Admission by Silence of Written Matter: A Comment on Evidence and Public Policy

G. Thomas Cestaro

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation


This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
ADMISSION BY SILENCE OF WRITTEN MATTER: A COMMENT ON EVIDENCE AND PUBLIC POLICY

G. Thomas Cestaro*

I. Introduction

Hicksville Daily Bugle, July 32, 1962

"LIKES REDS," SCHMALTZ SAYS

Joe Schmaltz, well known Hicksville left-winger, last night told a meeting of the Hicksville Junior College Political Science Club that communism would be good for the United States.

"We need another Castro in the White House," Schmaltz replied to a question from the floor. "Communism could cure a lot of our headaches," he added.

64 Crazy Lane
Upper Slabodia, Illinois

Dear Mr. Glurg:

I have repeatedly noticed you slipping into the Majestic Theatre without purchasing a ticket. Unless you write me by return mail and tell me that you will stop doing this, I shall be compelled to report you to the manager. A man of your age should be ashamed of himself.

Very truly yours,
Ebenezer Spy

The problem of admission by silence of written matter falls into one of two broad categories. The first constitutes the failure to deny or take other action to correct or redress false statements about or statements incorrectly attributed to an individual and coming to his attention only incidentally. The most common example is a newspaper or magazine story, radio or television broadcast, or letter to the editor of a periodical not written by the purported author. The fictitious article above illustrates this.

The other example, more frequently found in the cases, is the failure to reply to a letter specifically directed to the individual who is sought to be charged with the admission. The fictitious letter set forth above is an example of this.

* B.B.A. 1948, St. John's University, LL.B. 1951, New York Law School. Member of the New York Bar.
ADMISSION BY SILENCE OF WRITTEN MATTER

Of course, there are a number of special exceptions with which we are not now concerned. For example, where parties are engaged in mutual commercial transactions, and a statement of account is rendered and not disputed, the rule is that such a statement is admissible as an admission. Likewise, other commercial transactions between the parties, or even a course of mutual correspondence, may give rise to a duty to dispute an incorrect statement, and hence a failure to do so might constitute an admission. A written statement shown to a party and not answered by him orally on the spot, may have the effect of an oral admission, which is, of course, admissible. And finally, action taken on the basis of a written communication may constitute an admission of the material therein. In each of these cases, there is something more than the mere passive failure to answer the charge.

This article is concerned with the bare case where a party receives letters or reads articles appearing in newspapers or periodicals concerning him and omits to do anything at all. In such cases, should the mere omission to take any action to deny or rebut such material serve as an admission of the truth of it?

II. RECEIPT OF COMMUNICATION

In order to lay the foundation for an admission by silence of written material, it is, of course, first necessary to prove that the party sought to be charged with the admission has actually read and understood the charge made in it. In the case of newspaper stories, actual reading must be directly proven. One could hardly raise a presumption of the reading of a newspaper story merely because the newspaper was sold in the community in which he lived. Even purchase of the newspaper involved would be insufficient to create the presumption, since a newspaper has many stories, and it is entirely possible that only some of them were read. It would be going entirely too far to require a party to read every line in any periodical to be purchased at the risk of being concluded by evidence that he had purchased the newspaper or periodical and that

1 2 Wigmore on Evidence (2d Ed.), § 1073(3).
2 See 31 C.J.S., Evidence, § 297.
3 2 Wigmore on Evidence (2d Ed.) § 1073(1).
4 Id. § 1073(4).
somewhere in its pages it contained something pertaining to him which he did not protest.\textsuperscript{6}

Knowledge of the contents of a letter, however, may be presumed where the letter is personalized and received by the party to whom it is addressed.\textsuperscript{7} Most people read their mail, and accordingly, actual receipt of a letter should raise an inference of knowledge of the contents.

In charging a person with knowledge of the contents of a letter, proof of mailing with proper postage and a proper address is necessary to raise the presumption that the letter was received.\textsuperscript{8} The contest as to proof of facts necessary to raise the presumption usually revolves around whether the correct address was used, since most people are acquainted with ordinary postage rates and the need to drop the letter in a mail box.

The Illinois rule is that "the placing in the mail of an envelope properly stamped, is not even presumptive evidence of the receipt of the same, unless the same was properly addressed."\textsuperscript{9} This rule is in accord with the great weight of authority,\textsuperscript{10} not only in the state courts, whose rules of evidence are sometimes not too

\textsuperscript{6} Cf. 31 C.J.S., Evidence, § 150c.
\textsuperscript{7} Ibid.
\textsuperscript{8} 31 C.J.S., Evidence, § 136.
\textsuperscript{9} Equitable Life Assurance Soc. v. Frommhold, 75 Ill. App. 43, 54 (1897).
\textsuperscript{10} 31 C.J.S., Evidence, § 136b.

\textsuperscript{11} Denson v. Kirkpatrick Drilling Co., 225 Ala. 473, 144 So. 86, 92 (1932) ("To raise a presumption of delivery of a letter to a particular person, it is not enough to show that it was mailed to him, but it must be shown that the envelope was properly addressed to the person at his place of business or residence, stamped, and posted"); Ninth District v. Wofford Power Co., 37 Ga. App. 271, 139 S.E. 916, 917 (1927) ("Evidence that a letter was mailed to a named person does not raise a presumption that he received it, unless there is also evidence that the letter was properly addressed and duly stamped. The court erred in admitting . . . testimony . . . as to mailing . . . it not appearing that they were mailed in letters properly addressed and duly stamped"); Breedlove v. General Baking Co., 138 Kans. 143, 23 P.2d 482, 483 (1933) ("The entire absence of evidence as to its being properly addressed deprives it of the presumption of delivery"); Brown v. Union Central Life Ins. Co., 241 Ky. 514, 44 S.W.2d 514, 516 (1931) ("In the absence of evidence showing it was properly addressed, stamped and mailed, there is no presumption that it was received by the addressee"); Miller v. John Hancock Mut. Life Ins. Co., 155 S.W.2d 324, 328 (Mo. App., 1941) ("The rule which prevails generally, and as we read the cases which prevails in our State, is set forth in 22 C.J. 98 § 89 as follows: 'Receipt of a letter by the person for whom it was intended cannot be presumed unless it is proved that the letter was properly addressed to him, at the city or town where he resides or has his place of business, with the street and number if it is a city of considerable size"); Fountain City Drill Co. v. Lindquist, 22 S.D. 7, 114 N.W. 1098, 1100 (1908) (without correct address, there is no presumption of receipt of mail); Crow v. Thompson, 131 S.W.2d 1064, 1069 (Tex. Civ. App., 1939) ("The mailing of the notice to the wrong address does not raise any presumption that it
ADMISSION BY SILENCE OF WRITTEN MATTER

liberal, but in the federal courts as well, both before the Federal Rules of Civil Procedure as well as after its adoption.

