cases collected in Notes (1922) 17 A. L. R. 366-372 and (1936) 42 Id. 1455. Of how much real value is a statement by the widow on the hearsay of a doctor, who himself was forming an opinion on hearsay as to the very facts which were put to the jury? Is this decision an example of the use of a rule of evidence to upset a verdict that the court did not like?
done nothing affirmatively to indicate his adoption. A third party makes an assertion in the presence of the defendant to which the defendant makes no response and upon which he takes no action. How can he be said to be in the same position as if he had uttered the same words? Obviously only if the circumstances are such that his silence or inaction can be reasonably interpreted as an assent. If he heard and understood the statement, if it was of such content that a reasonable man would deny it if untrue, and if he was in such a situation as to be free to deny it, it is reasonable to infer that he assented to it. This is illustrated in numerous criminal cases where a defendant has remained silent under an accusation of crime. Whether he can be considered as free to deny it when he is under arrest at the time is a question to which the courts give conflicting answers.

Now assume that the defendant, instead of remaining silent, gives an equivocal answer. It is pretty obvious that he is not trying to express the proposition that the third person’s assertion is true. Indeed, he must be either hoping to give the impression of its untruth or intending to express his unwillingness to concede its truth. Consequently, it is difficult to see how there can be any rational inference that the situation is the same as if he had expressly adopted the assertion. If the evidence is to be received—and it is generally admitted—it must be on some other theory. The third party’s assertion is, by itself, pure hearsay and inadmissible under any exception. Coupled with defendant’s adoption, it is an admission. Without the adoption, it is still an event occurring in defendant’s presence and having some relation to an issue in the case. Defendant’s reaction to it, assuming that he was conscious of it, is relevant. It may indicate whether he believes the assertion to be true. If so, then his belief is the basis of a deduction to the existence of the fact believed. Even his express denial may be made in such a manner as to justify the inference that he nevertheless believes the assertion to be true. If so, his conduct is equally evidence, first, of his state of mind, and second, of the events creating the state of mind. It is on this theory only that several curious cases can be justified. The House of Lords held in 1914 that the trial judge had not erred in permitting a witness to testify that a child who had been violated pointed to defendant and in his presence said to her mother: “That is the old man,” etc., to which he responded: “I am innocent.”

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19See cases collected in Note (1932) 80 A. L. R. 1229, 1235.
20See Comment (1920) 34 Harv. L. Rev. 205; Developments in the Law—Evidence (1933) 46 id. 1162; (1923) 21 Mich. L. Rev. 806.
the demeanor of the defendant while making the denial. In California and in New York also an accusation and its denial have been received. Most courts, proceeding on the adoption theory, expressly reject accusations which are denied; those proceeding on the other theory should require evidence from which a jury might reasonably find that the manner of stating the denial was such as to furnish the basis for an inference that the defendant believed himself guilty. But there are some decisions, and it is often assumed, that anything said in the presence of a party is admissible against him. For such a doctrine there is not the slightest theoretical foundation.

Factors applicable to admissions by adoption and to admissions by authorization must be considered in dealing with statements made by an attorney in behalf of his client. Averments in pleadings stand by themselves. Under the old equity system allegations in the bill were regarded as mere surmises of the pleader rather than as statements authorized by the party. Common law pleadings, designed primarily to discover and define the issues, contained so much of the technical and fictitious as to fall naturally into the same class with the bill in equity. The answer in chancery was, of course, a personal response of the party and was, for evidential purposes, so treated. In handling pleadings under modern codes, the courts have been somewhat influenced by precedents pertaining to common law pleading, but the majority hold averments in pleadings to be made, adopted or authorized by the party and, therefore, admissible against him in the same or other proceedings. But what of statements made by counsel in the conduct of litigation? Is counsel the speaking agent of the party? Or must the inquiry be whether he spoke in the presence and with the apparent approval of the party? The courts appear to be reluctant to charge a party with any but formal deliberate declarations of the attorney. The Supreme Court of North Carolina expressed the general attitude of the judiciary when it said: "Merely casual, hasty, inconsiderate admissions of counsel in the course of a trial, do not bind the client; they are not intended to have such effect, nor does the nature of the relation of attorney and client produce such result. And this is so, although the client

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[22] People v. Philbon, 138 Cal. 550, 71 Pac. 650 (1903); People v. Hughson, 154 N. Y. 153, 47 N. E. 1092 (1897). It is possible to explain these two cases on special grounds.


