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Comments

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COMMENTS

EVIDENCE—ADMISSIBILITY OF HEARSAY—A COMPARISON OF SOME OF THE UNIFORM RULES OF EVIDENCE AND PENNSYLVANIA LAW.

Years of demand for reform of the rules of evidence brought about, in 1942, the American Law Institute's Model Code of Evidence.[1] While the famed Restatements of the Institute aimed, as their title indicates, at merely restating the extant law, the Model Code assumed the broader task of law revision. Although hailed by academicians, the Model Code was nevertheless virtually ignored by the courts and legislatures; no state enacted it and few courts cited it as authority. The failure of the Model Code to gain acceptance has been largely attributed to its drastic departure from the current law of evidence, especially in its ultra-radical hearsay provisions. In 1949, the National Conference of Commissioners on Uniform State Laws stepped into the picture by undertaking to formulate a code of evidence with the by then moribund Model Code as a basis. With the reason for that proposed legislation's unhappy reception fresh in mind, the Conference set about to draft with a conservative pen. The Conference and the American Bar Association approved the Rules in 1953, and the American Law Institute a year later. They have also received the benediction of the Pennsylvania Bar Association's Committee on Judicial Administration.

This Comment will compare the exceptions to the hearsay rule embodied in the uniform Rules of Evidence, Rule 63(1) through Rule 63(13), with their Pennsylvania counterparts in order to establish what salient differences and/or similarities exist between each. Neither the relative merits nor the historical background of the two sets of rules under comparison are within the scope of this Comment.[2]

1. See, generally, MODEL CODE OF EVIDENCE pp. vii-xvi (1942).

2. For an excellent, highly readable treatise on the hearsay rule and its exceptions, at the same time both scholarly and concise (with occasional references to the Uniform Rules), the reader is urged to consult MCCORMICK, EVIDENCE § 223-305 (1954). The merits and failings of the hearsay exceptions of the Uniform Rules *vis à vis* those exceptions currently in use which they purport to replace have been dealt with in a number of extremely useful law review articles. Falknor, *The Hearsay Rule and Its Exceptions,* 2 U.C.L.A.L. REV. 43 (1954), is of singular value on this point and deserves especial note. See Donnelly, *The Hearsay Rule and Its Exceptions,* 40 MINN. L. REV. 455 (1956); McCormick, *Some High Lights of the Uniform Evidence Rules,* 33 TEXAS L. REV. 599 (1955); McCormick, *Symposium on the Uniform Rules, Hearsay,* 10 RUTGERS L. REV. 620 (1956); Powers, *The North Carolina Hearsay Rule and the Uniform Rules of Evidence,* 34 N.C.L. REV. 171 (1956); Wright,

I.
HEARSAY EXCEPTIONS.

A.
Previous Statements of Persons Present and Subject to Cross Examination.

Rule 63(1): A statement previously made by a person who is present at the hearing and available for cross examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness.

Pennsylvania, in accord with the majority of jurisdictions, rejects this view and holds that previous statements of persons, whether or not present at the hearing and available for cross examination, are nonetheless inadmissible as substantive evidence, unless the person is a party to the suit and the declaration meets the requisites for submission into evidence as an admission.[3] Translated into actual courtroom procedure, what this ordinarily means is that whenever prior inconsistent statements are admitted to impeach a witness or prior consistent statements are admitted to rehabilitate an impeached witness, such statements may not be received by the jury as proof of the truth of the matters asserted, but only for the purpose of impeachment or rehabilitation.[4] This distinction compels the time-honored courtroom ritual of judicial instruction to the jury that such evidence may be considered for one purpose (to determine the credibility of the witness) but not for another (to determine the truth of the matter asserted). Rule 63(1) allows such evidence to be considered as substantive

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Uniform Rules and Hearsay, 26 U. CIN. L. REV. 575 (1957); Note, 31 N.Y.U.L. REV. 1100 (1956); Note, 49 NW. U.L. REV. 481 (1954). For guides to the Pennsylvania law on exceptions to the hearsay rule, consult 1 HENRY, PENNSYLVANIA EVIDENCE, c. vii (1949). Recent law review material of interest on the various exceptions will be cited *infra.*

The following subsections have not been discussed in this Comment: 63(2) (provides that affidavits are exceptionally admissible "to the extent admissible by the statutes of this state"); 63(11) (provides that "a statement by a voter concerning his qualifications to vote or the fact or content of his vote" is admissible; no Pennsylvania cases have been found which in any way touch upon this point); 63(13) (the Comment to this subsection states that it "embodies the substance of the Uniform Business Records as Evidence Act" which is in force in Pennsylvania, PA. STAT. ANN. tit. 28 § 91b (1957 Supp.).

