SILENCE AS HEARSAY

JUDSON F. FALKNOR †

“The term *hearsay*, said Pitt Taylor, “is used with reference to what is *done* or *written*, as well as to what is spoken; and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person.” ¹ Taylor’s definition is noteworthy in its express inclusion of conduct—“what is done”—the usual phrasing of the rule merely proscribing out-of-court “assertions”.² It is particularly noteworthy, because, while in stating the rule and in identifying the reasons for it, Taylor “in great part” avowedly followed Greenleaf, who closely followed Phillipps; neither Greenleaf nor Phillipps, in defining hearsay, condemned more than what was “written” or “spoken”.³

But in thus amplifying previous definitions of hearsay, Taylor was on solid ground. According to the prevailing doctrine then and now, the hearsay rule will exclude, except in a few situations, evidence of conduct, though non-verbal and non-assertive, if its relevancy depends upon inferences from the conduct to the belief of the actor to the fact believed ⁴ (unless, of course, it be evidence of a party’s conduct, offered against him). For example, when defendant’s defense in a criminal case is that another (say X) committed the crime,


¹ TAYLOR, EVIDENCE (8th ed. 1885) § 570.
² “The Hearsay rule, as accepted in our law, signifies a rule rejecting assertions, offered testimonially which have not been in some way subjected to the test of cross-examination.” ⁵ WIGMORE, EVIDENCE (3d ed. 1940) § 1362.
³ “The term ‘hearsay’ is used with reference to that which is written, as well as to that which is spoken; and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person.” ⁶ GREENLEAF, EVIDENCE (14th ed. 1883) § 99.

(192)
evidence that X fled is inadmissible. The logical usefulness of the evidence requires us to infer first that because X fled he believed himself guilty and second, that because he believed himself guilty, he was, in fact, guilty.

What of negative conduct, i.e., inaction? Particularly, what of silence, the failure to speak or write? Suppose, for instance, on an issue as to the quality of goods sold, it appearing that the particular goods were part of a larger lot, the remainder of which had been sold to other customers, the seller proposes to show that no complaints as to quality were received from these other customers. Is the offered evidence inadmissible hearsay? Or, suppose on an issue as to the service of a summons, it is proposed to be shown that the person alleged to have been served never mentioned the writ to the members of his immediate family. May the alleged service be negatived in this fashion against an objection invoking the hearsay rule?

In each of the supposed cases it is clear that the relevancy of the offered evidence depends upon inferences from the failure to speak to the belief of the silent individual as to the relevant fact (in the first illustration, that the goods sold were of satisfactory quality, in the second, that he had not been served) to the relevant fact itself.

Now, inaction, while of a negative sort, is, nevertheless, conduct, i.e. behavior, deportment. To be literally comprehensive, therefore, Taylor's definition should be enlarged to the point of embracing "what is not done", as well as "what is done". And, of course, failure to speak or to write, i.e. silence, is a variety of "what is not done".

Theoretically, then, evidence of silence when proposed as the basis of an inference to the belief of the silent individual, this belief to form the basis of a further inference to the fact believed, will run afoul of the hearsay rule. And such has been the holding in most of the cases where the hearsay objection has been raised.\(^5\) New York courts have said that it is not only "purely hearsay evidence"\(^6\) but "most mis-

\(^5\) In respect to conduct, the hearsay point often (probably more often than not) escapes counsel and, consequently, the court. "This variety of hearsay (conduct) does not appear to have received much attention in practice. Counsel probably are not alert to recognize as hearsay, evidence in the guise of ordinary mechanical action, and no doubt testimony as to personal conduct is often received without protest, which so far as the issue is concerned only amounts to a voucher as to a relevant fact." TREGGANIEN, THE LAW OF HEARSAY EVIDENCE (1915) 32. For example, in Foellner v. Perkins, 197 Wash. 462, 85 P. (2d) 1095 (1938), on an issue as to the making of a second modification of a contract for the sale of a hotel, proof in behalf of the defendant purchaser that, after the expiration of the first modification, she continued to act in accordance therewith, apparently went in without objection and was treated by the court as corroborative of the purchaser's testimony that the first modification agreement had been orally extended. For reference to a number of cases where evidence of silence (i.e., failure to give notice or make complaint) might have been objected to as hearsay, but apparently was not, see note 56 infra.

chievous evidence"; a Texas court has called it "pure hearsay" and because "negative in form", it has been considered by the North Carolina court to be "all the more incompetent".

However, before turning to the cases which deal specifically with silence as hearsay, it may be profitable to venture an estimate of the validity of the prevailing doctrine which extends the hearsay stigma to non-assertive conduct in general, because, as has already been noted, "silence" is merely a sort of conduct.

It is, of course, familiar doctrine, repeated here merely for the sake of continuity in the discussion, that the hearsay rule rests on "the belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test." "It is the experience of every court and every lawyer," said a great Western judge many years ago, "that cross-examination is the most powerful instrument known to the law in eliciting truth or in discovering error in statements made in chief, whether that error arise from mistaken judgment and careless observation and expression, or from a corrupt desire and intent to pervert the truth." The utility of an intelligent and carefully planned cross-examination lies in its efficacy in bringing to light deficiencies, first, in the witness' observation or in his opportunity or capacity for observation of the facts about which he testifies; second, in the quality of his present recollection of the impressions resulting from that observation; third, in his testimonial expression or narration as a faithful, accurate and complete reproduction of his present recollection; and finally, in the veracity of the witness, that is to say, his determination—at least his willingness and desire—to faithfully, accurately and completely communicate to the tribunal his present recollection.

In respect to an out-of-court assertion offered as proof of the truth of the matter asserted, danger may lie in any or all of these directions. Though the tenor of the declaration may imply otherwise, it is entirely possible that a cross-examination of the declarant would disclose that he either did not see or could not have seen the event to which the declaration relates; moreover, it is not impossible that at

10. 5 WIGMORE, EVIDENCE § 1367.
11. Dunbar, J., in State v. Eddon, 8 Wash. 292, 36 Pac. 139 (1894). Wigmore's appraisal has often been quoted: "It (cross-examination) is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 WIGMORE, EVIDENCE § 1367.
the time he made the declaration he had no reliable recollection of what he had seen. Then too, there is grave danger either of outright distortion or of incompleteness in such a second hand communication of the declarant's recollection to the tribunal; and finally, he may have been consciously lying.

On the other hand, non-assertive conduct, although its relevancy depends upon inferences from the conduct to the belief of the actor to the fact believed, is obviously entitled to more favorable appraisal than an assertive utterance. This is so because, by hypothesis, the actor by his conduct did not intend to express or convey an idea. Thus, the actor's veracity (or lack of it) is without relevancy to the trustworthiness of the evidence, and the lack of opportunity to cross-examine the actor becomes definitely less significant. For example, as already noted, evidence of flight of a third party offered in exculpation of the defendant in a criminal action has generally been excluded, the courts in these cases having been content, without very much discussion, to assimilate this conduct to an extra-judicial confession of the third party and thus to exclude it as "pure hearsay". Yet, less superficial treatment of the problem makes it quite clear that the flight evidence has considerably more to be said for it than the out-of-court confession. The confession is assertive, intended by the declarant to convey the idea of his guilt. Upon his veracity, therefore, depends the trustworthiness of the confession. But in the case of flight, nothing to the contrary appearing, it may safely be assumed that the actor fled, not to express or convey the idea of his guilt, but to escape detection and punishment. The conduct being non-assertive, the actor's veracity is not involved in a rational appraisal of the trustworthiness of the evidence.