[24] This subject is fully treated with ample citation of cases in 2 Wigmore, Evidence (2d ed. 1923) §§ 1063-1067.

be present when such inconsiderate admissions are made. It would be rude, indecorous, disorderly and confusing, if the client should interpose to correct his counsel and disclaim his authority to make such admissions. Neither the Court, counsel, nor any intelligent person expects him to do so. And for the like reason, the client, if examined as a witness, is not required to disclaim such admissions of his attorney, unless he shall be examined by the opposing party for that purpose.” If, however, counsel makes a considered relevant statement, it need not be for the purpose of relieving the opponent from proof, or be in the form of a stipulation. Thus, in New Jersey in an action to recover for loss due to a fire the plaintiff was permitted to show that after the fire, an attorney for the defendant railway company had appeared before the Public Service Commission and stated in effect that the defendant’s right of way was in bad condition in that combustible material had not been cleared away, and that this was one of the causes of the fire.26 Again, in a suit involving a patent by the Ward Baking Company against the Hazleton Baking Company,27 Mr. Beyer of the Beyer Company was present during the whole trial. In the opening statement for defendant counsel asserted that the defense was being conducted by the Beyer Company. In a later action between the Beyer Company and the Fleischmann Company one of the issues was whether the Beyer Company was bound by the judgment in the Ward-Hazleton case. Upon this issue the assertion of counsel in the opening statement in the Ward-Hazleton trial was held admissible against the Beyer Company.28

In like manner evidence given in behalf of a party at a former trial may be brought up to plague him at a later trial, even where it would not be admissible under the reported testimony exception, either because the parties are not the same or because the witness cannot be shown to be unavailable. Thus, in a West Virginia case where plaintiff was suing for loss caused by fire, one of plaintiff’s theories was that the fire originated in defendant’s dry kiln. At the first trial defendant’s witness Cairn testified that the fire originated in a waste basket in which an employee had thrown his cigar stubs, cigarette stubs and ashes. At the second trial, plaintiff offered this testimony of Cairn, who was not called but was not shown to be unavailable. The Supreme Court held it reversible error to reject the evidence, saying: “Of course, a party is not bound by everything his witness may say on the stand, as an admis-

sion, on his part, particularly where he does not know beforehand what the witness is going to say; but if he puts a witness on the stand, as defendant did in this case, to prove a particular fact in issue, he is bound thereby as an admission on a subsequent trial. This seems to be the view accepted in most of the few American cases, although the English rule is to the contrary.

Before considering vicarious admissions, a word as to personal admissions in criminal cases is necessary. It is too well known to justify elaboration that a confession obtained by improper inducement is inadmissible, and that where a defendant asserts such improper inducement, he is entitled to a preliminary hearing upon that question. On just what theory the confession so improperly obtained is rejected is not clear. There are numerous statements in the opinions that the ground of rejection is the danger that it may be false. To some extent this theory is given support in the cases allowing all or a portion of an improperly induced confession to be received where investigation in reliance upon it has disclosed theretofore unknown corroborative facts and, to a less degree, in those allowing evidence of such facts and a showing that they were discovered as a result of or following a conversation with the accused. Some cases can be explained only on the sporting theory of a lawsuit. And in many the idea that the police and prosecutor must be restrained from using third degree methods seems to furnish the rationale. There is, however, a growing number of cases to the effect that this exclusionary rule, whatever its basis, applies only to confessions—that is, to admissions of guilt. It does not apply to the admissions of subordinate facts. For example, in State v. Cook the defendant, taken to the scene of an alleged attempt to break and enter in the night-time with intent to steal, said: "That is the house. I tried to get in, but was frightened away by the woman's scream." The court held the confessions rule inapplicable because the statement did not admit the criminal intent. Again, in a New Mexico case, where defend-

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188 Ia. 655, 661, 176 N. W. 674 (1920).

31E. g. State v. Moran, 15 Ore. 262 (1887); Commonwealth v. Knapp, 10 Pick. 477 (Mass., 1830).

30See e. g. State v. Garrison, 59 Ore. 440, 117 Pac. 657 (1911).

29Ia. 655, 661, 176 N. W. 674 (1920).

ant was charged with bigamy, he said he had previously been married to Y and didn't know whether he had been divorced from Y. He did not admit the subsequent marriage to X. This likewise was held no confession. And an Idaho case admitted a statement by defendant to the sheriff that he wanted to plead guilty, saying that it "borders closely on a confession, but we are inclined to view it as partaking more of an admission." Now, in all these cases the improper inducement held out was a promise of more lenient treatment. No case of this kind has been found which actually applied this rule to statements induced by physical torture or threats of physical torture, although the language used in the opinions makes no such discrimination.