The reason for the rule requiring a showing of a correct address where a letter is sent to a city of any size is that unless the name is very unusual, there will probably be more than one person of that name residing in the city, and without the right address the letter may be delivered to the wrong individual. This possibility precludes the presumption because it is not more likely than otherwise that the letter was delivered to the person intended if the address was wrong or omitted. As the leading case of Lansburgh v. M. P. Howlett Fish & Oyster Co. held:

But the general statement of the witness that he mailed the bill in an envelope addressed to the defendant at Baltimore, Md. was hardly sufficient proof of a proper mailing to raise a presumption that the bill reached its destination. . . . Receipt of a letter by the person for whom it was intended cannot be presumed unless it is proved that the letter was properly addressed to him, at the city or town where he resides or has his place of business, with the street and number if it is a city of consider-

---

12 Henderson v. Carbondale Coal & Coke Co., 140 U.S. 25, 36-7 (1890) (unless letters are correctly addressed, mailing is not "evidence, tending, if credited by the jury, to show the receipt of such letters").

13 Flowers v. Aetna Casualty & Surety Co., 163 F.2d 411, 416 (6th Cir., 1947) ("The usual presumption that a letter properly stamped, addressed and mailed is delivered in due course would not prevail in this case, as the record does not show any address to which the notice was mailed"); Kansas City Life Ins. Co. v. Cox, 104 F.2d 321, 325 (6th Cir., 1959) ("Before there arises a presumption of fact that the addressee of a letter has received it, it must first be proved that it was properly addressed, but no such presumption arises unless it appears that the person to whom sent resided at the place to which mailed"); Baltimore & O.R.R. v. Reaux, 59 F. Supp. 969, 972 (N.D. Ohio, 1945) ("Unless a letter is correctly addressed to the street, number and city in which the addressee lives, the usual presumption that it was received will not be entertained").

14 153 Md. 312, 138 Atl. 269 (1927).
able size, . . . we have not the requisite information as to the course of correspondence between the parties to enable us to determine that a letter directed to the defendant in so large a city as Baltimore, without the designation of the street and number of his place of business, or residence, was sufficiently addressed to raise the presumption of its receipt for the purposes of secondary proof of its contents.\footnote{Id. at 271.}

Likewise, \textit{Selken v. Northland Insurance Co.}\footnote{249 Iowa 1046, 90 N.W.2d 29 (1958).} holds:

In order to raise a presumption of delivery of a paper through the mail, . . . (3) there must be evidence of the correct post office address of the person to be charged with receiving it; (4) evidence that the package containing the document was properly addressed.\footnote{Id. at 31.} It also held:

As a general statement 31 C.J.S., [Evidence S. 136(b)] states: "Receipt of mail matter by the person for whom it was intended cannot be presumed unless it is proved that the matter was properly addressed to him, at the city or town where he resides or has his place of business, with this street and number if it is a city of considerable size, or at the post office where he usually receives his mail."\footnote{Id. at 32.}

The rule that a correct address must be shown to raise a presumption of delivery to the addressee intended has even been extended to include the zone number. One federal case held as follows:

The deficiency notice was mailed. . . . It was not properly addressed, in that the wrong zone number in Washington was included in the address. . . . Since the address was not proper, there is no presumption that it was delivered in the ordinary course of the mails.\footnote{Kiker v. C.I.R., 218 F.2d 389, 392 (4th Cir., 1955).}
This rule is very important in admission-by-silence in letter cases. The requirement of testimony as to a correct address must be positive and unequivocal. Mere conjecture, belief, or practice to correctly address letters is not enough.\(^{20}\)

Moreover, the rule that letters must be correctly addressed if a presumption of receipt is to be raised applies to cities of any size. One case applied the rule to a city of only 6,000 people.\(^{21}\) In the early days of the United States, most people lived on farms or in rural areas where the town postmaster knew them all. Today, with ever-increasing urbanization of the population, and with anonymous cities and suburbs growing apace, the rule requiring a correct address even to raise the presumption of receipt of a letter covers most of the population.

If the party sought to be charged with the admission admits receipt of the letter, then no problem of presumption need arise. However, if as often happens, he denies having received the letter, then his testimony must be weighed against the presumption which arises from proof of due mailing. In such a case reliance on the bare presumption of receipt is tenuous at best, since evidence of non-receipt tends to overthrow the presumption.\(^{22}\) Thus, in *Hult v. Interstate Savings & Loan Assn.*,\(^{23}\) it was held:

From the mailing of the letter to the defendant, but a prima facie presumption that it was received in due course of mail arose; and, when the defendant testifies in express terms that it was not received, this presumption was entirely negatived; not because such testimony was in conflict with that of the plaintiff, but because it overcame a presumption flowing from the acts proved. A letter mailed to a person does not necessarily reach him, and while, for convenience sake, and from the necessity of

\(^{22}\) Cassel v. Randall, 10 Ga. App. 587, 93 S.E. 858 (1912), holding that the rebuttable presumption of receipt of mail properly addressed, stamped and mailed is entirely overcome by the uncontradicted evidence that the letter was never received. See, however, Kingsland Land Co. v. Newman, 1 App. Div. 1, 36 N.Y.S. 960 (1896): "The fact that the notice had not been received by the appellant, though it would have been of very little weight against the positive testimony of a disinterested person that it had been deposited in the post office, was yet a circumstance which, in this case, the appellant was entitled to have the jury consider."
\(^{23}\) 15 Wash. 627, 47 Pac. 13 (1896).
business, its reception will be presumed, this presumption, flowing from the fact that letters usually reach their destination, can have little weight, as against positive testimony to the effect that the letter was never received.  