3. Stiegelman v. Ackman, 351 Pa. 592, 41 A.2d 697 (1949); Dampman v. Pennsylvania R.R., 166 Pa. 520, 31 A.2d 244 (1895); Commonwealth v. Smith, 178 Pa. Super. 251, 115 A.2d 782 (1955); Herr v. Erb, 163 Pa. Super. 430, 62 A.2d 75 (1948); Commonwealth v. Blose, 160 Pa. Super. 165, 50 A.2d 742 (1947). Although prior inconsistent statements are admissible to impeach, and prior consistent statements to corroborate, a witness whose credibility has been attacked in certain ways, neither are, of course, hearsay since they are not offered as substantive evidence, *i.e.,* as proof of the truth of the matter asserted. See 1, 2 HENRY, PENNSYLVANIA EVIDENCE, §§ 10, 801 (1953); MCCORMICK, EVIDENCE, § 39 (1954).

4. See note 3, *supra.*

by the jury, which would seem no more than a belated recognition of what has probably been a long-standing jury practice anyway.[5] Rule 63(1) would effect additional change in Pennsylvania law in allowing into evidence alleged statements which are not prior "consistent" or 'inconsistent" (but merely prior) even though the alleged declarant on cross examination denies having made them, and in allowing a case to be made out when the only evidence on a material matter is the witness's prior statements.

B.

Depositions and Prior Testimony.

> Rule 63(3): Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial or another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered.

Rule 63(3)(a) conflicts with the Pennsylvania rule in that it does not require that the deponent be unavailable as a witness for the deposition to be used at the trial of the action in which the deposition was taken.[6]

Rule 63(3)(b) differs from the applicable Pennsylvania statutory law which provides that notes of evidence given at a former trial may be received into evidence only in subsequent litigation between "the same parties and involving the same subject-matter as that upon which such witness was so examined."[7]

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5. See 3 WIGMORE, EVIDENCE § 1018 (3d ed. 1940).

6. PA. R. CIV. P. 4020(a)(3) requires, for such use of a deposition, that the witness be dead, over 100 miles away from the place of trial, outside of the Commonwealth, unable to testify because of age, sickness, infirmity or imprisonment, or that the party offering the deposition be unable to procure the attendance of the witness by subpoena, or that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. A constitutional difficulty may arise should this section be applied in a criminal case in Pennsylvania. See PA. CONST. art. 1, § 9 ("In all criminal prosecutions the accused hath a right . . . to meet the witnesses face to face . . ."; 3 VILL. L. REV. 95 (1957-58).

7. PA. STAT. ANN. tit. 28, § 327 (1930). See 1 HENRY, PENNSYLVANIA EVIDENCE §§ 482, 483, 487 (1953).

C.

Contemporaneous Statements and Statements Admissible on Ground of Necessity

Rule 63(4): A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception, or (c) if the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action.

Rule 63(4)(a) is similar to the Pennsylvania res gestae exception to the hearsay rule. Pennsylvania decision, however, have indicated that in order for a statement to be exceptionally admitted as part of the res gestae, it must, among other things,[8] have been made while the declarant was in an excited state.[9] Rule 63(4)(a), on the other hand, requires only that the statement be made while the declarant is perceiving the occurrence; there is no requirement that the utterance be an excited one.

Thus it would seem that the adoption in Pennsylvania of the exception embodied in Rule 63(4)(a) would mean new law. The problem of whether utterances that are made simultaneously with the perception but by an

8. In BROWN, PENNSYLVANIA EVIDENCE p. 168 (1949), the res gestae exception is defined "in its broad sense" and "in its narrow sense". The former is said to consist of ". . . all those incidents of a fact directly or collaterally in issue, which illustrate its character with sufficient probative force to warrant their being admitted into evidence as proof of the existence or character of the fact in question." The latter is said to consist of ". . . spontaneous declarations arising out of a particular occurrence, which explain or qualify it, and which are made under the stimulus of the excitement produced by the event, while the reflective powers are in abeyance; so that, under the circumstances, the manufacture of self-serving declarations is unlikely". Rule 63(4)(a), as well as Rule 63(4)(b) discussed *infra*, deals with this latter type of res gestae. See also 1 HENRY, PENNSYLVANIA EVIDENCE § 466 (1953). As to the legal validity of grouping the latter as well as the former under the heading of res gestae, see Trouser Corp. v. Goodman & Thiese, Inc., 153 F.2d 284, 287 n.4 (3d Cir. 1946). See Hardman, *Spontaneous Declarations (Res Gestae)*, 54 W. VA. L. REV. 93 (1952), which is of interest, though it emphasizes West Virginia cases.