Or, take one of Wigmore's illustrations: "If, on looking out of the window of a comfortable home, the persons on the highway are

12. Non-verbal conduct may, of course, be assertive in character. It will be so where it is consciously intended by the actor to express or convey an idea, as, for example, the sign language of the dumb or the pointing out of a person, place or thing for the purpose of identification. Then, too, there is probably always present the theoretical possibility that conduct apparently non-assertive may have been intended by the actor as assertive. For example, flight of a third person offered to be shown in exculpation of the defendant in a criminal prosecution may ordinarily be assumed to be non-assertive in character. Yet, there is present the possibility that it was intended by the third person to be assertive, viz., to cast suspicion upon himself. But these are unusual and exceptional situations and are intended to be excluded from the idea of "hearsay conduct" dealt with in this discussion.

13. Goodlet v. State, 135 Ala. 39, 33 So. 892 (1903); Kemp v. State, 89 Ala. 52, 7 So. 413 (1890); Owensby v. State, 82 Ala. 63, 2 So. 764 (1887); Levison v. State, 54 Ala. 520 (1875); Lindsey v. State, 18 Ala. App. 494, 93 So. 331 (1922); Terry v. State, 13 Ala. App. 115, 60 So. 370 (1915); People v. Mendez, 193 Cal. 39, 223 Pac. 65 (1924); State v. Menilla, 177 Iowa 283, 158 N. W. 645 (1916); State v. Piernot, 167 Iowa 353, 149 N. W. 446 (1914); State v. Jones, 80 N. C. 415 (1879); State v. White, 68 N. C. 158 (1872); State v. May, 15 N. C. 328 (1833); Crookham v. State, 5 W. Va. 510 (1871).
observed to be shuddering and turning up their ulster-collars, a natural inference is that the temperature without is extremely cold.” ¹⁴ But if proof of this circumstance were to be offered as evidence of the temperature outside, it would be excluded under the orthodox rule as “hearsay conduct”, and it is extremely likely that the excluding court would see a conclusive resemblance between the conduct and a statement by one of the persons on the highway that it was an extremely cold day. But here again, it is plain that there is a palpable and substantial difference. The travelers upon the highway, neither by their “shuddering” nor by “turning up their ulster-collars” are consciously intending to express or convey an idea. The shuddering is no doubt involuntary and a mere physical reaction, while the turning up of the collars is for the sake of protection against the inclemency. No question of veracity is involved.

Bear in mind, then, the traditional rationalization of the hearsay rule that assertions offered testimonially are not sufficiently trustworthy to be fit to be considered by the tribunal unless and until they have been put to the fire of cross-examination, so that error arising “from a corrupt desire and intention to pervert the truth”, as well as from deficiencies in observation, recollection and expression, may be exposed. Thus, there appears to be sufficient justification to have treated non-assertive conduct considerably more leniently than an affirmative utterance. The judicial treatment of the problem might easily have taken such a course, even to the point of treating its non-assertiveness as sufficient to generally admit evidence of such conduct, where it fairly appears that the actor had opportunity to observe and nothing affirmatively appears to cast substantial doubt upon his recollection. Had it done so one would probably not now consider such treatment at all irrational.

It is, therefore, not a little remarkable that an examination of the cases dealing with non-assertive conduct as hearsay fails to disclose a single instance where a court has noticed this quality of “non-assertiveness” and its significance. ¹⁵

¹⁴. 2 Wigmore, Evidence (3d ed. 1940) § 459.
¹⁵. In addition to the “flight” cases (see note 13 supra) and the “silence” cases (which are hereafter epitomized in the text), the cases examined follow, chronologically: Wright v. Tatham, 7 A. & E. 313, 112 Eng. Rep. R. 488 (Ex. 1837), aff’d, 5 Cl. & Fin. 670, 7 Eng. Rep. R. 559 (H. L. 1838) (on an issue of sanity, evidence of sending of letters, about matters of consequence, to testator, held inadmissible); Backhouse v. Jones, 6 Bing. N. C. 65, 133 Eng. Rep. R. 26 (1839) (on an issue of the commission of prior acts of bankruptcy, evidence that certain creditors of the bankrupt delivered up to the assignees goods received from the bankrupt before the fiat held inadmissible); Gresham Hotel Co. v. Manning, 1 Ir. R. C. L. 125 (1867) (in the trial of an action for obstruction of light to the windows of plaintiff’s hotel, evidence that since defendant raised his building several persons about to take rooms in the hotel objected to the insufficiency of the light and, on that ground, refused to take the rooms
This lack of judicial discrimination is particularly surprising in view of the fact that the point has been made by a number of eminent commentators. Wigmore, in discussing the applicability of the hearsay rule to non-assertive conduct, had this to say as early as 1904: "A possible objection is found in the hearsay rule, i. e. in looking to a person's conduct as evidencing the material cause of the conduct, are we not virtually receiving the person's hearsay assertion as to the cause? The hearsay rule excludes extra-judicial assertions only, i. e. deliberate utterances in terms affirming a fact . . . ; and, although in effect an inference from conduct may be the same in result as an inference from assertion, nevertheless, the two are distinct. Nor does the policy or spirit of the hearsay rule apply; for that policy is to test the assertions of persons regarded as witnesses, by learning the source of their knowledge and by exposing its elements of weakness and error, if possible; and where the evidence is not dealing with a person's assertion as deriving force from his personal character, knowledge, or experience, it is not within the scope of the policy of the hearsay rule. No doubt the line is sometimes hard to draw between conduct used as circumstantial evidence and assertion used testimo-

held inadmissible hearsay); Thompson v. Manhattan Ry. Co., 11 App. Div. 182, 42 N. Y. Supp. 896 (2d Dep't 1896) (on an issue whether plaintiff suffered an injury to the spine, evidence that her physician treated her for spinal injuries held inadmissible as hearsay); In re Hine, 68 Conn. 551, 37 Atl. 384 (1897) (on an issue of sanity, evidence that boys in the neighborhood made fun of the testatrix held inadmissible as hearsay); Stallings v. State, 29 Tex. App. 220, 63 S. W. 127 (1901) (prosecution for embezzlement; evidence that creditors of prosecuting witness made claim for payment, after defendant had justified his failure to remit by stating that he had paid these creditors, held inadmissible as hearsay); Wells v. State, 43 Tex. Cr. 451, 67 S. W. 1020 (1902) (evidence that husband of rape victim assaulted accused inadmissible when offered to show husband believed defendant was assailant); Brittain v. State, 52 Tex. Cr. 169, 105 S. W. 817 (1907) (evidence that third person picked out marked money which had been stolen from a large lot held hearsay); Murray v. State, 56 Tex. Cr. 438, 120 S. W. 437 (1909) (evidence of the manner in which a person whose sanity is in question was treated by his family, without evidence of the conduct of the alleged insane person under such treatment, held inadmissible as hearsay); Gillespie v. State, 73 Tex. Cr. 585, 166 S. W. 135 (1914) (on an issue of prior chastity in a seduction case, it appearing that on one occasion O was seen in prosecutrix's company, evidence that on the next day he requested those who saw him with her not to say anything about it held inadmissible hearsay); State v. Menilla, 177 Iowa 283, 158 N. W. 645 (1916) (refusal to instruct that if jury believed one T, shortly after the killing, had a revolver and cartridges, concealed them and thereafter denied that he had had them, these facts might be considered in determining who fired the fatal shots, held reversible error, though in the same case it was also held that evidence of flight was inadmissible hearsay; the rulings are obviously inconsistent); Pitner v. Shugart Bros., 150 Ga. 340, 105 S. E. 791 (1920) (on an issue of whether the operation of a cotton gin near a dwelling was a nuisance, evidence of increase in fire insurance rates held inadmissible; it is to be noted, however, that the conduct was apparently proposed to be evidenced by hearsay, viz., the out-of-court statement of an insurance agent); Ray v. State, 88 Tex. Cr. 196, 225 S. W. 523 (1920) (it appeared that defendant, a witness in his own behalf, had been indicted for, though acquitted of, theft from an express company; evidence that the express company compromised his claim for malicious prosecution held inadmissible as hearsay); People v. Bush, 300 Ill. 532, 133 N. E. 201 (1921) (evidence that
nially. Nevertheless, the difference is a real one. . . .” 16 Seligman’s comment in 1912 was penetrating and persuasive: “Can utterances alone be hearsay, and can all utterances be hearsay? As to the first part of this question, it is clear that non-verbal conduct might well be excluded; for example, waving a signal-flag or talking in sign-language is really one form of speech. On the other hand, some