Likewise, in *Old Republic Insurance Co. v. Martin* the Supreme Court of Arkansas declared:

But the presumption ceases to exist where the addressee denies receiving the letter. In that case it becomes question of fact whether the letter was received.

The Court does not care to indulge in speculation or conjecture, as to what occurred to the letter, but it is not impossible nor improbable that the letter, when mailed in Fort Smith, before transmission in due course, might have been lost or misplaced. The court prefers, however, to predicate its finding upon the evidence in the record.

Moreover, not only does testimony that a letter was not received rebut the presumption of receipt through proof of proper mailing and addressing, but "there also arises a presumption that the letter *was not mailed* where the addressee testifies that such letter was not delivered and that he did not receive it." The

---

24 Id. at 15.
25 229 Ark. 1065, 320 S.W.2d 266 (1959).
26 Id. at 268. To the same effect see Campbell v. Snyder, 287 Ky. 596, 154 S.W.2d 724, 727 (1941), where the court declared: "Appellant . . . said he wrote appellee a letter notifying him to return to the work and finish it. Appellee denied having received the letter and since there is no evidence that he did receive it, except the mailing of it which merely raised a presumption that he received it, which presumption was completely overcome by appellee's positive evidence that he did not receive it."
27 Hobson v. Security State Bank, 56 Idaho 601, 57 P.2d 685, 688 (1936). This rule is also supported by Employers' Liability Assurance Corp. v. Maes, 235 F.2d 918, 921 (10th Cir., 1956) ("The law does presume where there is evidence that a notice of this kind wasn't received, a legal presumption arises that it wasn't properly mailed and addressed. . . non-receipt raises a presumption that it wasn't properly mailed"); Jenson v. Traders & Gen. Ins. Co., 141 Cal. App. 2d 162, 296 P.2d 434, 436 (1956) ("If proof that a properly addressed and stamped letter was posted gives rise to a presumption that it was received in due course, so proof that no letter was received warrants a finding that it was never posted. If this plaintiff's testimony denying the receipt of the letter was believed, the jury would be warranted in going further and finding that the letter was not posted [citing many cases]"); Matlock v. Citizens' Nat. Bank of Salmon, 43 Idaho 214, 250 Pac. 648, 649 (1926) ("However, when the failure of such a letter to arrive has been established, there conversely arises the presumption that it was never mailed"); Burkitt v. Broyles, 317 S.W.2d 762, 767-8 (Tex. Civ. App., 1958) ("presump-
rationale for this rule is set forth in *Wilson v. Frankfort Marine, Acc. & Plate Glass Ins. Co.* as follows:

The presumption arising from the known regularity of the United States mail service is as available for the supposed receiver of a letter as for the alleged sender thereof. If proof that a properly addressed and stamped letter was posted gives rise to a presumption that it was received in due course, so proof that no letter was received warrants a finding that it was never posted. If this plaintiff's testimony denying the receipt of the letter was believed, the jury would be warranted in going further and finding that the letter was not posted.

The foregoing cases illustrate how tenuous is proof of receipt of a letter, or even proof of mailing to a correct address, although this is testified to by the sender, when the addressee positively testifies that the letter was not received. When, however, the sender is unable to testify to the address to which the letter was sent, no presumption of receipt, and hence admission by failure to answer, can be indulged in, and evidence of the contents of the letter would be inadmissible. Even, however, where the letter is received, the weight of authority is against admission.

III. FAILURE TO RESPOND TO LETTERS: THE STATE COURT RULE

The question of whether the Illinois Supreme Court would admit a letter into evidence because the recipient, who is sought to be charged with the admission, had failed to respond to it, and deny the charges contained in the letter, has never been finally disposed of by that court. The only expression from that court on the subject was in *Hoef v. Hoef*, where it was held: "Where verbal communications are made, silence may authorize an inference of assent, but the same rule does not ordinarily apply to letters

28 77 N.H. 344, 91 Atl. 913 (1914).
29 Id. at 914.
30 323 Ill. 170, 153 N.E. 658 (1926).
received but never answered and in no way acted upon.” 81 This declaration is, of course, ambiguous. By saying that the rule does not “ordinarily” apply, the court has left open the possibility of a future holding that the same rule of admission by silence might sometimes apply if the situation was not “ordinary.” Thus, to determine what the Illinois Supreme Court would decide, it is necessary to examine the rule from other states.

The Alabama Supreme Court has recently declared that “The general rule is that self-serving declarations in a letter which was not answered cannot be treated as admitted because the letter was not answered. The rule is different from that which obtains in respect to a claim verbally made to another in person.” 82 Likewise, a decision of the Supreme Court of Arkansas holds that statements by one person brought to the attention of another are not made admissible against the latter by his silence. 83 A decision of the California District Court of Appeals looks the same way. 84

The same rule against admission by silence of written matter is in force in Colorado, according to its Court of Appeals, 85 in Connecticut, 86 and in Delaware. 87 The Florida Supreme Court has held in Sullivan v. McMillan, 88 as follows:

31 Id. at 659. See, however, Bradley v. Hubbard, 209 Ill. App. 236 (1917), holding that the mere fact that a letter received is not answered is not evidence of acquiescence by the party receiving it in the facts stated therein.

32 Fidelity & Casualty Co. v. Beeland Bros., 242 Ala. 591, 7 So. 2d 265, 267 (1942). See also Millsap v. Wolfe, 1 Ala. App. 599, 56 So. 22 (1911). In that case, an action for the price of a horse defended on the ground of breach of warranty, the testimony of the agent of the seller making the sale, that the buyer after the death of the horse did not claim that the agent on behalf of the seller had warranted the horse to be sound, was held to be properly excluded. The appellate court declared at p. 25: “This testimony was not offered to contradict any statement made by the defendant while he was on the witness stand, as a witness. It would have, if allowed, thrown no light on the questions involved in the case and was properly excluded.”


34 Macmillan Pet. Corp. v. Griffin, 116 Cal. App. 2d 425, 255 P.2d 75, 78 (1958) where the court said: “We do not see that such failure to deny amounted to an admission [of facts in an affidavit] by Jovick. We are dealing with evidence to prove facts, not with pleadings to frame issues. Jovick's mere failure to testify on the subject added nothing to the weight of Mr. Hatch's statement.”