9. Haas v. Kasnot, 371 Pa. 580, 583-584, 92 A.2d 171, 173 (1952) ("In short, [hearsay statements admitted under the res gestae rule] must be, not the narration or attempted explanation of a past occurrence, but in the nature of an emotional, impulsive outburst made under the spell of excitement or shock caused by the occurrence to which they relate and uttered before the processes of the intellect have had opportunity to come into play. So tested, it would seem clear that the alleged declaration by Mike should not have been admitted in evidence. . . . There was no testimony to show that he was injured, excited or in a state of either physical or mental shock."); Allen v. Mack, 345 Pa. 407, 410, 28 A.2d 783, 785 (1942) ("There is nothing in this record to indicate that the statement of Prattis was made while his mind was under the control of any emotion or shock caused by the occurrence he was talking about."). See also Commonwealth v. Noble, 371 Pa. 138, 88 A.2d 760 (1952); Brood St. Trust Co. v. Heyl, 128 Pa. Super. 65, 193 Atl. 397 (1937).

unexcited declarant are admissible as res gestae in Pennsylvania has been dealt with only peripherally by the courts, with no definitive holding one way or the other. It has been observed,[10] in regard to the treatment by the courts of spontaneous statements made by non-startled declarants, that the failure of the courts to analyze the problem makes the examination of the cases difficult since the courts seldom make explicit in a close case whether they regard the declarant as calm or startled; and the only clues of the declarant's state of mind in the reports are normally in the form of the statement and, to some degree, the circumstances under which it is made. Pennsylvania appellate courts share this failing. However, a few decisions can be found that touch the problem. In *Trouser Corp. v. Goodman Theise, Inc.*,[11] an action for damages to property caused by water leakage from a filter on the premises under defendant's exclusive control, a statement was made by an employee of defendant, while water was still running, to witnesses for plaintiff that the leakage was caused by removal of a filter which had not been replaced. The court, while disposing of the evidentiary problem on other grounds, concluded on the basis of a review of Pennsylvania decisions, that the statement would not be admissible as res gestae under the Pennsylvania rule. It is apparent from the decision that the court felt that the statement, although made ". . . at the time . . . the escaping water was still dripping, so the 'thing done' was still in the process of doing," was, however, not made by an excited declarant and therefore inadmissible. *Yoffee v. Pennsylvania Power & Light Co.*[12] presented an opportunity for an appellate court ruling on this point. The Common Pleas Court of Dauphin County[13] allowed, on cross-examination, as part of the res gestae, one of the witnesses of the plaintiff to testify that he made the remark that the deceased plaintiff's airplane, before it crashed in to defendant's power lines, was flying low. Unfortunately, plaintiff objected on the ground that such statement was inadmissible opinion (the trial court found it was not), instead of objecting on the ground that, although the statement was a spontaneous one, it was not made while declarant was in a state of excitement. The case was reversed on other grounds with no discussion of the hearsay point.[14]

The Pennsylvania appellate decision most apposite is *Shadowski v. Pittsburgh Ry.*,[15] an action against a street railway company to recover for personal injuries to a child, in which testimony by a witness who had seen the car rapidly approaching the child, that he made the remark, "look at that damn fool, he will run over that little girl up there," was held not to

10. Note, 46 COLUM. L. REV. 430, 432 (1946).
11. 153 F.2d 284, 287 (3d Cir. 1946).
12. 385 Pa. 520, 123 A.2d 636 (1956).
13. 67 Dauph. 349 (C.P., Pa. 1955).
14. It should be noted that it appears to be well settled, although there are no Pennsylvania cases on the point, that a witness's declarations of his own previous, unsworn statements are inadmissible as hearsay. See Ford v. Louisville & N. R. Co., 183 S.W.2d 137, 139 (Mo. 1944).
15. 226 Pa. 537, 75 Atl. 730 (1910).

be admissible as part of the res gestae. Unfortunately, the court did not even discuss the fact that the declarant was apparently not in an excited state at the time.

Rule 63(4)(b) is also similar to the Pennsylvania res gestae exception to the hearsay rule. At first blush, the question here would appear to be whether the Pennsylvania courts would allow into evidence declarations from an excited declarant which were not made contemporaneously with the perception of the occurrence. The answer, clearly, is yes, provided, however, that the time lapse between the perception and the occurrence is a reasonable one.[16] It is this proviso that distinguishes the Pennsylvania rule from that of Rule 63(4)(b) which, theoretically at least, would admit an utterance, so long as it was made by an excited declarant, no matter how long after the perception of the occurrence it was made. In *Allen v. Mack*[17] the court notes:

> "a res gestae declaration may be defined as a spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person has just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, *and this declaration must be made so near the occurrence both in time and place* as to exclude the likelihood of its having emanated in whole or in part from his reflective faculties. In a res gestae declaration the exciting event speaks through the impulsive words of a participator or onlooker. It is in a psychological sense a part of the act itself. The apparent condition of the declarant's mind when the declaration is made is the test of the latter's admissibility as a part of the res gestae. To make the declaration admissible the state of the declarant's mind as induced by the shock of the occurrence must be such as to integrate his spontaneous declaration exclusively with the occurrence itself."