an inmate of an institution, after a Wassermann test, was not segregated, offered in proof that the inmate did not have syphilis held inadmissible as hearsay); Powell v. State, 88 Tex. Cr. 367, 227 S. W. 188 (1921) (in prosecution of defendant, charged with theft of his grandmother’s cow which he admittedly sold, his defense being that she had authorized him to sell the cow, evidence that on her return home she demanded the cow and not the money from the purchaser held inadmissible as hearsay); Hansy v. State, 160 Ark. 229, 254 S. W. 691 (1923) (on an issue of whether a bank directed its agent to accept nothing but cash in payment of a draft held inadmissible as hearsay); Carpenter v. Asheville Power & Light Co., 191 N. C. 139, 131 S. E. 400 (1926) (on an issue as to damages in a wrongful death action, evidence of offer to deceased of employment with substantial salary held inadmissible as hearsay); McCurdy v. Pilibotte, 83 N. H. 143, 139 Atl. 367 (1927) (in an automobile accident case evidence that the license of one of the drivers had been revoked for reckless driving held inadmissible as hearsay); the court indicated, however, that had it appeared that the driver of the automobile which collided with the automobile in question had been admissible as hearsay); Daly v. Publix Cars, 128 Neb. 403, 259 N. W. 163 (1935) (Evidence that the driver of the automobile which collided with taxicab paid damages done to cab held inadmissible hearsay in action by taxicab passenger against the owners of both cars); Fitch v. Bemis, 107 Vt. 165, 177 Atl. 193 (1935) (in an automobile collision case, evidence that immediately after the accident a motor vehicle inspector arrested plaintiff on charges of driving while drunk and reckless driving held inadmissible as hearsay; the court indicated, however, that had it appeared that the officer had been present at the scene when the accident occurred and had acted under the influence of the “exciting occasion”, his conduct, like an assertion, might have been admissible as a spontaneous exclamation); United States v. Sessin, 84 F. (2d) 667 (C. C. A. 10th, 1936) (in an action on a war risk policy, plaintiff’s testimony that he was transferred to a tuberculosis ward in an army hospital held properly admitted, presumably in proof of his tubercular condition; the court declared: “. . . his testimony was direct and not hearsay. . . . If plaintiff’s trip to this ward was not as a tubercular patient, cross-examination would have neutralized any inference drawn from the question.” Id. at 669); Atlantic Co. v. Farris, 8 S. E. (2d) 665 (Ga. App. 1940) (on an issue of whether certain furniture belonged to plaintiff or plaintiff’s husband, evidence that plaintiff’s husband’s landlord had levied a distress warrant on the furniture in an effort to collect rent due from the husband held inadmissible as hearsay).

16. 2 Wigmore, Evidence (3d ed. 1940) § 459. But, strangely enough, Wigmore, at another point in his treatise (Id. at § 267), in dealing somewhat more precisely with the problem in hand, makes no mention of this quality of non-assertiveness: “What, then, are the objections to [conduct, where relevancy depends on inferences from the conduct to belief to the fact believed]? Plainly, that it is practically often equivalent to the inference from testimonial evidence, and that therefore we should be violating the Hearsay rule by accepting an extra-judicial assertion as evidence of the fact asserted. For example, on an issue of the existence of a lost will, suppose the fact to be offered that the deceased on his deathbed told his daughter, ‘My will is in the iron chest,’ or, on an issue of legitimacy, suppose the fact to be offered that the parents always treated the child as their own. In these instances suppose it is to be argued that the deceased’s utterance indicates circumstantially his belief in the will’s existence, and that his belief in turn indicates the fact of the will’s existence; or that the parents’ conduct leads to the inference that they believed the child to have been born to them after marriage, and that this belief evidences the fact of such birth. Such a double circumstantial inference is in theory perfectly possible and proper. But, after all, is not the process practically equivalent to accepting the deceased’s declaration and the parents’ conduct in a purely assertive and testimonial fashion, i. e., to admitting directly their assertions about the will and the child, precisely as if they were on the stand and credit were asked for their testimonial assertions to that effect? And if such evidence were allowed to come in as circumstantial, could not any and every hearsay statement be brought in upon the same plan, by resolving it into a double inference, namely, by translating A’s assertion, that he saw M strike N, into an inference from his utterance to his belief and from his belief to the fact asserted? Short of such an extreme deduc-
human conduct is clearly admissible; for example, the flight of an accused may be shown to prove his guilt. What is the distinction? In each case the conduct is used to evidence a belief in order to prove the fact believed, and so in each case there seems to be a possibility of the same three defects (first, inaccurate perception; second, faulty memory; third, untruthfulness) which are usually present in hearsay. Yet there is a difference, which lies in this: in the first example the conduct was intended to convey thought, in the second it was not. When there is no intention to communicate to any one there is very much less chance that the act was done in order to deceive, and hence the third and fundamental danger in admitting hearsay does not here exist, or at least not so strongly. . . . Accordingly, there appears to be a sound distinction between the cases, which may be formulated in the statement that only conduct apparently intended to convey thought can come under the ban of the hearsay rule. It is to be noted that the test employed is apparent intent, for it is obviously impossible to apply an internal standard in this connection.” 17 The significance of the quality of non-assertiveness was emphasized again by McCormick in 193018 and by Morgan in 193519 and in 1937.20 “Thus,” says Morgan, “if, after a crime has been committed, X flees under suspicious circumstances, intending thereby to express the proposition that he is guilty or that he believes himself guilty, and evidence of the flight is offered as tending to show his guilt, it is hearsay. Usually, if he intends this, it will be to protect another . . . but what if X flees

---

17. Seligman, note 4 supra at 148, 149.
18. McCormick, note 4 supra.
not for that purpose, but solely for the purpose of escape? . . . Since by hypothesis X did not express the proposition of his guilt or his belief in his guilt, his veracity is in no way involved." 21

But notwithstanding what appears to be a quite obvious difference in trustworthiness between non-assertive conduct and an assertive utterance and the emphasis upon this difference by these commentators, the courts, as has been said, have found no difficulty in assimilating conduct to assertion and in thus excluding instances of such conduct as "hearsay evidence, mere statements, expressed in the language of conduct instead of the language of words". 22

"Proof of a particular fact," said Baron Parke in Wright v. Tattham "which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible; and therefore, in this case the letters which are offered only to prove the competence of the testator, that is, the truth of the implied statements therein contained, were properly rejected, as the mere statement or opinion of the writer would certainly have been inadmissible." 23

In Thompson v. Manhattan Ry. 24 the issue was whether plaintiff had sustained a spinal injury in an accident; the trial court admitted evidence that her attending physician had treated her for an injury to the spine; in holding the admission of this evidence reversible error, the New York court said: "We think such proof was in the nature of hearsay. The treatment of the plaintiff for a particular disease was no more than a declaration of the physician that she was suffering from such a disease."