35 Lee-Clark-Andreesen Hardware Co. v. Yankee, 9 Colo. App. 443, 48 Pac. 1050, 1051 (1897) (“The fact that defendant had received such a letter from Mr. Judd, and failed to reply to it, could not have bound defendant in any manner”).

36 Weller v. Fish Transport Co., 123 Conn. 49, 192 Atl. 317 (1937), holding that evidence that a party failed to object to a written statement at a coroner's inquest was not admissible.

37 Wilmington Trust Co. v. General Motors Corp., 29 Del. Ch. 572, 51 A.2d 584, 592 (1947), holding that the failure of alleged donees of stock to deny statements made by alleged donor in his letters to them that he would dispose of stock in any way that he cared to, did not amount to an admission by silence that alleged donor was owner of the stock.

38 26 Fla. 543, 8 So. 450 (1890).
The authorities all hold that the acquiescence inferrable from silence when words are spoken to a person’s face cannot be inferred from silence as to a written communication. What is said to a man before his face he is in some degree called upon to contradict, if he does not acquiesce in it, but not answering a letter is quite different, and it is too much to say that a man, by omitting to answer a letter, at all events admits the truth of the statements that letter contains. . . . Letters addressed to a person, and found, unanswered, in his possession, are, upon this principle, held not to be admissible against him as evidence of the statements made in them. 39

There is no admission by silence of written matter in Georgia 40 or in Iowa. 41 Likewise, an old pre-Civil War case lays down the same rule in Louisiana. 42 And a quite recent case from the Supreme Judicial Court of Maine looks the same way. 43

There are several Maryland cases rejecting the admission-by-silence rule in respect to written matter. 44 In one of them, the Court of Appeals said:

39 Id. at 461.
40 Western Union Tel. Co. v. Nix, 73 Ga. App. 184, 36 S.E.2d 111, 116 (1945) (“a failure to reply to statements made in a letter, which is not a part of a mutual correspondence, is not considered an implied admission by the addressee of the truth of the statements”).
41 Seivers v. Cleveland Coal Co., 158 Iowa 574, 138 N.W. 793, 801 (1912) (“The mere fact that letters were received and remain unanswered has no tendency to show an acquiescence of the party in the facts stated in them. A party is not to be driven into a correspondence of that character to protect himself from such consequences.” [citing many cases]).
42 Porter v. A. Ledonx & Co., 6 La. Ann. 377, 379 (1851) (“it seems to us to be going too far to say that the plaintiff, by not answering this letter, is to be considered as admitting the truth of their declarations”).
43 Lyle v. Bangor & A. R. Co., 150 Me. 327, 110 A.2d 584 (1954), holding that a defendant did not admit liability for injuries sustained by employee merely because an investigator employed by defendant, in the discussion of case with employee’s attorney, did not specifically deny liability, liability was not denied in correspondence between attorneys for the employee and the defendant, and the defendant voluntarily and without solicitation paid the hospital bill and medical expenses incurred by the employee.
44 See Hieatzman v. Braecklein, 131 Md. 482, 102 Atl. 917, 919 (1919). In this suit, to cancel corporate stock transferred to defendant pursuant to an agreement with complainant, to whom a large amount of stock was issued, evidence that complainant in a conversation with witness did not assert any claim to the stock transferred to defendant was held of no weight in showing that complainant had no valid claim. And see also Katznel v. Clark, 215 Md. 54, 137 A.2d 125, 129 (1957) where it was held that evidence of the failure of the defendants to file suits against the plaintiffs was properly excluded.
But it is clear, both on principle and authority, that we have no right to indulge in the assumption that the letters above referred to had the force and effect of verbal statements made in the presence of the defendant's officers. The rule is precisely to the contrary: [Quotes at length from Learned v. Tillotson, 97 N.Y. 12 that:] a distinction exists between . . . oral declarations . . . and a written statement in a letter. 45

The rule against admission of unanswered letters as evidence of the truth of the matter stated therein on the theory that by failing to reply the party receiving the letter admits the truth of what is said therein was accepted in Massachusetts a full century ago. 46 This exclusionary rule is supported by over a half dozen decisions squarely on point. 47 The strength of the exclusionary rule is illustrated by one recent case where a letter written by a third party to the seller of stock contained certain statements relative to the third party's association with a buyer and the corporation in which both the seller and buyer were originally stockholders, and where the buyer saw a copy of the letter while conferring with the third party and did not deny the statements. The court held that since the statements were not directed to the buyer, his failure to deny them did not render the letter admissible in a later suit between the seller and the buyer on the ground that the letter contained admissions. 48 Here, the situation virtually approaches an oral admission-by-silence situation, for the reply of a spontaneous oral denial can be expected. Nevertheless, so strong is the rule against admission of written matter not affirmatively adopted, that the letter was excluded.

45 Briggs v. Stueler, 93 Md. 100, 48 Atl. 727, 729 (1901).
46 Dearing v. Kimball, 86 Mass. (4 Allen) 125, 128 (1862) ("the omission to answer letters written to a party by a third person does not show an acquiescence in the facts there stated, as might be authorized to be inferred in the case of silence where verbal statements were made directly to him").
ADMISSION BY SILENCE OF WRITTEN MATTER

The rationale behind the Massachusetts rule is best expressed in *Kumin v. Fine* as follows:

The rule is well established that a person to whom a letter is addressed ordinarily is not required to make any reply; and failure to answer it is no evidence of the truth of the facts therein stated, because such evidence would be in violation of the rule that a party cannot make evidence for himself by his own declarations. It was held in Wiedeman v. Walpole [1891] 2 Q.B. 534, that in an action for breach of promise of marriage the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he promised to marry her, was not corroborative of the plaintiff's testimony in support of such promise.

The Michigan rule that "omission to answer a letter pending a controversy cannot be held an admission of the adverse party's claims" is likewise well settled. In *State Bank of St. Johns v. McCabe*, the Supreme Court of Michigan declared:

The authorities make a distinction between statements made orally and those contained in letters which are unanswered or not acted upon. In the former case the party to whom statements hostile to his interest are made may with much reason be required to contradict, or be held to acquiesce in their truth. In the latter case he is not called upon to go to the trouble and expense of writing a denial, and silence cannot be construed into acquiescence in the truth of the written statements.