It must be too clear for argument that an improperly induced statement of a subordinate fact from which, in connection with others, guilt may be deduced, is no more trustworthy than a statement of guilt. If in the Iowa case the defendant had said: "That is the house. I tried to get in there to steal some money," how would it have been entitled to any less credit than was the statement which he made? If these cases are to be explained, it must be merely on the ground that the adversary theory applies to make receivable all admissions; and that for reasons of policy, based either on a desire to require the police to make thorough investigations and not to rely on confessions, or on a sporting notion of fair play to an opponent in a tight place, a check is put on the theory in its application to straight admissions of guilt.

So far as regards admissibility, the segment of the rules of evidence dealing with admissions based on a party's own conduct is consistent with itself, except perhaps that portion of it governing confessions.

Vicarious

When the Committee of the United States Senate was investigating the leases made by Secretary Fall for the Government to the Pan-American Oil Company, Mr. Doheny appeared and had read to the Committee a prepared statement explaining his loan of $100,000 to Fall. He also had counsel read a proposal to refer the whole question to a board of experts, saying: "Mr. Doheny does not wish to have his company appear as dealing unfairly with or taking advantage in any way of the Government." Later, when the United States brought action to cancel the leases, Mr. Doheny claimed his privilege against self-crimination. The Government then offered against the corporation Mr. Doheny's state-

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This is found on p. 206 of the printed record before the United States Supreme Court. See note 40 infra."
ment before the Investigating Committee. Was it admissible? To be sure, Doheny was an officer of the corporation and had acted for it in the negotiations for the leases; but was he acting as the agent of the corporation before the Committee to such extent that he was representing it in making his explanation of a personal loan to Fall, in view of the fact that he was also personally interested in making that statement?

Of course, the ordinary principles of the law of agency apply to narrative utterances as well as to words and nonverbal acts which have an operative effect. Doheny’s offer for the corporation was admissible to show its terms just as fully as if the corporation had been an individual and had itself made the offer. The mere fact, however, that he was authorized to make the lease did not give him any authority to talk about it afterward. A chauffeur who is authorized to drive his master’s car has no authority on that account to talk about his driving. Hence, if he has an accident and later tells W all about how it happened, W may not testify against the chauffeur’s master as to the chauffeur’s statements. Further, Doheny’s being a witness before the Senate Committee as to the facts bearing upon the lease would not, of itself, make him a representative of the corporation. Suppose, for example, in a prosecution of a chauffeur for criminal negligence in the operation of an automobile, an officer of the corporation is called to testify as a witness, either by the state or by the defendants; and suppose that later the corporation is sued civilly for injuries inflicted by the act for which the chauffeur was prosecuted; the officer’s testimony can not be received against the corporation as an admission, for he was not acting within the scope of his authority as an officer while so testifying; and although he was making assertions of facts within his knowledge concerning corporate matters, they cannot be considered as assertions of the corporation.

Consequently, the court in the Pan-American case had first to determine whether Doheny in making his statement to the Committee was making it as an agent of the corporation and within his authority as such agent. The trial court found that he was so acting and received the evidence. The Supreme Court affirmed on the ground that the trial judge was justified in “holding that, when he (Doheny) testified before the committee, he was acting for the companies within the scope of his authority.”


The usual phrasing of the rule makes admissible against the superior the utterances of the representative made within the scope of his authority or employment. Suppose that a master directs his investigator or claim agent to investigate and report to him the cause of a particular accident. The agent does a thorough, workmanlike job and renders a detailed written report. Obviously, he was hired for the very purpose of making the report; in writing and transmitting it, he was acting squarely within the scope of his employment. If the master is a corporation, the investigator's duty may be to make the report to an officer of the corporation; but essentially the situation is the same. Consequently, when the reported is offered against the master, it seems to fall squarely within the express words of the rule. And this seemingly has led a number of courts to admit it. But the fallacy is apparent upon analysis. The doctrine of respondeat superior does not apply between principal and agent or between master and servant. It is only where the agent or servant represents the master in dealing with third persons that the latter becomes responsible for the former's acts. If the master had directed the investigator to report the circumstances of the accident for him to the Industrial Commissioner or some other official or third party, then the doctrine would be operative. The Restatement of Agency clearly makes the distinction, and says expressly: "Statements by an agent to the principal or to another agent of the principal are not admissible."142

The test of admissibility is whether the agent "was authorized to make the statement or was authorized to make, on the principal's behalf, true statements concerning the subject matter."143 It will be noticed that this distinctly does not make admissible non-operative statements of an agent in situations where his operative statements would make the principal substantively responsible. Substantively, if the agent acts within his express authority, or within his ostensible authority even contrary to express instructions, or within an authority created by estoppel, the principal will be as responsible as if he had acted personally. But, merely because the situation is such that had the words uttered been words of offer, acceptance, warranty, or representation, the principal would have been responsible, it does not follow that the words when narrative are to be treated as words of the principal. But, if the

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1See e. g. Lemen v. Kansas City Southern Railroad Company, 151 Mo. App. 511, 132 S. W. 13 (1910). Cases are collected in Notes (1909) 18 L. R. A. (n. s.) 231; (1910) 25 id. 930; (1914) 47 id. 830.