In State v. Piernot 25 the trial court refused to instruct that the flight of one T "should be considered as substantive testimony bearing upon the defendant's guilt"; this was not error, held the Iowa court, because "flight, if proved, is nothing more than a confession by another, and the defendant was not entitled to the use of this testimony in his own defense."

And in George W. Saunders Live Stock Commission Co. v. Kincaid 26 on an issue as to the soundness of some hogs, the seller proposed to testify that he had received no complaints from customers who purchased other hogs from the same shipment. The Texas court

21. Ibid.
22. 1 Taylor, Evidence (8th ed. 1885) § 571.
25. 167 Iowa 353, 149 N. W. 446 (1914).
affirmed the exclusion of this testimony. Said the court: “That complaint was or was not made would appear to be pure hearsay.”

It is without doubt a debatable question whether this quality of non-assertiveness (which effectually forecloses the danger of untruthfulness which attaches to the ordinary hearsay statement) should be held sufficiently substantial in itself to override the other truly hearsay attributes of extra-judicial conduct, where relevancy depends upon inferences from the conduct to belief to the fact believed. At the least, however, this quality of non-assertiveness is entitled to judicial discussion and evaluation. Receiving such, it is quite possible that evidence of such conduct would be given somewhat more lenient treatment.

Of course, though the actor’s impaired or deficient veracity is not involved in a rational determination of the reliability of evidence of non-assertive conduct, there is the possibility of deficiencies in other respects which cross-examination might expose. Thus, the actor may not have observed, perhaps did not have the opportunity to observe the event, the belief in the existence or character of which his conduct seems to vouch. There is, too, the possibility of deficiency in the quality of the actor’s recollection at the time of the conduct in question, although it should be stated that it is quite difficult to conceive of more than a remote possibility of significantly deficient recollection in respect to the instances of non-assertive conduct which have been treated as hearsay in the reported cases. Since, by hypothesis, the actor vouched his belief in conduct rather than in language, the danger of inaccurate or incomplete narration or expression, the possibility of which is always present in respect to the usual hearsay assertion, appears to be absent. Still, as Morgan has suggested, “there is . . . a danger that an improper deduction will be drawn from (such) conduct. Though there is no more danger of a wrong deduction here than in other cases of circumstantial evidence.”

What, then, should be the answer when an objection invoking the hearsay rule is made to evidence of non-assertive conduct? Ought the quality of non-assertiveness be held sufficient to outweigh the danger of possible deficiencies in observation and recollection? It seems rather clear that no hard and fast rule would be rational. In each case, the answer should depend—on what? McCormick and Morgan have both suggested solutions.

McCormick, in 1930, rounded out his discussion of the orthodox rule excluding evidence of non-assertive conduct by concluding that the inflexible operation of the rule excluded “evidence which has the

27. Morgan, note 20 supra.
strongest circumstantial guaranties of reliability”. “It is true,” he said, “that very much of such conduct-evidence, if admitted, would be of trivial value and probably a general inclusionary rule that all such evidence is admissible wherever the actor’s testimony on the stand would be, would be only one degree better than wholesale exclusion. Consequently, it would seem sensible to conclude that conduct (other than assertions) when offered to show the actor’s beliefs and hence the truth of the facts so believed, being merely analogous to and not identical with typical hearsay, ought to be admissible whenever the trial judge, in his discretion, finds that the action so vouched the belief as to give reasonable assurance of trustworthiness.”

McCormick did not elaborate this conclusion, which, it will be observed, is phrased in very general terms; as a matter of fact, his article concludes with the quoted sentence. While he did not undertake to particularize as to the sort of “action” which, in his judgment, would “give reasonable assurance of trustworthiness”, it would seem that to give such assurance the “action” necessarily must be of significance or importance to the actor.

The tenor of McCormick’s discussion (particularly his emphasis on Pitt Taylor’s observation that belief vouched “by acts done in confirmation of their sincerity” are, morally speaking, entitled to great weight) appears to justify such an interpretation. If not so justified, then, with deference, it is here proposed that McCormick’s suggested criterion should be qualified accordingly. And, in the subsequent dis-

28. McCormick, note 4 supra at 504.

The greater probative force of a belief vouched by important conduct than of a belief merely expressed in words, was an argument pressed in Wright v. Tatham, 5 Cl. & Fin. 670, 7 Eng. Rep. R. 559 (H. L. 1838), though, of course, this consideration did not prevail against what the court considered compelling reasons for exclusion. Mr. Justice Coleridge: “Suppose, says [learned counsel] his fellow townsmen had elected Mr. Marsden [the testator] to be their representative in Parliament, might I not prove that fact as evidence of their opinion of his competency? . . . I distinctly answer, no. . . . The mere word of a man of character, the mere opinion of a man of experience and prudence where by some act he vouches its sincerity, will naturally and properly influence our opinions; but the law of England requires the sanction of an oath to that which is to influence the verdict of a jury.” Baron Parke: “Nor is the evidence [the writing by third persons of letters to the testator about matters of consequence] the more admissible because the persons writing the letters do not merely express an opinion in writing, but prove their belief of it by acting upon it to the extent of sending the letters and putting them in the course of reaching the person addressed. . . . If the opinion of a person be of itself inadmissible, the act which only proves the belief of that person in its truth, and is irrelevant to the issue, except for that purpose, cannot render it admissible.”

Pitt Taylor does not seem to have been entirely convinced: “In most of the instances given above, as illustrating the occasional inconvenience of the rule, the evidence rejected amounted to something more than the mere declarations of parties not examined on oath, nor subjected to cross-examination; for these declarations were accompanied by acts done in confirmation of their sincerity, and as such, the evidence was, morally speaking, entitled to great weight. The law, however, will not on this account allow any exception to be made in favor of hearsay. . . .” I TAYLOR, EVIDENCE (8th ed. 1885) § 572.
cussion of his proposal, such interpretation or qualification, whichever it is, will be assumed.

The argument, then, is that if the actor was sufficiently satisfied with his observation and recollection of the relevant event or condition to predicate action important to himself upon his belief in that event or condition, there is enough to be said for the trustworthiness of his belief, though uncross-examined, to permit it to be presented to the tribunal as a basis of a possible inference to the event or condition. In suggesting this criterion, McCormick undoubtedly assumed that before evidence of any instance of conduct would be admitted, it must appear that the actor either observed or had the opportunity to observe the relevant event or condition, and further, that nothing affirmatively appears casting substantial doubt upon the quality of his recollection. On this basis, his suggestion is very appealing. In admitting this type of evidence, it would take account of a palpable distinction between non-assertive conduct and an assertive utterance, in respect to untrustworthiness due to impaired veracity; in circumscribing admission, it would take account of a palpable distinction between belief vouched by important and merely by trivial conduct, in respect to untrustworthiness due to deficiencies in observation and recollection. Moreover, the proposal would achieve flexibility, a result ardently to be desired not only in this, but in many areas of the law of evidence.