The rule in Missouri is identical, and rests on the proposition that there is no duty to reply to letters. The Montana Supreme

50 Ibid.
54 Id. at 22.
55 St. Joseph Lead Co. v. Fuhrmeister, 353 Mo. 232, 182 S.W.2d 273 (1944). In that case, defendant sent a registered letter to a corporation's president stating his claim and requesting certain permission. The letter asked for an early reply. There was no reply and defendant offered the letter in evidence on the theory of admission by silence.
Court has likewise declared that letters need not be answered. A similar rule is in force in Nebraska.

In New Jersey, the same rule above-mentioned is in force. In one case, the Supreme Court of New Jersey declared:

oral declarations made to one sought to be charged thereby may in some cases be considered as admitted by silence, but the rule is otherwise as to letters. The recipient is not called upon to reply, or be considered as admitting what is written ... (citing cases, including New York). An unanswered letter, not received in the course of a correspondence, is not evidence at all against the recipient.

One of the best explanations for the rule against admission by silence of written matter comes from the Supreme Court of North Carolina. In Boney v. Boney, evidence was offered that a party remained silent when shown statements in letters adverse to his interest in the presence of witnesses. The court held this not to be an admission by silence although the force of showing someone a letter would almost amount to an oral declaration. The court gave its reasoning as follows:

In 2 Chamberlayne, Mod. Evi ... the author notes a distinction between oral and written accusations. ... Experience shows that, in the case of the average man, a marked distinction exists between the readiness with

---

The court held, at p. 280: "The evidence was properly excluded as hearsay and incompetent. [case] No duty rested upon National's president to reply to the letter and request, and silence in view of the content of the letter and surrounding circumstances was not an implied admission that defendant had talked to National's agents or that National acquiesced in what the agents had stated."

Whorley v. Patton-Kjose Co., 90 Mont. 461, 5 P.2d 210, 217 (1931) ("the mere fact that a person received a letter containing false statements of fact does not impose upon him an obligation to reply or to protest the falsity of the statement, and the omission to answer such a letter has no probative value as tending to show an admission of the matters stated").

Kane v. Chicago B. & Q. R. Co., 90 Nebr. 112, 132 N.W. 920 (1911), holding that failure to reply to a letter is inadmissible.

State (Hand) v. Howell, 61 N.J.L. 142, 38 Atl. 748, 749 (Sup. Ct., 1897) aff'd 61 N.J.L. 694, 43 Atl. 1098 (E & A, 1898). See also Garnick v. Gerewitch, 39 N.J. Super. 486, 121 A.2d 423, 427 (1956) ("The failure of the recipients of the letters to reply thereto cannot be taken as an acquiescence in plaintiff's construction of the restrictive covenant. ... There was no duty upon them to reply. Their silence is not admissible as evidence of an admission of the accuracy of plaintiff's statement.")

161 N.C. 614, 77 S.E. 784 (1913).
which he will reply to an oral question and his readiness to answer in writing a written claim or demand. Those who are addressed directly, face to face, feel a spontaneous impulse frequently, perhaps the result of habit, to deny a false declaration regarding a matter which intimately concerns them. In proportion as yielding to such an impulse would be natural, failure to do so is significant. No such intuitive suggestion is, as a rule, presented where statements are made in writing. Even where the initial impulse is to reply, the feeling frequently fails to persist until it becomes effective in a resultant denial. Delay removes spontaneity. A stage of deliberation intervenes. No immediate necessity for taking a definite position may be felt. In view of these and similar considerations, it can scarcely be said that any uniform natural impulse to traverse erroneous written statements exists under ordinary circumstances.60

A decision of the Ohio Court of Appeals shows that this state is in line with the general rule.61 Oregon has also held that "the mere fact that letters were received and remained unanswered has no tendency to show an acquiescence of the party in the facts stated in them."62

Over a century ago, a Pennsylvania court held that "letters not having been answered, were not evidence at all against the defendant."63 This rule has been uniformly adhered to in that state.64 Thus, in one leading case, the court said:

60 Id. at 787.
61 Aftel v. Cound, 32 Ohio App. 270, 167 N.E. 402, 403 (1928) ("We think the rule is well settled that a person is not required to enter into correspondence with another in reference to a matter in dispute between them, and that silence should not be regarded as an admission against the party to whom a letter is addressed. In this respect the law is different as to oral declarations made by one party to another, which are of such a nature as to require an answer.")
62 Wakefield, Fries & Co. v. Sherman Clay Co., 141 Ore. 270, 17 P.2d 319, 321-2 (1932). The court also declared "In . . . Learned v. Tillotson, 97 N.Y. 1 . . . the rule is stated as follows . . . failure to answer a letter is entirely different . . . [and no] silence should be regarded as an admission against the party to whom the letter is addressed." See also Kitzke v. Turnidge, 209 Ore. 563, 307 P.2d 522, 526 (1957) to the same effect.
63 Allen v. Peters, 4 Phila. 78, 81 (1860).
64 Dempsey v. Dobson, 174 Pa. 122, 34 Atl. 459 (1896). In Barrow v. Newton, 55 Pa. Super. 387, 391-2 (1913) it was held: "The letters . . . were properly excluded . . . the defendant did not answer them and he was in this case under no duty to answer them . . . and there being no duty upon the defendant to reply, it cannot be said that his failure to do so was an admission of the truth of the statements in the letters contained."
Certainly the law applicable to oral incriminating statements does not apply to letters received by a defendant. One would be likely to ignore such a letter, if false in its statements of fact or unsound in its advice, as unworthy of serious consideration. Accordingly, in the absence of proof that a defendant replied to letters received by him or otherwise recognized the validity of the statements contained in them or acted in pursuance of them, the letters are not evidence against him.65

The rule against admission by silence prevails in South Carolina,66 and appears to be the Texas law as well.67 And the Supreme Court of Vermont, in concurring in this rule, gave its reasoning as follows:

Almost all men will reply to and deny or correct a false statement verbally made to them. It is done on the spot and from the first impulse. But when a letter is received making the same statement, the feeling which readily prompts the verbal denial not infrequently cools before the time and opportunity arrive for writing a letter. Other matters intervene. A want of facility in writing, or an aversion to correspondence, or habits of dilatoriness may be the real cause of the silence. As the omission to reply to letters may be explained by so many causes not applicable to silence when the parties are in personal conversation, we do not think the same weight should be attached to it as evidence.68

IV. NEW YORK RULE

Special attention to the New York rule against admission by silence of written matter is warranted because it is one of the most exclusionary rules in the country. In no other state is the rule more rigid or firmly established.