2Restatement, Agency (1933) § 287; Restatement, Agency, Explanatory Notes (Tent. Draft No. 5 1930) pp. 73-102 collects the pertinent cases.

3Restatement, Agency (1933) § 286.
agent has an authority to talk about the subject-matter, then his narrative is to be received. This accords with the theory back of the reception of personal admissions. If the party has authorized another to speak for him, he can not object that the speaker was not under oath or subject to cross-examination when he spoke.

Partnership is in this aspect one form of agency. Within the scope of the partnership business, each partner is an agent for all. Are the partners authorized to make statements about partnership matters? Take first cases where a tort has been committed by a servant of the partnership, and it is established that the matter as to which the servant was acting was a partnership affair. A partner admits the existence of a defect in the instrumentality involved. Is this receivable against the other partners? Theoretically no, unless the speaker was authorized to talk about it. And such is the holding in about half of the pertinent cases. In the others, it seems to be assumed that the partner has such authority, for the evidence is received. And in contract actions, the holdings are almost unanimous to that effect. In this respect the language of many of the decisions makes no distinction between the situation where the words would be operative to create legal relations and the situation where they can have no operative effect and are merely narrative and evidential. If they are to be harmonized with the agency cases, it must be on the ground that each partner has authority to talk about any partnership transaction.

The confusion exhibited in these cases is much more striking in the conspiracy cases. Of course, any act of any conspirator, verbal or nonverbal, done in the furtherance of the conspiracy affects each of his co-conspirators as if the latter had himself done it. So, any narrative of one, if uttered in furtherance of the conspiracy, may be received as an admission against each of the others: but one may make a statement concerning the conspiracy while it is still in the course of being planned or executed, which in no way furthers it and which, in fact, is a most effective way of blocking it. Such a statement, admissible against the speaker, is, on theory, inadmissible against his fellow conspirators. Some cases make the distinction clearly; others, while stating it, assume that every declaration concerning the conspiracy made while it is still brewing is in furtherance of it. The Circuit Court of Appeals for the Seventh Circuit was puzzled by previous decisions of the United States Supreme Court and resolved the enigma thus:

See accord Merrill v. O’Dryan, 48 Wash. 415, 93 Pac. 917 (1908).

The cases are collected in Note (1931) 73 A. L. R. 427, 433, 447.

See e. g. People v. Davis, 56 N. Y. 95, 103 (1874).

International Indemnity Co. v. Lehman, 28 F. (2d) 1, 4 (C. C. A. 7th, 1928).
"The rule we deduce from these cases is that an admission of one conspirator, if made during the life of the conspiracy, is admissible against a joint conspirator, when it relevantly relates to and is 'in furtherance of the conspiracy.' Construing the expression 'in furtherance of the conspiracy' reference is not to the admission as such, but rather to the act concerning which the admission is made; that is to say, if the act or declaration, concerning which the admission or declaration is made, be in furtherance of the conspiracy, then it may be said that the admission is in furtherance of the conspiracy."

This is employing a time-honored judicial device to make new law without appearing to neglect, much less to abuse, the doctrine of stare decisis. It may indicate a change in the substantive law of conspiracy or merely the evolution of a new exception to the hearsay rule.

What is the explanation of the large group of cases in which the declaration of a principal is received in an action against a surety? First, is the contract of guaranty or suretyship to be construed as a promise by the surety to be responsible for the acts of the principal to such an extent that the promisee need show only that he could have established his claim against the principal? If so, then any evidence receivable against the principal would be admissible against the surety. There is a suggestion to this effect in a Vermont case; and a theory of this sort is embodied in the California Code of Civil Procedure (Sec. 1851): "where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties." Under the generally accepted interpretation of the usual guaranty contract, however, the surety promises to answer only for certain conduct of the principal and not for his narrations about it. And ordinarily the test of admissibility of evidence against the surety will not be its admissibility against the principal. But one item of the principal's conduct is the rendering of an account of his doings in the performance of his obligation. Consequently, it may be said without unreason that the surety authorizes the principal to make statements as to the performance of his obligations both for himself and for the surety. This will place the principal's statements made within the authorization on the same basis as those of an agent. This explanation has been made by a Canadian

court;" and it will justify the result reached in a great majority of the cases. It will not, however, account for the reception of statements made by the principal to outsiders, e. g. to the Chief of Police after his arrest; or even to the employer-promisee after the employment has terminated. There are a few modern cases tending to exclude such statements to outsiders.60