In *Commonwealth v. Stallone*[18] the court discussed the time lapse factor in spontaneous declarations in language that has been often quoted in subsequent Pennsylvania decisions:

> "Although the question of time between the occurrence and the declarations is an important one, it is not conclusive. Under particular circumstances the res gestae may extend over a considerable period of time, and the criterion is whether the declarations are made under such circumstances as will raise a reasonable presumption that they were spontaneous utterances created by the transaction itself and so soon thereafter as to exclude the presumption of premeditation and

16. See Rich Hill Coal Co. v. Bashore, 334 Pa. 449, 7 A.2d 302 (1939); Eby v. Travelers' Ins. Co., 258 Pa. 525, 102 Atl. 209 (1917).
17. 345 Pa. 407, 410, 28 A.2d 783, 784 (1942).
18. 281 Pa. 41, 45, 126 Atl. 56, 58 (1924).

> design. No fixed measure of time or distance from the main occurrence can be established as a rule to determine what shall be part of the res gestae. Each case must necessarily depend on its own circumstances to determine whether the facts offered are really part of the same continuous transactions."

Analysis of the cases on this point is made difficult by the fact that the courts are probably a great deal more liberal in admission of hearsay as part of the res gestae in workmen's compensation cases than in others, especially criminal cases.[19]

It is difficult, if not impossible, in analyzing the cases to discover if there are any Pennsylvania cases in accord with the literal language of 63(4)(b) (*i.e.*, that it does not matter how long after the occurrence the declaration is made so long as the declarant is excited because of it). Although the courts when basing their decisions on the fact that the declaration was made too long after the perception of the occurrence to be admissible as part of the res gestae, seem really to mean that the element of excitement had disappeared, they do not specifically say so. We do not know, therefore, whether the basis of these decisions is merely that some magic time limit has passed in which the statement must be made to be admissible, or that the declarant was no longer excited when the statement was made (with the "unreasonable time" phraseology merely indicating that the court felt a "unreasonable time to remain excited" had passed). At any rate, under Rule 63(4)(b) it would seem that the judge would find the declarant to have been excited only if the statement were made within a "reasonable time to remain excited" after the occurrence, and the question may well be said to be moot.

While research reveals no Pennsylvainia cases which deal directly with the specific question posed by Rule 63(4)(c), *viz.*, whether or not hearsay testimony should be admitted into evidence on the mere grounds of unavailability of the declarant as a witness, it seems quite clear that no Pennsylvania court, regardless how trustworthy the testimony and stringent the safeguards, would permit such a liberal exception to the hearsay rule.[20]

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19. *Compare* Broad St. Trust Co. v. Heyl, 128 Pa. Super. 65, 193 Atl. 397 (1937) (statements made within 20 or 25 minutes after the occurrence were admissible) *with* Commonwealth v. Noble, 371 Pa. 138, 88 A.2d 760 (1952) (statements likely made after at least half an hour had elapsed were not admissible).

20. See Jackson v. Pennsylvania R.R., 112 Pa. Super. 535, 172 Atl. 20 (1934); Fowler v. Borough of Jersey Shore, 17 Pa. Super. 366 (1901); Hogg v. Wilkins, 1 Grant 67 (Pa. 1854). The Comment to Rule 63(4) states that "clause (c) is drafted so as to indicate an attitude of reluctance and require most careful scrutiny in admitting hearsay statements under its provisions. The fact remains that there is a vital need for a provision such as this to prevent miscarriage of justice resulting from the arbitrary exclusion of evidence which is worthy of consideration, when it is the best evidence available. 'Unavailability' is carefully defined in Rule 62 so as to give assurance against the planned or fraudulent absence of the declarant."

D.

Dying Declarations.

Rule 63(5): A statement by a person unavailable as a witness because of his death if the judge finds that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery.

There are two important distinctions between the rule of this section and that of Pennsylvania in regard to the admissibility of dying declarations. Firstly, Pennsylvania allows dying declarations to be received into evidence only in criminal prosecutions for homicide,[21] while, under this rule, such declarations could be received in all criminal cases and in civil cases as well. Secondly, Pennsylvania allows into evidence only those dying declarations which relate to the facts and circumstances leading up to or causing the death of declarant,[22] while this rule would admit a dying declaration to be admitted which is relevant to any issue in litigation.

E.

Confessions.

Rule 63(6): In a criminal proceeding as against the accused, a previous statement by him relative to the offence charged if, and only if, the judge finds that the accused when making the statement was conscious and was capable of understanding what he said and did, and that he was not induced to make the statement (a) under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (b) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same.