In one of the earliest decisions in the United States on failure to reply to written matter, the New York Supreme Court,

67 Houston, T. C. Ry. Co. v. Fox, 106 Tex. 317, 166 S.W. 693, 696 (1914).
68 Fenno v. Weston, 31 Vt. 345, 352 (1858).
in *Starkweather v. Converse,*\(^6^9\) held that "no man, by doing wrong, can make it the duty of another to complain of the injury at the peril of being concluded by his silence."\(^7^0\) More recently, in *Gray v. Kaufman Dairy,*\(^7^1\) the New York Court of Appeals held as follows:

But it is clear, both upon principle and authority, that we have no right to indulge in the assumption that the letters above referred to have the force and effect of verbal statements made in the presence of the defendant's officers. The rule is precisely to the contrary. It is well expressed in *Learned v. Tillotson,* 97 N.Y. 12 as follows: "We think that a distinction exists between the effect to be given to oral declarations made by one party to another, which are in answer to or contradictory of some statement made by the other party, and a written statement in a letter written by such party to another. It may well be that under most circumstances what is said to a man to his face, which conveys the idea of an obligation upon his part to the person addressing him, or on whose behalf the statement is made, he is at least in some measure called upon to contradict or explain; but a failure to answer a letter is entirely different, and there is no rule of law which requires a person to enter into a correspondence with another in reference to a matter in dispute between them, or which holds that silence should be regarded as an admission against the party to whom the letter is addressed. Such a rule would enable one party to obtain an advantage over another and has no sanction in the law."\(^7^2\)

In another leading case, *Viele v. McLean,*\(^7^3\) the New York Court of Appeals added the following:

The theory upon which [the letter] was admitted in evidence seems to be that the defendant's failure, upon the

\(^6^9\) Wend. 20 (N.Y., 1837).
\(^7^0\) Id. at 24-5.
\(^7^1\) 162 N.Y. 388, 56 N.E. 903 (1900).
\(^7^2\) Id. at 905-6. To the same effect see Burns v. Blidberg Rothchild Co., 195 Misc. 625, 91 N.Y.S.2d 55 (1949).
\(^7^3\) 200 N.Y. 260, 99 N.E. 468 (1910).
receipt of the statement, to deny its truth was in the nature of an admission. It is well-settled that this is an erroneous view of the law. "While a party may be called upon in many cases to speak where charges are made against him, and in failing to do so may be considered as acquiescing in its correctness, his omission to answer a written allegation, whether by affidavits or otherwise, cannot be regarded as an admission of the correctness thereof, and that it is true in all respects. Reasons may exist why he may choose and has a right to remain silent, and to vindicate himself at some future period and on some more opportune occasions." (citing cases) "One to whom a letter is written may remain silent . . . and in such cases silence does not operate as an admission of the matters to which the letter relates." (cases)  

In a relatively recent case, the Appellate Division, First Department had before it a strong case for admission of a letter. Here the party sought to be charged with the letter had been shown the letter and had an oral chance to rebut its contents but had not done so. Nevertheless, the Court held that the letter was inadmissible, saying:

The letter was received in evidence on the theory that the contents had been admitted by the defendant's failure to make a statement in relation to its contents when it was originally shown to him shortly after the death of the plaintiff's wife. In the first place, defendant was not asked to make a statement in respect to the letter. In the second place, had he been asked, he was under no duty to make any statement.  

V. The Federal Rule Under the New Federal Rules of Civil Procedure

Under Rule 43(a) of the Federal Rules of Civil Procedure, the federal courts are not strictly enjoined to follow state rules of evidence, but rather may be more liberal and admit evidence

admissible under any federal statute or under rules of evidence heretofore applied in equity cases heard in the federal courts. In a recent decision, it was held that a federal court hearing a non-equity case might look to non-equity federal precedents to determine whether evidence was admissible, even though the state rule called for exclusion. Accordingly, complete examination of this subject requires an attempt to ascertain the federal rule notwithstanding the application of *Erie R. Co. v. Tompkins* to the local federal district courts.

The earliest federal case on point comes from the District of Columbia, and holds that failure to reply to letters does not admit the facts therein. The next case of importance was decided by Judge Taft, later President of the United States and Chief Justice of the United States Supreme Court. Speaking for the Circuit Court of Appeals for the Sixth Circuit, Judge Taft declared:

The rule is well-settled that conversations between parties to a controversy, in which one makes a statement of fact of which both have personal knowledge, and which naturally calls for a denial by the other if the statement is untrue, are competent against the silent party, as admissions, by acquiescence, of the truth of the statement. . . . With respect to written communications, however, the rule is different, because the failure of one receiving a letter to answer it may be attributed to many causes besides an acquiescence in the truth of what is written, and such a rule would furnish a dangerous weapon in the hand of an unscrupulous party to make evidence in his favor against a careless opponent. . . . The better-supported rule, probably is that unanswered letters are ordinarily not evidence against the person addressed, as admissions of the truth of statements contained therein. Learned v. Tillotson, 97 N.Y. 8; Talcott v. Harris, 93 N.Y. 567, 571 (other cases).

---

77 304 U.S. 64 (1938).
The foregoing case was a civil case, but it was very shortly followed thereafter by a leading criminal case from the Circuit Court of Appeals for the Second Circuit, which held as follows:

It is also urged that the letter was admissible as a tacit admission by the accused of the truth of its statements, it having been proved that the accused did not reply to it. Admissions, of course, may be inferred from silence as well as from express statements, but it has been uniformly held by the courts that the failure to reply to a letter is not to be treated in a criminal or in a civil action as an admission of the contents of the letter. In Com v. Eastman, 1 Cush. 215, the court said:

..."Letters addressed to an individual, and received by him, are not to have the same effect as verbal communications. Silence in the latter case may authorize the inference of an assent to the statement made, but not equally so in the case of a letter received, but never answered or acted upon."