The suretyship cases lead to those dealing with declarations of joint-obligors. Here we go back to the mighty Lord Mansfield for the dictum that one joint-obligor is "virtually" an agent of the rest, so that "an admission by one, is an admission by all".51 Such an adverb is a convenient covering for loose thinking or none at all; and though its fallacy has been exposed, the authority of this great judge has generally prevailed. In modern times it has been buttressed by that of the greatest living master, Wigmore, who says:52

(1) "So far as one person is privy in obligation with another, i. e., is liable to be affected in his obligation under the substantive law by the acts of the other, there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally." At the risk of conviction of treason, it is suggested that this sentence would read as well and carry quite as much conviction if changed thus: "Although one person is privy in obligation with another, etc., there is no reason for receiving against him such admissions, etc." It would then be supported by all the cases which refuse to receive against one conspirator confessions made by another after termination of the conspiracy; the confession of a principal against his accessory; the narratives of a servant causing a tortious injury against his master; and by the majority of American cases which reject against a partner, statements made by another partner after dissolution of the partnership.

(2) "Not only as a matter of principle does this seem to follow, since the greater here may be said to include the less; but also as a matter of fairness, since the person who is chargeable in his obligations by the acts of another can hardly object to the use of such evidence as the other may furnish."

Again, the query presents itself, what is "matter of principle"?

52Wigmore, Evidence (2d ed. 1923) § 1077. The next two quotations are a part of the same paragraph.
If it connotes consistency with other recognized rules of law, it necessarily implies a selection of those rules that happen to please the user of the phrase. In this instance it rejects the rules to which attention has just been called in agency, conspiracy, and partnership. If it refers to the mathematical maxim that the greater includes the less, it overlooks the essential of identity of kind. A bushel of apples does not include a pint of peanuts. As to the matter of fairness, this must be a matter of judgment, this should put one to an examination of the basis for admitting any evidence. As a matter of fairness generally all relevant evidence should be received, but the great bulk of the rules of evidence have to do with the rejection of relevant evidence.

(3) "Moreover, as a matter of probative value, the admissions of a person having precisely the same interests at stake will in general be likely to be equally worthy of consideration."

This may be true enough, but it entirely disregards the theory upon which admissions are received—which has nothing at all to do with their trustworthiness. And if it had, how can identity of legal obligation indicate identity of trustworthiness of the obligors?

It is, therefore, submitted that if the reception of this class of evidence is to be justified, it must be on some other grounds than those expressed in the opinions and by the commentators.

The same sort of suggestion is applicable to the doctrine which sanctions the reception of declarations of the former owner of a property interest against his successor in interest. It begins with Lord Ellenborough and continues through Wigmore. Here Mr. Wigmore advances no independent reasons, but is content to rest upon the reasoning of Mr. Justice Henderson of North Carolina, Mr. Justice Kennedy of Pennsylvania, and the New York commentators, Cowen and Hill. Mr. Justice Henderson adds the following "plainest reasons":

"Truth is the object of all trials, and a person interested to declare the contrary, is not supposed to make a statement less favorable to himself than the truth will warrant; at least there is no danger of overleaping the bounds of truth as against the party making the declarations. It is therefore evidence against him, and his subsequent purchaser stands in his situation; for he cannot better his title by transferring it to another, or thereby affect the rights of those who have an interest in his confessions."

Note, (1) that the declarant is assumed to be "interested to declare the contrary"; that is to say, his statement has the guaranty of trustworthiness that the fact stated is dissembling. His successor

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Guy v. Hall, 3 Murph. 150, 151 (N. C. 1819).
stands in the declarant’s shoes. It may be granted that this is true substantively. To assume that it must, therefore, be true evidentially is to leap a long logical gap, and to forget the postulate with which Mr. Justice Henderson began: "Truth is the object of all trials". It is for this reason that statements not subject to cross-examination are usually excluded. Where a person makes a statement consciously contrary to his interest, it has such a characteristic of credibility as to justify dispensing with cross-examination. As pointed out before, the admission of a party, if not disserving when made, is received not because it has any earmarks of abstract verity but because he cannot object to the lack of the usual safeguards against his own utterance. Why should he be compelled to vouch for the veracity of his predecessor? (2) To say that others have an interest in the "confessions" of the predecessor which cannot be destroyed by a transfer is not to give a reason but to restate the result in terms which assume testimony to have the qualities of a vendible commodity.