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21. See Commonwealth v. Knable, 369 Pa. 171, 85 A.2d 114 (1952) (concisely covering the Pennsylvania law on dying declarations). In Commonwealth v. Antonini, 165 Pa. Super. 501, 504, 69 A.2d 436, 438 (1949), a criminal prosecution for making false and untrue entries in a tax ledger of the City of Philadelphia with intent to defraud the Commonwealth, the prosecution submitted into evidence the suicide note of a co-conspirator which stated that defendant had participated in the embezzlement. A new trial was granted by the trial court on the question of law raised by the admission of this evidence. The Superior Court affirmed, stating that the suicide note "was not admissible as a dying declaration, for, whether logically or not, dying declarations are received in evidence *only when made by the victim of a homicide* for which the defendant is on trial." See also Friedman v. Railroad Co., 7 Phila. 203 (Dist. Ct. Pa. 1875).

22. See Commonwealth v. Knable, 369 Pa. 171, 175, 85 A.2d 114, 116 (1952); Commonwealth v. Spahr, 211 Pa. 542, 60 Atl. 1084 (1905).

The distinction between an admission and a confession in criminal cases[23] has often loomed large in importance when an appeal from conviction is grounded on the charge that the inculpatory statement of the accused submitted into evidence by the prosecution was coerced. For it has not been an infrequent holding that although coerced admissions may properly be received into evidence, it is error to so admit a coerced confession.[24] On appeal, therefore, in those jurisdictions which effect this distinction, the slot into which the involuntary declaration falls becomes crucial. Furthermore, it is often held that a confession, before being submitted to the jury, must be investigated by the judge to determine whether it meets certain established prerequisites to admissibility, while an admission is subjected to no such safeguards.[25] It is clear that the language of Rule 63(6) defining a confession (". . . a previous statement by [the accused] . . . relative to the offence charged . . . .") is broad enough to encompass admissions as well as the traditional confession; both, therefore, under the Uniform Rules, are ringed with the same pre-admission safeguards. To what extent this aspect of Rule 63(6) would work a change in Pennsylvania law is difficult to surmise because of the few, if any, Pennsylvania decisions which state what investigation by the court is necessary to establish the trustworthiness of admissions before they may be submitted to the jury in criminal cases[26] and whether a coerced admission stands before an appellate tribunal in any more acceptable light than a coerced confession.[27]

23. See Commonwealth v. Maloney, 365 Pa. 1, 9, 73 A.2d 707, 711 (1950) (confession is defined, citing Wigmore, as "one species of Admission, namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some fact essential to the charge," the court going on to note that "an admission, not of guilt, but tending merely, in connection with other facts, to establish guilt, does not amount to a confession.") Commonwealth v. Elliott, 292 Pa. 16, 20, 140 Atl. 537, 538-539 (1928) ("an 'admission' as applied to criminal cases has been defined as a statement by defendant of a fact or facts pertinent to the issues, and tending, in connection with proof of other facts or circumstances, to prove the guilt, . . . but which is, of itself, insufficient to authorize conviction; it is a circumstance which requires the aid of further testimony to generate a reasonable conclusion of guilt, . . . voluntary statements made by a defendant, although they may not amount to a confession of guilt, can be used against him if they tend to explain issues on trial . . . .") See also Commonwealth v. Price, 67 York L.J. 21 (Pa. 1953).

24. See WHARTON, CRIMINAL EVIDENCE §§ 592, 646 (11th ed. 1953).

25. See State v. Johnson, 69 Ariz. 203, 211 P.2d 469 (1949); People v. Sambrano, 32 Cal. App. 2d 200, 91 P.2d 221 (1939); Commonwealth v. Haywood, 247 Mass. 16, 141 N.E. 571 (1923).

26. It would seem that it could be inferred from one Pennsylvania criminal case that, under certain circumstances, precedent proof that the admission was voluntary is necessary. In Commonwealth v. Kutler, 93 Pa. Super. 119, 122, (1928), the court, in upholding a conviction based on an admission made by defendant which was admitted into evidence with no proof that it was made voluntarily, observed that "the appellant contends that the alleged statement of Kutler to the postal inspector was inadmissible because there was no precedent proof that it was made voluntarily. . . . The defendant was not under arrest. . . . There was no evidence that any promise was made or inducement offered . . . ."