In People v. Green, 1 Parker Cr. R. 17, the court said: "The maxim, 'Qui tacet consentire videtur,'... could not, in principle, be applicable to facts stated in a letter which the party was not bound or interested to answer. It would be placing a man entirely at the mercy of another if he was bound by what others chose to assert in addressing letters to him. In no case could his silence be considered an admission of such facts."

...The same principle has been repeatedly applied in civil actions... Learned v. Tillotson, 97 N.Y. 1; Bank v. Delafield, 126 N.Y. 418, 27 N.E. 797; Gray v. Ice Cream Co., 162 N.Y. 397, 56 N.E. 903.80

Several years later, the Ninth Circuit took a similar view. In Poy Con Tom v. United States,81 the court declared that "it has been uniformly held by the courts that the failure to reply to a letter is not to be treated in a criminal or civil action as an admission of the contents of the letter."82

81 7 F.2d 109 (9th Cir., 1925).
82 Id. at 110.
In 1927, the United States Supreme Court had occasion to deal with this problem. Citing many prior decisions, such as *Packer v. United States* and *Viele v. McLean* with approval, Mr. Justice Holmes declared for a unanimous court:

A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts. He no more can impose a duty to answer a charge than he can impose a duty to pay by sending goods. Therefore, a failure to answer such adverse assertions in the absence of further circumstances . . . has no effect as an admission.  

Thus, the pre-Federal Rules decisions strongly favored exclusion of written matter not answered by the party sought to be charged with the admission.

The number of decisions subsequent to 1938 is not large enough to say that the past rule is accepted as still binding in all federal courts, but such few decisions as there are indicate that Rule 43(a) will make no change in this area. For example, in one case in the United States Court of Appeals for the Second Circuit, an ex-employee sued an employer for wrongful discharge, and moved for summary judgment. In opposition to this, the employer presented its officer's affidavit wherein the officer swore that he and the employee had made an oral agreement cancelling the employment contract. In his reply affidavit, the employee stated that even if the officer's version were true the alleged agreement of cancellation was legally invalid. On trial, the affidavits were offered into evidence on the theory that the employee's failure squarely to contradict the officer was a virtual admission of the making of the rescission agreement, but this evidence was excluded. The appellate court upheld the exclusion, citing an old New York case dealing with admission by silence of written matter.  

And a federal district court in Pennsylvania has reached the same result.  

VI. NEWSPAPER ARTICLES

The number of cases dealing with admission of facts set forth in newspaper articles by failing to protest them is very small. In all probability, the reason why so few cases have arisen is the widespread recognition that a person is not responsible for what others say about him without his consent, and that any statement in an article is merely printed hearsay and is not admissible unless adopted by the person sought to be charged.\(^8\)

The mere fact that a person is aware of an article about him and fails to deny statements made therein does not constitute an admission that the statements are accurate. A leading case on point comes from the New York Court of Appeals. In *People v. Smith*,\(^8\) that court declared:

The declarations of a party that he had heard or read certain statements cannot be given in evidence to establish such statements, because they are at most hearsay, and when stated by him as such it does not change their nature, but they continue to be hearsay and are, consequently, inadmissible. All the defendant said as to the newspaper account was that it contained a statement to the effect that the witness had said that the decedent declared that the defendant did it. This was not an admission that he did it, or of the truth of any of the matters there stated.\(^8\)

In *Louisiana Purchase Exposition Co. v. Emerson*,\(^9\) the plaintiff sought to use as evidence of the making of a subscription for

---

8 See, for example, Collins v. State, 75 Tex. CrR. R. 534, 171 S.W. 729, 731 (1914), where the court held: "If Ira W. Collins authorized the publication, it would be admissible against him, but until that was shown in some way the mere fact that the A. T. Still Osteopathic Infirmary published his name with it would not make Collins responsible." And see Norwood v. United States, 45 F.2d 495, 496 (8th Cir., 1930) holding that the introduction of a telephone directory listing to show defendant's connection with another in operating a certain place was error, in the absence of a showing of defendant's knowledge that he was going to be listed in this way.

87 172 N.Y. 210, 64 N.E. 814 (1902).
88 Id. at 236.
89 149 Mo. App. 594, 129 S.W. 753 (1910).
stock the fact that defendant had failed to deny an article in a newspaper which had stated that the defendant was a large purchaser of stock in the plaintiff exposition. The Missouri Court of Appeals rejected this evidence as inadmissible, and held that there was no admission of the facts stated in the article by failure of the defendant to deny them. It said:

it is said the newspaper article was competent evidence because it tended to prove defendant had ratified the subscription for $2,500 worth of stock if he did not make it in the first place, and tended further to prove he had made it. This argument proceeds on the theory that, as defendant read the article in the Banner which said he subscribed for $2,500 worth of stock and did not deny or repudiate the statement, the article was relevant evidence to prove he had subscribed for stock or had assented to a subscription in his name to the amount mentioned. We reject this contention and hold the article was incompetent. It was not competent unless the exposition company could have made out a case against defendant for the price of the stock merely because he did not repudiate a newspaper article which said he had subscribed. A contract of subscription between the exposition company and defendant would have to be established to make him liable; and certainly the exposition company could claim no such contract from the bare fact that a newspaper had so stated and defendant had not denied the statement. . . . It is manifest those cases lend no support to the proposition that a man will become liable as a subscriber for corporate stock if some newspaper represents he has subscribed and he does not come forward in denial of the statement.\textsuperscript{90}

Probably the most striking case holding in favor of exclusion is \textit{Spencer v. Read}.\textsuperscript{91} Here the party sought to be charged was actually asked about the article. Indeed, this case verges on a situation analogous to admission by silence of an oral charge.

\textsuperscript{90} \textit{Id.} at 754.