Morgan in 1935 suggested in great detail, criteria for the judicial handling of evidence of conduct. After proposing that hearsay be de-

29. "It is clear that the drift is from rules of exclusion mandatory on the judge, to rules expressed in terms of discretionary balancing of considerations. Undoubtedly there are advantages in definite rules. The lawyer in preparing his proofs has a fairly certain guide as to what will be admitted. But definite rules tend to crystallize in sharp restrictions based on past situations, and these restrictions, when applied in other cases, result in excluding evidence which would be useful. In some fields of evidence, the discretionary treatment has long been recognized as essential. . . . Even the important safe-guarding rules must soon be restated in more flexible terms. Chief of these, the great characteristic feature of the common law of evidence, is the group of rules requiring that testimony be limited to statements in court of witnesses who observed the facts at first hand, and are produced for cross-examination. This demand for the best, reduced to a rule, voices a high ideal, but manifestly one that in the everyday world must constantly be compromised. First-hand observers die and move away; their letters and declarations must be accepted as second-best. When will the second-best be good enough? It now seems strange that the courts should have attempted to answer this by defining in sharp categories the special situations when the secondary proof would be allowed. But the urge for certainty prevailed, and the particular situations where the second-hand evidence seemed most needed in the first half of the eighteen hundreds, as for example, dying declarations and book-entries, were crystallized into exceptions to the hearsay rule. These now number from ten to twenty, depending on the minuteness of the classification. Of course, they were improvisations intended to be played by ear, but they fail of that purpose because the classes are grown so many and the boundaries so meandering that no one can carry any large part of this hearsay-exception—learning in his head. Moreover, the values of hearsay declarations or writings, and the need for them, in particular situations cannot with any degree of realism be thus minutely ticketed in advance. . . . Too much worthless evidence will fill the categories; too much that is vitally needed will be left out. A broader and more practical method will be developed." McCormick, Tomorrow's Law of Evidence (1938) 24 A. B. A. J. 507, 511.
fined so as to include non-assertive conduct, where relevancy depends upon inferences from the conduct to the belief of the actor to the fact believed, he suggested the recognition of an exception to the hearsay rule which would accommodate evidence of such conduct “if the trial judge first finds

(1) that the event or condition consisted of the person's own behavior or condition of which he was then conscious, or

(2) that (a) the event or condition was within the person's knowledge, and

(b) his conduct offered to evidence the event or condition was a detriment to him, and

(c) it would have been useless for him to undergo that detriment if the event had not happened or the condition had not existed.”

In respect to non-assertive conduct qualifying under clause (1) of this “exception”, Morgan appears to have advocated somewhat more lenient treatment than McCormick; in respect to non-assertive conduct which cannot so qualify, the proposal is definitely more conservative than McCormick's.

Under clause (1) evidence of non-assertive conduct would be admitted in all cases where the ultimately relevant event or condition (“the fact believed”) consists of the actor’s “own behavior or condition of which he was then conscious”. Thus, flight of a third person (it appearing to the trial judge to have been non-assertive), offered in exculpation of the defendant in a criminal action, being ultimately relevant to the prior behavior of the actor (the proposed inferences being from the flight to his belief in his guilt to his guilt) would clearly qualify under the clause. In the case of non-assertive conduct generally, Morgan said, “the chief perils lie in unconscious self-deception of (the actor) as to his perception and memory. If the external event (“the fact believed”) is (the actor’s) own behavior, these perils are reduced to a minimum,” since the actor “is not likely to make innocent mistakes in the perception of his own behavior or in his memory of it”. This is true, of course, if the conduct is consequential enough to the actor to reliably evidence his belief, i. e. the accurate and complete recol-

30. Morgan, note 19 supra at 1159.
31. The application of clause (1) of Morgan's proposed exception to evidence of conduct like that admitted in Foelkner v. Perkins, 197 Wash. 462, 85 P. (2d) 1095 (1938), cited note 5 supra, would present an interesting question. There the ultimately relevant event (“the fact believed”) was the making of a contract, i. e., the prior joint behavior of the actor and another.
32. Morgan, note 19 supra at 1150.
33. Id. at 1154.
lection of his prior behavior. And in the case of "flight", the conduct plainly is of that character. So that under the first clause of Morgan's exception, evidence of flight would receive the same treatment as would be accorded by McCormick. But the rule would admit evidence of all non-assertive conduct where "the fact believed" consists of the actor's own prior behavior or condition, regardless of the importance of that conduct to the actor. It is suggested that such a rule overlooks the value if not the practical necessity of that sanction or avouchment represented by the quality of importance. Without such guarantee, it is not clear that the mere circumstance that the ultimately relevant fact consists of the actor's own prior behavior, furnishes much assurance of trustworthiness of the actor's apparent belief in respect to such prior behavior. It is in this respect that the first clause of Morgan's exception seems to propose somewhat more lenient treatment than does McCormick's suggestion.

If the conduct-evidence which has been condemned as hearsay in the past is a fair indication of the sort of conduct-evidence which will be proffered in the future, it is apparent from the reported cases that the first clause of Morgan's exception would accommodate but a fraction thereof. Evidence of flight, to be sure, falls within the category; but it is difficult to identify in the cases other instances of conduct which would be included. Consequently, clause (2), dealing with non-assertive conduct ultimately relevant to an event or condition other than the prior behavior of the actor, appears to be of considerably more significance.

This second clause, as has been said, represents a far more conservative departure from the existing rule than does McCormick's proposal. It will not be enough that the conduct be important to the actor; it must further possess a detrimental or disavailing quality; not only that, it must appear that the conduct would have been "useless" but for the event or condition to the proof of which the conduct is relevant.

But in 1937 Morgan proposed much more radical treatment. He said: "When a court analyzes non-assertory, non-verbal conduct as hearsay, it ought then to examine all the recognized exceptions to the hearsay rule to ascertain whether the hearsay in question does not fall within one of them. If no apt exception is found, it ought then to ascertain whether the dangers of error in perception or memory which might be eliminated by cross-examination are so substantial as to call for its exclusion. If not, the evidence should be received for, by hypothesis, neither veracity nor narration is involved." 34 This assumes perhaps

---

34. Morgan, note 20 supra at 10.
that, in determining whether danger of error in perception or memory is substantial, rational treatment by the trial court would require consideration of the significance of the conduct to the actor and of its self-serving or disserving character. Consequently, it is possible that Morgan's later proposal does not imply as radical a departure as at first appears. Yet, the fact remains that in his second proposal the admissibility of the evidence is not to be expressly conditioned either upon the importance or detrimental character of the conduct.

It seems to the writer that, as proper treatment for non-assertive conduct in general, McCormick's suggestion represents the most desirable solution. In requiring that the conduct be of such a sort "as to give reasonable assurance of trustworthiness", interpreted here to mean that it must be of substantial importance to the actor in his own affairs, the proposal would exclude evidence of mere casual, unimportant or frivolous conduct. This would be a wise restriction. In so far as dangers in observation or recollection are concerned, there is probably nothing to choose between a belief vouched only by unimportant or casual conduct and a belief merely put in words. It is only when the conduct is of some genuine significance or importance to the actor that it can rationally be said that there is a likelihood of greater trustworthiness than in the case of the hearsay utterance. Taking Morgan's later suggestion at its face value, it is conceivable, for instance, that a trial judge applying it would feel justified, on an issue involving the mental competency of a testatrix, in admitting evidence that "the boys (in the neighborhood) used to make fun of her", if it fairly appeared that the boys had personal knowledge of her behavior and the doctrine of the particular jurisdiction permitted lay opinion testimony on the point. Yet, it seems clear that there is just as much danger of deficiency in observation and recollection in the use of trivial conduct of this character as in the case of a hearsay assertion. The belief of the actor lacks that strong, avouchment which, for example, is so apparent in "the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of the vessel, embarked in it with his family".

On the other hand, the requirement of Morgan's original proposal that the conduct (where the "fact believed" is other than the actor's own prior behavior or condition) must have been detrimental to the actor, appears difficult to justify. As has already been noted, Morgan, in his later suggestion, does not condition the admissibility of the evidence upon a preliminary finding of "detriment". If the actor had sufficient confidence in the quality of his observation and recollection

35. In re Hine, 68 Conn. 551, 37 Atl. 384 (1897).
and in his resulting belief in the existence of the ultimately relevant event or condition, to predicate upon that belief action of substantial importance to himself, this sanction would appear to be substantial enough to admit the conduct evidence.