27. It would seem safe to say, however, in regard to this latter aspect of the problem, despite the paucity of Pennsylvania cases which deal lucidly with the point, that a coerced admission would prove grounds for reversal of a conviction in Pennsylvania. See Commonwealth v. Turner, 367 Pa. 403, 80 A.2d 708 (1951); Common-

Rule 63(6) provides that a confession may be admitted into evidence only if the judge makes certain preliminary findings as to its trustworthiness. This differs from the Pennsylvania practice as concisely set forth in 1 HENRY, PENNSYLVANIA EVIDENCE § 184 (1953), where it is stated that the question of the voluntariness of the confession must be determined in the first instance by the court ". . . if a confession offered is alleged to have been involuntarily made . . . ." The Commonwealth's witnesses to establish the confession are thereupon heard subject to defendant's cross examination. Should the judge then decide that the confession was obtained improperly he should exclude it, otherwise it should be submitted into evidence. Defendant may then give evidence attacking the voluntariness of the confession and that issue then becomes one for the jury.[28]

One area in which there seems, at least on the surface, to be a possibility of a clash between the Uniform Rules and Pennsylvania law on this subject is the prohibition in 63(6)(a) against statements received ". . . by prolonged interrogation under such circumstances as to render the statement involuntary . . . ." While it goes without saying that no Pennsylvania appellate court would fail to reverse a conviction based on an involuntary statement, the difficulty arises in determining from case to case whether the prolonged interrogation has been conducted under such circumstances as to render it involuntary. It is clear, at least, in Pennsylvania, that prolonged interrogations as such not only provide no grounds for reversal,[29] but have even elicited judicial sanction.[30]

Two other aspects of Rule 63(6) worth noting, though there do not seem to be any Pennsylvania decisions on point, are the prohibitions against allowing into evidence a confession of the accused induced ". . . under compulsion or by infliction or threats of infliction of suffering upon him *or another* . . . ." (Emphasis added). The Comment to this rule notes that "threats to a member of [the accused's] . . . family may render the confession involuntary." Rule 63(6) also interdicts confessions obtained through infliction or threats of infliction upon the accused or another of suffering in the generic, without qualification that it be physical suffering. The exertion of mental pressure upon the accused, it seems, could be grounds for excluding a confession or reversing a conviction under the rules.

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wealth v. Shupp, 365 Pa. 439, 75 A.2d 587 (1950); Commonwealth v. Smith, 185 Pa. 553, 40 Atl. 73 (1898); Commonwealth v. Burke, 64 Dauph. 304 (C.P., Pa. 1953).

28. See Commonwealth v. Jones, 341 Pa. 541, 19 A.2d 389 (1941). Pennsylvania is in accord with the Rules that such preliminary investigation should be conducted away from the jury. Commonwealth v. Weiss, 284 Pa. 105, 130 Atl. 403 (1925).

29. Commonwealth v. Shupp, 365 Pa. 439, 75 A.2d 587 (1950); Commonwealth v. Jones, 297 Pa. 326, 146 Atl. 905 (1929).

30. Commonwealth v. Agoston, 364 Pa. 464, 72 A.2d 575 (1950). *But see* Turner v. Commonwealth, 338 U.S. 62 (1949).

F.

Admissions By Parties.

Rule 63(7): As against himself a statement by a person who is a party to the action in his individual or a representative capacity and if the latter, who was acting in such representative capacity in making the statement.

This rule, on the whole, is similar to the Pennsylvania view.[31] Where the admission is made by "a person who is a party to the action in . . . a representative capacity . . . [while] . . . acting in such representative capacity in making the statement" Pennsylvania would agree that it is admissible against the real party in interest.[32] Furthermore, Pennsylvania and the Uniform Rules are in accord in allowing the party's statements to be admitted against him even when not based on his personal knowledge,[33] though in Pennsylvania this would effect the weight to be given such statements.

G.

Authorized and Adoptive Admissions.

Rule 63(8): As against a party, a statement (a) by a person authorized by the party to make a statement or statements for him concerning the subject of the statement, or (b) of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth.

The Pennsylvania view would seem to agree with clause (a) of this rule. Pennsylvania law on the subject generally is concisely enunciated in the following language from *Campbell v. Murphy Co.*,[34] which also embodies the rule of clause (a):

"The law in this state on the subject of admissions by an agent is laid down by Mr. Justice Sharswood in the case of Pa. R. Co. v. Books, 57 Pa. 339, 343, 98 Am. Dec. 229, as follows: 'The rule is well settled, that what an agent says while acting within the scope of his authority, is admissible against his principal, as part of the

31. See Zank v. West Penn Power Co., 169 Pa. Super. 164, 82 A.2d 554 (1951); Cupryk v. Ruthenian Union, 66 Pa. Super. 595 (1917); Berkeley v. Maurer, 34 Pa. Super. 363 (1907). See, generally, Morgan, *Admissions*, 1 U.C.L.A.L. REV. 18 (1953).

32. Anderson v. Washabaugh, 43 Pa. 115 (1862); Lobb v. Lobb, 26 Pa. 327 (1856); Reagan v. Grim, 13 Pa. 508 (1850). See Mertz v. Detwiler, 8 W. & S. 376 (Pa. 1845) (admissions of a *prochein amy* made *before* the writ was purchased were held to be inadmissible on behalf of the defendant).