Messrs. Cowen and Hill, whose "masterly exposition" of the doctrine is likewise highly commended by Dean Wigmore, offer the following justification:54

"This doctrine proceeds upon the idea that the present claimant stands in the place of the person from whom his title is derived; has taken it cum onere; and as the predecessor might have taken a qualified right, or sold, charged, restricted or modified an absolute right, and as he might furnish all the necessary evidence to show its state in his own hands, the law will not allow third persons to be deprived of that evidence by any act of transferring the right to another. Declarations made by the predecessor are a part of the res gestae, whether accompanied with acts of possession or forbearance, so much so, indeed, that . . . they might for many purposes be evidence in his own favor to fortify his claim; but, above all, to weaken or contract it."

The first part of this quotation may be accepted as an accurate statement of the substantive law. The last part may be entirely disregarded as mere "sound, signifying nothing", for the assertion that the declarations are part of the res gestae in this connection is wholly meaningless. It at once raises the suspicion that the distinguished authors were not quite satisfied with their previous reasons and that their most definite idea about the matter was the conviction that the evidence should be received. This leaves only the conclusion that "the law will not allow third persons to be deprived of the evidence by an act of transferring the right to

54In 1 Phillips, Evidence 314, n. 104.
Insofar as this is anything more than a statement of the result, it merely suggests that when an opponent has evidence that would be admissible against X, it is unfair to let that evidence be destroyed by a transfer of property from X to Y. It is not a suggestion that the transfer closes up the source of information, for at the time Messrs. Cowen and Hill wrote, the direct opposite might be true. If the transfer divested the grantor of interest, it would in fact open up the source of testimony by making the grantor a competent witness, whereas before the transfer, he would have been incompetent. And it was not suggested at that time, that a competent witness could not be made incompetent by the device of a transfer of interest to him, or an incompetent witness made competent by his putting aside all interest. In short, Messrs. Cowen and Hill and Mr. Justice Henderson differ only in phraseology.

Mr. Justice Kennedy, after making a number of assertions concerning admissions or confessions of a litigant, some of which are at least debatable, shows that as a matter of substantive law, a successor in interest obtains no more than his predecessor had. He says that evidence admissible against the former ought to be equally so against the latter, and proceeds: 'Lord Ellenborough has given the true reason of the rule for admitting the declarations of a party in evidence,... where he says, it 'is founded upon a reasonable presumption that no person will make any declaration against his interest, unless it be founded in truth.' If true when made, and therefore receivable in evidence, his selling or disposing of the property afterwards cannot make his former declaration in respect to it untrue, nor furnish any reason, that I can perceive, which ought to derogate from its character as evidence. But I cannot avoid believing that as long as the great object of receiving testimony is to aid in and promote the investigation of truth, the declarations or admissions of a vendor or assignor against his interest, made before the sale or assignment, may be more safely relied on and received in evidence against his vendee or assignee, than the testimony that would be given by such vendor or assignor himself, if the party claiming in opposition to his vendee or assignee, must be compelled to resort to him.'

The learned justice, then, makes the rationale of the rule incompatible with the reception of any self-serving or neutral declarations of the predecessor. The sole substitute for cross-examination is the dissuading quality of the declaration. Privity alone and of

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5See 1 Wigmore, Evidence § 576, quoting Bentham; 5 Jones, Evidence (2d ed. 1926) § 2119 and cases cited.

itself, therefore, cannot suffice; it may perhaps obviate the necessity of showing the declarant unavailable; it furnishes no guaranty of trustworthiness.

These lines of reasoning would make receivable against the successor all statements by his predecessor, but it is agreed that only those made while the predecessor had the very interest which the successor is now claiming are receivable against the latter. Baron Parke suggested an additional limitation: the declaration must "affect or qualify the title." In its application he did not consider as affecting the title any facts which merely put a limitation upon the declarant's right to convey to another, as where while indebted to A and having insufficient assets to meet the indebtedness, he conveyed gratuitously to B. Baron Parke declared inadmissible against B the declaration of B's predecessor that he was indebted to A. The Iowa Court reached the opposite result, and North Carolina and Alabama, in an action by the predecessor's creditor to set aside a conveyance to B, have received against B declarations of B's predecessor that he was not indebted to B.