A "detrimental" quality would, as in the case of assertions against interest, potently negative untrustworthiness due to untruthfulness; but the conduct being, by hypothesis, non-assertive, the actor's veracity is not involved. And, assuming that the conduct was of importance to the actor, it is difficult to see how a detrimental quality would add much if anything to trustworthiness, in respect to the actor's observation and recollection. However that may be, a requirement of detriment, over and above a requirement of importance, does not appear to be demanded.

These theoretical conclusions find support in the obvious undesirability of result when the detriment requirement is applied concretely. Thus, the conduct of plaintiff's attending physician in treating plaintiff for a spinal injury 37 would seem to amount to a sufficient avouchment of the physician's belief to admit evidence of the treatment as proof of the existence of a spinal injury. Sufficient sanction would seem to exist also in the conduct of the authorities of a home for delinquents in placing an inmate in a non-venereal ward, after a Wassermann test, when offered to be shown in proof that the inmate was not afflicted with syphilis. 38 In each of these cases the conduct-evidence was excluded as hearsay. Such evidence must continue to be excluded under any modification of the existing rule which insists upon a preliminary finding of "detriment", because in neither of these cases was the conduct in any sense detrimental or disserving to the actor. Yet these cases seem to typify the very sort of non-assertive conduct which, strongly vouching the actor's belief so as to give "reasonable assurance of trustworthiness", is entitled rationally to more sympathetic treatment than a hearsay assertion. The same may be said of evidence, on an issue of sanity, that the testator's "fellow townsmen had elected (him) to be their representative in Parliament". Here again, because the conduct is of significance to the actors and because, consequently, "it is morally convincing" and "will naturally and properly influence our opinions", 39 it ought to be admitted under a rational relaxation of the existing rule. Yet such conduct could not be said to be "detrimental".

Except for a number of those treating of "silence", in practically none of the reported cases excluding evidence of non-assertive conduct as hearsay was the conduct in question disserving.\textsuperscript{40} It follows, consequently, that, as a practical matter, any relaxation of the existing rule which would require a showing of "detriment" preliminary to admission would be of very limited significance. But this idea of detriment cannot be entirely dismissed. It will be found serviceable when we come to deal specifically with "silence" as hearsay.

Perhaps what has been said makes it reasonable to conclude that Morgan's first proposal would too greatly restrict and his later one too freely permit, the admission of evidence of non-assertive conduct. Avoiding these extremes, McCormick's proposal, as here interpreted, consequently seems preferable.

Whether, if the rule were to be relaxed, admissible non-assertive conduct should be considered as non-hearsay or as hearsay exceptionally admitted is a matter of no practical consequence. However, because, even though non-assertive, such conduct is burdened with some of the dangers of pure hearsay, and because under all the proposals which have been made, and under McCormick's in particular, not all, but only some non-assertive conduct would be admitted, it would appear logical, in the first instance, to treat it all as hearsay.

First, then, hearsay should be defined so as to include not only utterances but non-assertive conduct where relevancy depends upon inferences from the conduct to the belief of the actor to the fact believed. However, in accordance with McCormick's suggestion (amplified and interpreted somewhat), evidence of such non-assertive conduct should be exceptionally admitted if, but only if, the trial judge first finds that (a) the actor had personal knowledge of the fact (i. e. the occurrence of the event or the existence of the condition) to the proof of which the evidence is offered; more precisely, that it fairly

\textsuperscript{40} As a matter of fact, one finds it difficult to appraise as "detrimental" the conduct excluded in any of the reported cases. However, this circumstance must, in a measure, be fortuitous, because it is not difficult to imagine cases where the conduct is plainly enough detrimental or disserving to the actor, e. g., two of the hypothetical illustrations considered by the court in Wright v. Tatham, 7 A. & E. 313, 343, 387, 112 Eng. Rep. R. 498, 500, 516 (Ex. 1837): Suppose an issue arises respecting the loss of insured property, would the fact of payment by other underwriters be admissible? Furthermore "suppose a third person had betted a wager with [the testator] that he could not solve some mathematical problem, the solution of which required a high degree of capacity; would payment of that wager to [the testator's] bank be admissible evidence that he possessed that capacity"?\n
McCormick has suggested an example where the detrimental quality is apparent: Suppose that "on an issue (in a suit between third parties) of whether at a certain time \( A \) was indebted in a certain sum to \( B \), evidence is offered that \( A \) paid the amount of the alleged debt to \( B \)". \textsuperscript{4} McCormick, note 4 \textit{supra} at 497.

As the text implies, "silence", consisting of the failure of the buyer of goods to complain as to quality or the failure of one involved in an accident to complain of injury, seems clearly conduct of a detrimental or disserving sort. Cases dealing with such conduct are noted later.
appears that the actor observed or had the opportunity to observe such event or condition and that nothing appears to cast substantial doubt upon the quality of his recollection at the time of the conduct; and (b) that the conduct was important or significant to the actor in his affairs and so vouched his belief “as to give reasonable assurance of trustworthiness”.

As applicable to non-assertive conduct in general, the adoption of the foregoing suggestion, relieving as it would against the inflexible and undiscriminating operation of the orthodox exclusionary rule, would represent a rational and feasible solution. However, as applied to “silence”, and perhaps to negative conduct generally, it is believed, as will be pointed out later on, that some modification of the formula is necessary.

The “silence” cases (those treating of silence as hearsay) fall easily into two groups:

(1) those concerned with the admissibility of evidence of the failure of the buyer of goods to complain, on an issue of quality; or of the failure of one who might have been injured in an alleged accident to give notice of or make claim for injury, on an issue as to the occurrence or severity of the accident; and

(2) those concerned with the admissibility of evidence of the failure of one alleged to have made an agreement, executed an instrument or to have been served with process, to mention the disputed act or event to his family or associates, on an issue as to the occurrence of that act or event.

The cases are few, and consequently it is feasible to make some reference to each of them. Preliminarily, it ought to be said that in none of the cases do we find anything like an adequate discussion of the problem presented. In none is apt authority cited, and in nearly all, the result rests on nothing more than the ipse dixit of the court that the evidence is or is not hearsay. In a very few of the cases the court has extended itself to the point of assimilating the failure to speak to an assertion of the belief evidenced thereby. And as has already been said, in no case has a court noticed the quality of non-assertiveness and its significance.

In the first group, St. Louis S. W. Ry. v. Arkansas & T. Grain Co. was an action by the grain company against the railway company

41. The same may be said of the cases dealing with non-assertive conduct generally. As McCormick has observed (note 4 supra at 502) since Wright v. Tatham (1838) the decisions have given only “slight consideration” to the foundation of the orthodox rule.

42. 42 Tex. Civ. App. 125, 95 S. W. 656 (1906).
for the conversion of a carload of corn of No. 2 quality. A witness for plaintiff testified that the corn in question was a part of a lot of 60,000 pounds, that the balance had been sold to retail dealers in Texarkana "as No. 2 corn", and "no complaint was ever made by any of the purchasers of the same". The Texas court held that the admission of this evidence was not error, because: "The witness simply stated a fact within his own knowledge; that he did sell it in the course of trade as No. 2 corn, not at retail, but to retail dealers, and no complaint was ever made. These are facts and not declarations of third persons." The court went on to observe, however, that the amount of plaintiff's verdict indicated that the jury did not believe that the corn was No. 2 corn. Any error in the admission of the testimony was consequently harmless, and this circumstance undoubtedly militates against the persuasiveness, if not the authoritative of the appellate ruling.

