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# Evidence—Hearsay—Equivocal Replies to Accusations When the Accused Is under Arrest

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## Notes

### Evidence—Hearsay—Equivocal Replies to Accusations When the Accused Is Under Arrest

Having been arrested under suspicion of robbery, the defendant was confronted with a taxicab driver and an alleged accomplice who each made statements implicating him with that robbery. When asked what he had to say about those accusations, the defendant replied, "I do not wish to make a statement until I see my lawyer," and, "Do you think I would tell you something that would put me in jail?" Over the timely objections of the defendant, the trial court permitted police officers to relate the accusations of the taxicab driver and the accomplice on the theory that, when coupled with the defendant's reaction to them, they constituted admissions which were admissible despite the hearsay rule. On defendant's appeal from his conviction, the Circuit Court of Appeals for the District of Columbia *Held,* reversed.[1]

The court noted that "the general principle applicable to this type of evidence is that an accusatory statement and the defendant's failure to deny it are admissible only if the circumstances are such 'as would warrant the inference that he would naturally have contradicted it if he did not assent to its truth.' "[2] The court also noted that when an accused who is under arrest remains silent in the face of an accusation the jurisdictions split as to whether the fact of arrest alone is sufficient to prohibit the inference of admission, some jurisdictions holding that an accusation made while an accused is being held under arrest does not call for a reply and cannot be taken as an admission[3] and others holding that the fact of arrest is only one of the circumstances to be considered.[4] "But," said the court,[5]

[1] Kelley v. United States, 236 F.2d 746 (D.C.Cir. 1956).

[2] Id. at 749. The court quoted from Sparf v. United States, 156 U. S. 51, 52 (1895). To the same effect see: 4 Wigmore, Evidence § 1071 (3d ed., 1940); McCormick, Evidence § 247 (1954); and cases cited therein. The rationale is that prompt denial is the natural reaction to a false or unjust accusation.

[3] Rickman v. State, 230 Ind. 262, 103 N.E.2d 207 (1952); State v. Hester, 137 S.C. 145, 134 S.E. 885 (1926); State v. Redwine, 23 Wash.2d 467, 161 P.2d 205 (1945). This view is based upon the theory that the natural reaction of one under arrest is to remain silent.

[4] Scott v. State, 249 Ala. 304, 30 So.2d 689 (1947); Barber v. State, 191 Md. 555, 62 A.2d 616 (1948); People v. Bennett, 413 Ill. 601 110 N.E.2d 175 (1953). Wigmore, op. cit. supra note 2, § 1072, describes this as the better view.

"we need not select the rule we would apply had the accused simply remained silent, for he spoke, and gave as his reason for refusing to make a statement his desire to first consult his lawyer .... [which amounted to] ... an explicit rebuttal of any inference that the accused was admitting the truth of the accusations ..." Then the court looked at the defendant's second statement ("Do you think I would tell you something that would put me in jail?") and ruled that it did not amount to an adoption of the alleged accomplice's accusation.[6]

It is submitted that this rationale is misleading and that the court should have been more detailed in regard to its interpretation of the defendant's replies. First, it should be recognized that these replies are equivocal, that either admission or denial can be inferred from them.[7] Second, note that silence in the face of an accusation is also equivocal. Thus, it may be said that an equivocal reply is tantamount to silence in this situation. So, if it is necessary to determine whether the fact of arrest should be controlling when interpreting an accused's silence, it also must be necessary to make that determination when interpreting an accused's equivocal reply. Because it is not necessary that the fact of arrest be given the same weight in both cases,[8] this court correctly determined that it need not rule in regard to silence. However, this court also failed to directly determine whether the fact of arrest should be controlling when interpreting equivocal replies; instead, it simply interpreted the replies in light of all the circumstances and incidentally followed the view that the fact of arrest is not controlling.

The question of whether the fact of arrest should or should not be controlling aside, it seems unfortunate that the court would adopt either view after it had ostensibly reserved the question. The confusion to which this can lead is illustrated by the Nebraska case of *O'Hearn v. State*.[9] This case is often taken as leading authority for the view that the fact of arrest is controlling, although the Nebraska court expressly refused to adopt that rule and, instead, rested its

[5] 236 F.2d at 749.

[6] Id. at 750.

[7] In fact, Judge Miller dissented on the ground that the replies were enough to make the accusations admissible. Id. at 752.

[8] For example, in Massachusetts the accusations will not be admissible if the accused remains silent, but they will be admitted if the accused makes an equivocal reply. Commonwealth v. Hebert, 264 Mass. 571, 163 N.E. 189,192 (1982). See also, State v. Thorne, 43 Wash.2d 47, 260 P.2d 331,338 (1953).

[9] 79 Neb. 513, 113 N.W. 130 (1907).

decision on its interpretation of the equivocal replies[10] of the defendant.[11] In so interpreting the defendant's replies, the court considered the fact of arrest, but it also considered other factors. Thus, even though Nebraska is often counted among those jurisdictions which hold that the fact of arrest is controlling, the rule here may be to the contrary.[12]

It is suggested that an arrested accused's equivocal replies to accusations against him should not be interpreted in the light of all the circumstances until it has been determined that the circumstance of arrest should not be controlling. This kind of approach would meet the issue of arrest head-on and would probably lead to a clearer statement of the law.

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[10] "O'Hearn was asked by a police captain if he wanted to make any statement in regard to [the accusation]. He said he did not; he would make his statement at the proper time, or that he would stand trial and tell his story then, as the witnesses variously testify." Id. at 521, 113 N.W. at 133.

[11] ". . . Under such circumstances, taking into consideration the fact that the defendant was under arrest, . . . the fact that the defendant reserved his statement until some future time is far from giving countenance to the idea that he thereby assented to the statement which had been read in his hearing. So far from giving color to the idea of assent, it rather conveys to an unprejudiced mind the idea of dissent and the intention to tell the true facts himself." Id. at 522, 113 N.W. at 134.

[12] In 1934 the Nebraska court said: "In the case of *O'Hearn v. State*, . . . it was held that the test of admissibility of statements, made in the presence of one accused of crime who remains silent, is whether the time, place, and circumstances surrounding the transaction are such as to lead to the inference that the accused, by his silence, consented to the truth of the statements." Vinciquerra v. State, 127 Neb. 541,542, 256 N.W. 78 (1934). The other Nebraska cases which touch on this issue are: Musfelt v. State, 64 Neb. 445,448, 90 N.W. 237,238 (1902), where the court noted that the defendant was not under restraint; and Stagemeyer v. State, 133 Neb. 9,25, 273 N.W. 824,832 (1937), in which the court merely noted that an accused's admissions must be "accomplished in harmony with the principles laid down by this court in *O'Hearn v. State*. . . ."