The construction put upon this limitation is important in will cases. If title be construed broadly enough to include the power to transfer to anyone willing to take, the testator's assertion of a fact showing incapacity to transfer by will, will be receivable against his legatee or devisee. But under both views declarations by a testator of facts tending merely to validate or destroy a particular testamentary document must be rejected. In like manner, where a conveyance or transfer is attacked for fraud or duress, the predecessor's statements of facts which in no way affect his own interest in the property but which do affect the validity of the transfer will, under either construction, be inadmissible. Messrs. Cowen and Hill, of course, would have repudiated this restriction in toto, for they argued vigorously for the reception of all relevant utterances of testators. On this theory they justified and approved Reel v. Reel, a leading authority for the reception of post-testamentary declarations. Baron Parke's idea, however, seems to have prevailed in these lines of cases. While the courts have relied upon the doctrine of privity to admit statements of a testator regarding the quantum or quality of his estate, they have dealt with declarations concerning his testamentary capacity and the validity of

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65Coole v. Braham, 3 Exch. 183 (1848).
67Satterwhite v. Hicks, 1 Busbee L. 105 (N. C. 1852); Moses v. Durham, 71 Ala. 173 (1881).
681 Hawks 248 (N. C. 1821).
692 Wigmore, Evidence § 1081.
his will on an entirely different basis. Likewise only a small minority of decisions use privity as a ground for receiving declarations by a predecessor of facts which tend only to impair or validate a conveyance or transfer without affecting his then existing interest in the property.

The rationale of these limitations has no relation to trustworthiness, and the doctrine even thus circumscribed produces some curious results. Where an insurance company is attacking the validity of the policy and offers against the beneficiary, statements made by the assured of facts which would impair or destroy it, their admissibility depends, according to some decisions, not at all on the circumstances of their utterances, but upon the wording of the policy. If the assured has reserved the right to change the beneficiary, then the sorcery of privity is present to provide a cloak for their reception; if he has made no such reservation, no magic covering hides their hearsay infirmity; unless they come clothed with some guarantee of trustworthiness, they are rejected. In another field, a modern Massachusetts decision demonstrates the illegitimacy of privity as a test of admissibility. In an action for wrongful death, the administrator was claiming damages for conscious suffering of the decedent and for the loss to the next of kin. The decedent's statement, "it is my fault, I am to blame", was received, on the issues of negligence and contributory negligence, in opposition to the claim for conscious suffering, and was rejected on the same issues in opposition to the claim for loss to the next of kin. Almost as much a shock to common sense are the cases dealing with the admissibility of a bankrupt's schedules. If a bankrupt files a schedule with his voluntary petition, his statements therein are made while he is owner; the title has not yet passed to his trustee. If he becomes an involuntary bankrupt, his schedule is made after the trustee acquires title. In the former situation, the schedule is admissible against the trustee, in the latter, inadmissible. The absurdity of this distinction so impressed the Circuit Court of Appeals for the Second Circuit that they entirely disregarded it. They accepted without much examination the decisions admitting the schedules of the voluntary bankrupt, and then, finding the schedule of an involuntary bankrupt quite as trustworthy, held its rejection reversible error. The same reasoning would destroy the distinctions relied on in the insurance cases

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Admissions

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"3 id. §§ 1734-1740.
"2 id. § 1081 and cases cited in note 6; Kales, Admissibility of Declarations of the Insured against the Beneficiary (1908) 6 Col. L. Rev. 509.
"In re Weissman, 19 F. (2d) 769 (C. C. A. 2d, 1927).
and wrongful death actions. Indeed, it would so damage the whole doctrine as to require a complete reexamination of its fundamentals.

Such a reexamination would be welcome. The dogma of vicarious admissions, as soon as it passes beyond recognized principles of representation, baffles the understanding. Joint ownership, joint obligation, privity of title, each and all furnish no criterion of credibility, no aid in the evaluation of testimony. Yet it is not difficult to rationalize about their origin as *indicia* of admissibility. An examination of the pertinent precedents discloses that in most of them the admitted declarations were of facts palpably against the interest of the declarant. In the late 1700s and early 1800s the exception to the hearsay rule for declarations of facts against interest had established itself in essence, though some details remained to be worked out. It was not until after 1800 that the unavailability of the declarant became a thoroughly recognized requisite, and it was some years later before the exception was restricted to statements against pecuniary or proprietary interest. Both of these restrictions were entirely without justification. The very basis of the exception—that the statement is of a fact consciously against interest when made—makes it plain that a statement is likely to be quite as reliable as the testimony of the declarant. And to treat a declaration against pecuniary or proprietary interest as more likely to be in accord with truth than a declaration against penal interest is blindly to disregard realities. The development of these abnormalities to the detriment of this exception invited recourse to the concurrently evolving doctrine of vicarious admissions.