In an action by the buyer of hogs to recover for the seller's misrepresentations of soundness, the same court rejected proposed testimony that there had been no complaint by the packing companies who purchased hogs from the same shipment. Without referring to the St. Louis S. W. Ry. case, the court said: "We do not think it would be permissible merely to show that no complaint as to diseases among the hogs had been made by the packing houses purchasing them. That complaint was or was not made would appear to be pure hearsay. It perhaps would be permissible to show by witnesses who knew the facts that other hogs contained in the shipment with those in controversy were or were not affected with disease, but this is altogether another question." 43

Where a buyer sued for breach of warranty as to the quality of woolens sold, the trial court allowed the defendant to show that goods rejected by plaintiff were afterwards sold to other customers "who made no complaint in reference thereto". The admission of this evidence constituted reversible error, said the New York court, because "this was clearly hearsay evidence as to the opinions of other customers upon these goods. This evidence was most mischievous evidence, and might well have been a controlling factor in the minds of the jury in determining that the goods in question were up to sample." 44 And in another case, where the same issue of quality was involved, the court again held erroneous the admission of evidence of the resale of the goods in question to non-complaining customers. It was felt that "the fact that these other customers had made no complaint as to the quality

---

of these goods sold to them was purely hearsay evidence upon the question of quality of these goods".\textsuperscript{45}

\textit{Sullivan v. Minneapolis Street Ry.}\textsuperscript{46} was an action by a passenger on one of defendant's street cars to recover for personal injuries claimed to have been sustained when the car made an emergency stop to avoid colliding with a truck. Plaintiff testified that the car was crowded and many passengers were standing, and that "because of the emergency stop, all the passengers who were standing were just like one great mass of humanity, just hurled right forward; they just went down headlong into the center of the aisle; they (those holding straps) were torn right loose from the straps and went right down with the rest of us; everyone fell on top of each other." The conductor testified that no one was thrown to the floor. Over plaintiff's objection, defendant's claim agent was permitted to testify that no other claim was made upon defendant arising out of the accident. The Minnesota court approved the admission of this testimony, though the hearsay question is not identified. While the testimony, the court said, may have been remote and of little weight, it was, nevertheless, admissible "in the discretion of the trial court", because "it had a direct tendency to show that the statements of a witness on one side were more reasonable and therefore more credible than the statements of a witness on the other side". Though, while admissible, the court continued, "such testimony obviously must be received with caution". And in \textit{Fogg v. Oregon Short Line R. R.}\textsuperscript{47} plaintiff sought compensation for an injured knee. In support of its claim that the knee had been injured in a prior accident, defendant introduced a written statement by plaintiff to that effect. In rebuttal, plaintiff's wife was permitted to testify that plaintiff had made no complaint of any injury to his knee in the prior accident. Affirming this ruling on appeal, the Utah court said that the defendant had not furnished it with any citation of authority or argument showing why the admission of this evidence was error. While the hearsay rule was thus not expressly invoked, the appellate court undoubtedly had the possibility of such an objection in mind, declaring that "declarations of present pain and suffering are admissible as original evidence in all inquiries where pain and suffering constitute the question involved . . . we see no reason why the plaintiff should not be permitted to show he had made no complaint of pain and suffering in his knee". That is to say, even though the failure to complain be treated as hearsay, still evidence thereof will come in under the exception for declara-

\textsuperscript{46} 161 Minn. 45, 200 N. W. 922 (1924).
\textsuperscript{47} 78 Utah 105, 1 P. (2d) 954 (1931).
tions of a presently existing mental or physical condition. And this seems sound because if a statement of presently existing pain, which, by hypothesis, is assertive, is able to qualify against the hearsay rule, then conduct (i.e. failure to complain) which presumably is non-assertive and thus somewhat more trustworthy, ought likewise to be admitted.

In group 2, in a case where the issue was the service of a summons upon the defendants’ mother, the defendants were permitted by the trial court to testify “that they never heard their mother say anything to anybody about the summons having been served upon her”. Holding this to be error, the North Carolina court said: “In the first place, if the witnesses had testified affirmatively that Mrs. Spencer had said that the summons had not been served upon her, it would have been incompetent as hearsay. It is all the more incompetent in this negative form that they had heard her say nothing about it, which proves nothing, and if it proved anything, would tend to show that she had been served.”

*Sherling v. Continental Trust Co.* was an action based upon an alleged oral agreement of defendant’s testator to give to plaintiffs “one-half of all the property that he might leave at his death”. The trial court permitted a witness for the defendant to testify that the testator never said anything to her about such a contract. The Georgia court held this error, declaring the evidence irrelevant and immaterial, because “no circumstances were shown requiring (the testator) to make any statement about the contract referred to or to admit or deny the making of the same”. And the Court continued: “If he had denied to the witness making such a contract it would have been objectionable as hearsay testimony.” The Court likewise held erroneous as “in the nature of hearsay” and as irrelevant, the testimony of the wife of the testator’s half-brother that “she had not heard (the half-brother) make any statement in reference to his or (the testator) having made a contract” such as plaintiffs alleged. It is a fair conclusion that in its ruling the appellate court placed its principal reliance upon its determination that the testimony of these witnesses was irrelevant, because it likewise held erroneous the admission of the testimony of one of the same witnesses that plaintiff herself “had never said anything in the presence of the witness in reference to a contract (of the testator) to leave her any property”. *Latham v. Houston Land & Trust Co.* is a case of the same sort. The suit was one to recover a trust fund alleged to have been placed in the hands of defendant’s testator during

---

48. 6 Wigmore, Evidence (3d ed. 1940) § 1716 et seq.
50. 175 Ga. 672, 165 S. E. 560 (1932).
his lifetime for the use and benefit of the plaintiffs. Defendant denied the creation and existence of the alleged trust fund. The trial court admitted testimony of the alleged settlor's widow and attorney that he had never mentioned the creation or existence of the trust to them. The Texas court held that the evidence was properly admitted: "This testimony is cogent and material. It is not hearsay testimony. It is a statement of fact ..." In *Segars v. City of Cornelia* 52 an issue was the execution by plaintiff's deceased wife of an easement agreement. The trial court refused to permit plaintiff to testify that he and his wife "always consulted with each other with reference to all business transactions, and that if she had made this easement she would have told him so and she made a statement in his presence immediately after the easement was purported to have been signed, and nothing was said to him about having signed an easement". The Georgia court held that the exclusion of this evidence was proper: "Even if Mrs. Segars had then denied giving the easement, such denial would not be admissible because it would be hearsay, and might also be a self-serving declaration."

Though of a somewhat different sort, the remaining case, *People v. Layman*, 53 appears to belong in the second group. Defendant was charged with perjury in having testified in a prior civil action, instituted by him against a railway company, to the occurrence of a non-occurring accident. He was injured, he had testified, "as he was pushing his stalled automobile away from the street car tracks". For the state, all the motormen on the line testified that no such accident occurred. In addition, all of the conductors testified that they knew of no accident and the train dispatchers testified that they had received no report of an accident. The defendant contended, on appeal, that the testimony of the train dispatchers was hearsay, but said the California court, "it was not hearsay, but direct proof, of course, of a fact; the fact being that no report had been turned in." This fact was considered material because of the presumption that the ordinary course of business had been followed, 54 "that is, that if there had been an accident, it would have been reported to the dispatchers". Despite the court's confidence that the evidence was not hearsay, it seems plain that the problem is just as clearly presented as in any of the silence cases, and it is difficult to see how the statute, which merely goes to the extent of recognizing that in the ordinary course of business an accident will be reported, disposes of the hearsay question.