33. Salvitti v. Throppe, 343 Pa. 642, 23 A.2d 445 (1942). *But see* Bredder v. Leidenfrost, 134 F. Supp. 487 (M.D. Pa. 1955); Lombard & S. Street Pass. Ry. Co. v. Christian, 124 Pa. 114, 16 Atl. 628 (1889). See also Folk v. Schaeffer, 180 Pa. 613, 37 Atl. 104 (1897).

34. 122 Pa. Super. 342, 347, 186 Atl. 269, 271 (1936).

res gestae, but not statements made by him at any other time. Shelhamer v. Thomas, 7 Serg. & R. 106; Levering v. Rittenhouse, 4 Whart. 130; Jordan v. Stewart, 11 Harris (23 Pa.) 244. The admissions of an agent, not made at the time of the transaction, but subsequently, are not evidence; thus the letters of an agent to his principal, containing a narration of the transaction in which he had been employed are not admissible against the principal. Hough v. Doyle, 4 Rawl. 291; Clark v. Baker, 2 Whart. 340.' Again, in Oil City Fuel Supply Co. v. Boundy, 122 Pa. 449, 460, 15 A. 865, 866, by Hand, J., the Supreme Court says: 'In order to warrant the proof of admissions by an agent, one or more of the following facts must exist: It must appear that the agent was specially authorized to make them, or his powers must have been such as to constitute him the general representative of the principal, having the management of the entire business; or the admissions must have formed part of the consideration of a contract, or, if they are non-contractual, they must have been part of the res gestae.' "

Clause (b) would also seem to be well in agreement with the Pennsylvania view.[35]

H.

Vicarious Admissions.

Rule 63(9): As against a party, a statement which would be admissible if made by the declarant at the hearing if (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or (b) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination, or (c) one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability.

Clause (a) of this rule would seem somewhat more liberal than the Pennsylvania view which would only admit into evidence an agent's admissions against his principal if, as noted in the quote from the *Murphy* case *supra,* the agent was specially authorized to make the statements comprising the admissions, or the agent was the general representative of the

35. See Burton v. Horn & Hardart Baking Co., 371 Pa. 60, 88 A.2d 873 (1952); Commonwealth v. Brown, 264 Pa. 85, 107 Atl. 676 (1919); Scheel v. Shaw, 252 Pa. 451, 97 Atl. 685 (1916) (dicta on ratification); McClenkan v. McMillan, 6 Pa. 366 (1847); Smith v. American Stores, Inc., 156 Pa. Super. 375, 40 A.2d 696 (1945); Commonwealth v. Coyne, 115 Pa. Super. 23, 175 Atl. 291 (1934). See also Rucker, *The Twilight Zone of Hearsay,* 9 VAND. L. REV. 453 (1956).

principal having the management of the entire business, or the admissions made by the agent formed part of the consideration of a contract or were part of the res gestae.[36] No Pennsylvania case has been found which would admit into evidence a statement by an agent as an admission against his principal merely because it concerned a matter within the scope of the agency or employment of the agent.

Clause (b) of Rule 63(9) is in substantial agreement with the Pennsylvania law on the subject,[37] although the language of the rule that all state-
the Pennsylvania rule.[38]
ments "relative to the plan" are admissible would seem more liberal than

Pennsylvania law has long been in accord with clause (c) of Rule 63(9), which applies, ordinarily, to those situations in which a principal-obligor had made an admission of his liability which the debtor seeks to introduce into evidence in his suit against the surety.[39]

I.

Declarations Against Interest.

> Rule 63(10): Subject to the limitations of exceptions (6), a statement which the judge finds was at the time of the assertions so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true.

While under this rule it is not necessary that the declarant be unavailable in order that his declarations against interest be received into

36. See Boyce, *Rule 63(9)(a) of the Uniform Rules of Evidence — A Vector Analysis,* 5 UTAH L. REV. 311 (1957). Insofar as the res gestae aspect of the Pennsylvania rule is concerned, McCormick notes that "the early texts and cases used as analogies the doctrine of the master's substantive responsibility for the acts of the agent, and the notion then prevalent in evidence law that words accompanying a relevant act are admissible as part of the *res gestae.* Thus they formulated the theory that the agent's statements could be received against the principal only when made at the time of, and in relation to, some act then being performed in the scope of the agent's duty. This rather clumsy theory finds reflection in some current opinions, where the fashion lingers of testing admissibility of the agent's statements by the test of 'res gestae'." MCCORMICK, EVIDENCE, § 244 (1954). It would seem clear that not even the res gestae part of the Pennsylvania rule approaches the liberality of admission allowed by clause (a). For an interesting coverage of vicarious admissions in general, see Lev, *The Law of Vicarious Admissions — An Estoppel,* 26 U. CIN. L. REV. 17 (1957).