Even today it is often very difficult to determine whether the courts are relying upon the disserving character of the statement or the bond of common interest to warrant the reception of extra-judicial declarations of a joint owner, joint obligor, or predecessor in interest. Until after the first third of the nineteenth century, the former element was usually given the greater weight. Vague analogies of the doctrine of *res adjudicata* furnished plausible ground for shifting the emphasis. Since both elements were usually present in the same case, the courts, under no compulsion to choose

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"See Walker v. Broadstock, 1 Esp. 458 (1795) and Doe ex dem. Hindly v. Rickarby, 5 Esp. 4 (1803), in which extra-judicial declarations against interest by living witnesses were admitted.

"The Sussex Peerage Case, 11 Cl. & F. 85 (1844).

"See Falcon v. Famous Players Film Co., (1926) 2 K. B. 474; Fourth National Bank v. Albaugh, 188 U. S. 734, 736-7 (1903); CAL. CODE CIV. PROC. (Deering, 1923) § 1849; MONT. REV. CODES (Choate, 1921) § 10510; ORE. LAWS (Olson, 1920) § 706; Washoe Copper Co. v. Junilla, 43 Mont. 178, 185, 115 Pac. 917, 919 (1911)."
between them, wandered about in a bog of uncertainty. Then with the ill-advised assistance of commentators like Messrs. Cowen and Hill they selected as their guide the *ignis fatuus* of privity. The results, as might have been anticipated, have been lamentable. Testimony has been received or rejected without reference to its capability of evaluation by the trier. Self-serving statements without the slightest guaranty of trustworthiness have been admitted; disserving declarations with every badge of credibility have been excluded.

To furnish a real remedy for this intolerable situation would require a thorough revision of the rules governing the admissibility of declarations against interest and of vicarious admissions. It is past hope of realization within the reasonably near future. A partially satisfactory solution, however, may not be beyond attainment. The cases admitting declarations against the interest of the predecessor or joint obligor or joint owner reach a desirable and theoretically justifiable result. All courts and commentators agree that a sufficient guaranty of trustworthiness is found in the circumstance that the fact stated is consciously against the interest of the declarant. There is also an adequate necessity for using it. To paraphrase Mr. Justice Kennedy's dictum, such an utterance may be more safely relied on than the testimony that would be given by the declarant himself. In this respect it stands on a footing equal if not superior to that supporting the now established hearsay exception admitting spontaneous statements. Here, then, are ideal conditions for an exception to the hearsay rule with none of the absurdities that disfigure the orthodox exception for declarations against interest. The element of joint interest, joint responsibility, or privity of title, which distinguishes these cases factually from those involving ordinary utterances against interest, may well be seized as an excuse for discriminating legally—for disregarding those limitations in the accepted rule which exclude declarations against penal interest and demand the unavailability of the declarant. The adoption of this suggestion would, to be sure, compel the repudiation of those decisions admitting self-serving or neutral declarations on the sole ground of privity or joint interest or joint responsibility, but they are comparatively few in number. On the other hand, it would make no change at all in the cases where the declarant really represents the party against whom his declaration is offered. It would continue the practice of receiving disserving statements of one joint owner or joint obligor against another and of a predecessor in interest against his successor, but would liberalize it by including all
relevant declarations against such declarant's interest, pecuniary or proprietary or penal. It would hasten the accomplishment of the end for which the courts appear to be striving in the conspiracy cases, for even where a conspirator's utterances are without the scope of his authority as a representative of his fellows, they are usually against his penal interest. It would to some extent eliminate the necessity for bizarre interpretations of accepted generalizations to make them seem applicable to situations to which they are totally inapplicable. It would reduce but not remove the occasion for absurd distinctions in the insurance and wrongful death actions. In a word, it would tend to put on a rational basis a substantial segment of the hearsay rule. It would, of course, leave much, very much, to be desired; but it must be realized that in liberalizing the rules of evidence, the courts make haste slowly.\textsuperscript{69\dagger}

\textsuperscript{69} The subject-matter of this paper has been dealt with by the writer in Morgan, \textit{Admissions as an Exception to the Hearsay Rule} (1921) 30 \textsc{Yale L. J.} 355 and Morgan, \textit{The Rationale of Vicarious Admissions} (1929) 42 \textsc{Harv. L. Rev.} 461. The material in the latter article has been used extensively in this paper; and large portions of it have been copied verbatim.

\textsuperscript{\dagger} The third of a series of papers upon the law of evidence presented by Professor Morgan to the Seattle Bar in July, 1936, revised by the author for publication. For previous articles in this series see (January, 1937) 12 \textsc{Wash. L. Rev.} 1 and (April, 1937) 12 \textsc{Wash. L. Rev.} 91. The final paper of this series will appear in the November, 1937, issue of the \textsc{Review}. 