52. 60 Ga. App. 457, 4 S. E. (2d) 60 (1939).
53. 117 Cal. App. 476, 4 P. (2d) 244 (1931).
Now, the inferential process involved in the evidential use of the conduct in both classifications is very evidently the same. In the first group, relevancy of the evidence of conduct depends upon inferences from the failure of the buyer to complain, to his belief that the goods were of good or specified quality, to the fact that they were of that quality; or, in a situation like that presented in the Sullivan case, upon inferences from the failure to make claim, to the individual's belief that he had not been hurt, to the fact that he was not hurt, with an additional inference here to the non-occurrence or insignificance of the accident. Analogously, in the second classification, relevancy depends upon inferences from the failure to speak, to the belief of the silent individual that the disputed act or event did not occur, to the non-occurrence itself. Yet, while the relevancy of this evidence of "silence" rests, in both cases, on the same circumstantial analysis—failure to speak, to belief, to the fact believed—there is reason to suggest that the evidence typified by the cases in the first group is, theoretically, more trustworthy and, quite obviously, of more probative force than that illustrated by the second group of cases.

But before undertaking this comparison, there are some things to be said which are applicable to all the silence cases. Admissibility of evidence of conduct generally, it has been suggested, should depend upon a preliminary finding "that the conduct was important or significant to the actor in his affairs and so vouched his belief 'as to give reasonable assurance of trustworthiness'". It is apparent that, generally, the avouchment in case of negative conduct (inaction) is definitely weaker than in the case of positive or affirmative conduct.}

55. This conclusion finds support in the fact that, aside from any hearsay question, even the relevancy of a failure to complain has, in a good many cases, been denied. Thus, in S. J. Van Lill Co. v. Frederick City Packing Co., 155 Md. 303, 141 Atl. 898 (1928), the court said: "The fact that Ralston Company did not complain of the quality of the goods had no necessary connection with any issue in the case. It may have known the grade and quality before it purchased, or it may have been unwilling to incur the annoyance and expense of a controversy, so that while its failure to complain, standing alone, may have had some possible probative force, it was too remote to warrant its recognition as judicial proof, and this question should not be allowed." For reference to a number of cases which, though not passing upon the hearsay question, discuss the admissibility of evidence of silence in terms of relevancy, see note 56 infra. A majority of these cases held the evidence inadmissible, although it should be noted that in a number of the excluding decisions the rulings were based on the insufficiency of the showing of similarity of the goods sold or of the contract specifications.

It is, of course, true, as the Maryland court says, that the proposed inference from the failure to complain to the belief that the goods were of specified quality is not an absolutely necessary one. But relevancy is not usually so rigorously conditioned. "The requirement that circumstantial evidence must be explainable only, or most convincingly, upon the inference relied on by the proponent, is not one usually applied by the courts in testing relevancy. A moment's survey of familiar types of circumstantial evidence (e.g., evidence of threats and opportunity to commit an act as evidence of its commission) will show that no such test for a particular item of proof is customarily required for its admission. It may look both ways, but it is for the adversary to argue its contrary bearing to the jury. All that is required for admission is that the item offered, taken alone or in conjunction with other evidence in the case, might suggest
Failure to complain does, in a measure, vouch the buyer's belief that the goods were of satisfactory or specified quality; still this mere inaction, this failure to speak, is definitely less persuasive of the trustworthiness of the buyer's apparent belief than would be the case if the conduct were affirmative in character, i.e., if the buyer had performed positive, important conduct on the faith of that belief, for example, if he had repeatedly made important use of the goods purchased. And the failure of the alleged recipient of the writ to mention it to members of her family does not necessarily represent conduct important to her. So that there appears to be grave question as to whether a rational application of the criterion heretofore proposed would operate to admit much, if any, evidence of negative conduct. Consequently, if it be concluded, as it is believed it should, that failure to speak is, under some circumstances, sufficiently trustworthy for its consideration by the tribunal, some modification of the suggested formula appears to be demanded.

Now, comparing the trustworthiness of the evidence typified by the two groups of cases, substantial differences appear in at least two respects.

First: It is probable that there is more danger that conduct typified by cases in the second group (i.e., the mere failure to mention an act or event which, had it occurred, would have been within the personal knowledge of the silent individual) was intended by the individual to have been assertive than in the case of conduct generally, or in the case of the conduct typified by cases in the first group (i.e., failure of the buyer to complain of the quality of goods or the failure of one who might have been injured in an accident, had it occurred or been of consequence, to complain of injury). It is hard to conceive of more than a remote possibility that the buyer of goods, by his failure to complain, intended to express the idea that the goods were of good quality, because it is plain that his silence, for him, is disserving in character. The same may be said of the failure of the passengers on the suddenly stopped street car to make complaint of injury. This detrimental quality rather effectually negatives the possibility that the silence was intended as assertive. But in respect to conduct like that involved in the Spencer and Sherling cases, supra,
namely, the failure of one alleged to have been served with summons to mention the service, or of one alleged to have made an agreement to mention the agreement, there is an absence of any such disserving or detrimental quality. Not only that, but the silence might easily have been foreseen by the silent individual to possess a possible self-serving evidential use. That is to say, it is entirely possible that in such situations, the silence, i.e., the failure to mention the service of the writ or the making of the agreement, may have been intended as assertive, that is, intended by the silent individual to have impliedly expressed the idea that she had not been served or that he had not made the agreement. Particularly might this be the case where the period or a substantial part of the period of silence, sought to be evidenced, commenced after the possibility of controversy became apparent to the silent individual.

Theoretically, however, this circumstance does not indicate any deficiency in the previously suggested formula as applicable to evidence of silence, because that formula purports to deal only with non-assertive conduct. It does follow, however, that in determining preliminarily whether the conduct was actually non-assertive, evidence of silence typified by the second group of cases should be scrutinized with particular care.

Second: However, aside from any question of veracity, that is to say, assuming that silence of the second sort was not intended as assertive, there is quite obviously a substantial difference in trustworthiness, in respect to the actor's observation and recollection, between the silence typified by the two groups of cases. This difference in reliability rests upon the fact that the silence typified by the first group was detrimental to the actor, while that typified by the second group was not. No more than unimportant or trivial affirmative conduct, does mere silence, when not palpably detrimental or disserving to the silent individual, appear to represent sufficient avouchment of the actor's apparent belief to warrant more favorable treatment than that given the ordinary hearsay assertion.

If there be substance to the foregoing, the test heretofore proposed for the admissibility of evidence of non-assertive conduct requires some modification, if it is to deal with negative conduct, and particularly silence, in a rational manner. Restated and rephrased with this end in view, the suggestion, then, is that while hearsay should be defined so as to include not only utterances but also non-assertive conduct, where relevancy depends upon inferences from the conduct to the belief of the actor to the fact believed, evidence of such non-assertive conduct should be exceptionally admitted if, but only if, the
trial judge first finds that (a) the actor had personal knowledge of the fact (i.e., the occurrence of the event or the existence of the condition) to the proof of which the evidence is offered; more precisely, that it fairly appears that the actor observed or had the opportunity to observe such event or condition and that nothing appears to cast substantial doubt upon the quality of his recollection at the time of the conduct; and (b) that the conduct was important or significant to the actor in his affairs and so vouched his belief "as to give reasonable assurance of trustworthiness", and (c) in the case of negative conduct (i.e., inaction) or silence, that such negative conduct or silence was a detriment to the actor.

The number of cases considering silence as hearsay is hardly an accurate indication of the consequence of the problem because the hearsay question has been present, potentially, in many cases where it was not identified.\(^56\) Plausibly, and supported by a respectable number of decisions, an objection invoking the hearsay rule may be interposed to evidence of silence in a rather wide variety of situations, and in this circumstance this discussion largely seeks its justification.

\(^56\) In the following cases the admissibility of evidence of silence was considered, though the hearsay question was not discussed and, presumably, was not raised.