37. Commonwealth v. Strauss, 89 Pa. Super. 82 (1926); Commonwealth v. Dibella, 72 Pa. Super. 360 (1919). See, generally, Levie, *Hearsay and Conspiracy,* 52 MICH. L. REV. 1159 (1954).

38. See Commonwealth v. Stambaugh, 22 Pa. Super. 386 (1903).

39. Morrell v. Adams Express Co., 1 Walk. 388 (Pa. 1877); Bachman v. Killinger, 55 Pa. 414 (1867); Commonwealth v. Kendig, 2 Pa. 448 (1846); Respublica v. Davis, 3 Yeates 128 (Pa. 1801). See Philadelphia v. Toner, 68 Pa. D. & C. 280 (C.P., Phila. 1949).

evidence, it would appear that in Pennsylvania the admission of such evidence seems ordinarily to have occurred in those cases in which the declarant was deceased,[40] although no Pennsylvania case had been found in which it is declared that the declarant must be dead for such evidence to be admitted. It is clear, however, that the unavailability of the declarant, at least, is a requisite in Pennsylvania for the admission into evidence of his declarations against interest.[41]

This rule would consider a declaration to be against the interest of the declarant which would subject him to civil or criminal liability, or render invalid a claim by him against another or render him an object of social disapproval. No Pennsylvania cases have been found which would exceptionally admit declarations against penal interest. While there are Pennsylvania decisions which might be construed to stand for the proposition that Pennsylvania is in accord with that part of Rule 63(10) which admits statements which would subject the declarant to civil liability or render a claim by him against another invalid, the question could well be raised as to whether or not the courts in those cases confused declarations against interest with admissions, and admitted the statements into evidence actually, although not nominally, under the latter exception.[42]

On the whole, Rule 63(10) would bring change to Pennsylvania law in greatly widening the concept of a declaration against interest from one restricted to statements against the declarant's proprietary or pecuniary interest,[43] to include those made against the wide area encompassed in what could be labelled his social interest.

J.

Statements of Physical or Mental Condition of Declarant.

Rule 63(12): Unless the judge finds it was made in bad faith, a statement of the declarant's (a) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant, or (b) previous symptoms, pain or

40. Taylor v. Gould, 57 Pa. 152 (1868). See Rudisill v. Cordes, 333 Pa. 544, 5 A.2d 217 (1939); Yentis v. Mills, 299 Pa. 25, 148 Atl. 909 (1930); King v. King, 281 Pa. 511, 127 Atl. 142 (1924); Caldwell v. Caldwell, 24 Pa. Super. 230 (1904). See generally, Morgan, *Declarations Against Interest*, 5 VAND. L. REV. 451 (1952).

41. It should be kept in mind, however, that statements of this type are often admissible into evidence under other exceptions to the hearsay rule should it be found that the declarant is available. For example, the statement might also meet the requisites for admissibility as an admission, prior inconsistent statement, or as part of the res gestae.

42. See Salvitti v. Throppe, 343 Pa. 642, 23 A.2d 445 (1942); Rudisill v. Cordes, 333 Pa. 544, 5 A.2d 217 (1939).

43. See 1 HENRY, PENNSYLVANIA EVIDENCE § 446 (1953).

physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition.

The Comment to this rule notes that clause (a) is accepted today in most jurisdictions. Pennsylvania would seem to be substantially in accord with this majority view.[44] Pennsylvania, also, has long embraced the exception enunciated in clause (b).[45]

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44. Commonwealth v. Marhoefer, 375 Pa. 1, 99 A.2d 276 (1953); *In re* Kehr's Estate, 373 Pa. 473, 95 A.2d 647 (1953); *In re* Wenz's Estate, 345 Pa. 393, 29 A.2d 13 (1942); Commonwealth v. Marshall, 287 Pa. 512, 135 Atl. 301 (1926); Commonwealth v. Santos, 275 Pa. 515, 119 Atl. 596 (1923); Padden v. Ass'n Journeymen Plumbers, 168 Pa. Super. 511, 82 A.2d 327 (1951); *In re* Owen's Estate, 167 Pa. Super. 101, 14 A.2d 705 (1950); Cockcroft v. Metropolitan Life Ins. Co., 133 Pa. Super. 598, 3 A.2d 184 (1938); Moyer v. Frankford Crate Co., 133 Pa. Super. 323, 2 A.2d 587 (1938).

45. Ferne v. Chadderton, 375 Pa. 320, 100 A.2d 854 (1953); Caskie v. Coca-Cola Bottling Co., 373 Pa. 614, 96 A.2d 901 (1953); Freedman v. Mut. Life Ins. Co., 342 Pa. 404, 21 A.2d 81 (1941); Eby v. Travelers' Ins. Co., 258 Pa. 525, 102 Atl. 209 (1917); Lichtenwaller v. Laubach, 105 Pa. 366 (1864).