\textsuperscript{91} 217 Fed. 508 (8th Cir. 1914).
Nevertheless, the article was excluded. In upholding this ruling, the United States Circuit Court for the Eighth Circuit declared:

Complaint is next made of the exclusion of an article published in the Morris Herald of August 11, 1911. . . . There was offered in evidence by plaintiff a clipping from this issue of the newspaper mentioned, entitled "Get Rich Quick Deal, Marseilles People Stung by High Finance, Swanson Deal." This clipping is an attempt at "a humorous write-up" of what purports to be the efforts of citizens of Marseilles to secure the location at that place of the Swanson Manufacturing Company in lieu of some manufacturing plant recently removed from Marseilles to Moline, Ill., and the subsequent bankruptcy of the Swanson concern, and the resulting loss to the Marseilles citizens. A witness testified that he had a copy of this paper of August 11th at his place of business in Shenandoah some time in the fall of 1911, and, as the defendant Mitchell was passing one day, called to him and said, "I did not know you were such a scoundrel or bad man as this," and showed him the article; that Mitchell read it aloud in his presence and the presence of some others and laughed and said, "That is about the way we got the money. . . ." He did not deny in my presence any of these statements in the transactions . . . . Nor is it admissible against Mitchell, for one is not called upon to deny the truth of matters appearing in the public press concerning him, to which his attention may be called, under the circumstances shown in this case, to avoid personal responsibility for such matters. There is no merit in this assignment of error.92

From these authorities, it can hardly be doubted that newspaper articles of any kind are inadmissible against the persons to whom they refer unless such person expressly admits the truth of the matter set forth in them. A failure to deny the statements, even in discussing the article, is insufficient to constitute an admission of the correctness thereof. No statement at all is even less of a foundation on which to lay the basis for an admission.

92 Id. at 517.
VII. KEEPING WRITTEN OR PRINTED MATTER

Printed Matter

Although it has been shown above that the mere failure to rebut written or printed statements is not an admission against the party mentioned therein, a further question arises as to whether this rule is altered by the fact that the party sought to be charged with the admission kept the written or printed matter in his possession for whatever personal use he decided to make of it.

The rule is well-settled that as to printed matter at least, the mere retention of the material does not show agreement with or admission of the truth of the matter involved. In *Herndon v. Lowry*, the United States Supreme Court declared, in a constitutional law case, that "no inference can be drawn from the possession of the books mentioned, either that they embodied the doctrines of the Communist Party or that they represented views advocated by the appellant." Likewise, in *Shaw v. State*, an Oklahoma court declared:

The contention of the defendant that the books, pamphlets, and other written material admitted in evidence over objection of defendant and purportedly showing the doctrines advocated by the Communist Party without some evidence to authenticate these various exhibits and to show that the statements therein made were in truth and fact statements representing the true position of the Communist Party is so fundamentally sound that this court has been unable to find any legal authority to sustain the admission of this evidence.

A very strong case in favor of exclusion is *Commonwealth v. Jaunes*. Here, the defendant was prosecuted for arson. The prosecution introduced into evidence testimony that on the evening after the fire the defendant voluntarily exhibited a maga-
zine to an officer which he had been reading and called the officer's attention to an article entitled "How to Catch Fire Bugs." The appellate court held that the admission of this article and testimony surrounding it was reversible error. It said:

The conduct of the defendant, in handing the current number of the magazine article to the witness and declaring that he was just reading an article about fire bugs, cannot be construed into an admission from defendant of any participation in the crime on his part. . . . The testimony was irrelevant and prejudicial, failing to connect defendant in any way with the commission of the crime.

The court below did not restrict the admissibility of the evidence to defendant's declaration, but admitted the contents of the article, and indeed, the entire magazine into evidence. This action was, we believe, prejudicial error. Not only were the contents of this article printed declarations of a third party, not himself a witness, but the article contained nothing to connect the defendant with participation in the setting of the fire. The admissibility of the article itself into evidence violates the hearsay rule; the contents are irrelevant to the issues, and grossly prejudicial to defendant.98

Unanswered Letters

Although authority is not abundant, such authority as there is supports the position that the mere retention of unanswered letters is not an admission of the truth of the statements therein. Thus, in an early New York case, the court declared that "The opinion seems now to be established . . . that the possession of unanswered letters is not, of itself, evidence of the contents."99 In a California case, letters addressed by one secret society to another, directing the latter to inform the defendant that friends of one whom the defendant has killed and the police were after him, in order that defendant might change his residence to avoid detection, and which were found in defendant's possession at the time

98 Id. at 793.
99 People v. Green, 1 Parker's Cri. Rep. 11, 18 (N.Y., 1845).
of his arrest, were held to be inadmissible on his trial for murder.\textsuperscript{100} And a decision of the United States Court of Appeals for the Seventh Circuit declared:

The letters, however, if properly identified, would not of themselves authorize any inference against the defendants. They were only the acts and declarations of others; and, unless adopted or sanctioned by the defendants, by some reply or statement, or by some act done in pursuance of their suggestions, they ought not to prejudice the defendants.\textsuperscript{101}

VIII. CONCLUSION

The foregoing analysis shows clearly that neither a letter nor any other writing or publication constitutes an admission merely because the person to whom it is addressed or who is described therein, fails to reply or rebut the statements.

To require individuals to reply to all correspondence directed to them would constitute an intolerable imposition. A busy person, and especially one occupying a public or semi-public position, gets dozens of letters from cranks, or apparent cranks, and others with whom he wishes to avoid dealing. Such letters often contain accusations or charges of various kinds. Were the recipient of the letter compelled to enter into correspondence with the writer, the latter's goal of annoyance might well be fulfilled by compulsion of law. Surely no rational legal system would tolerate such a situation.

Even where the letter contains what purports to be helpful information, such as acknowledgment of receipt of some item alleged to be sent by the addressee, no duty to respond is raised. The recipient may well rely on the letter-writer to determine his own mistakes, and may assume that such error will be corrected in due course by other means, such as correspondence from the actual sender. People are not required to be drawn into the affairs of others by the errors of the latter, or of some third party. While

\textsuperscript{100} People v. Ree Dick Lung, 129 Cal. 491, 62 Pac. 71 (1900).
\textsuperscript{101} Moy Wing Sun v. Prentis, 234 Fed. 24, 26-7 (7th Cir., 1915). And in Sorenson v. United States, 168 Fed. 785, 796 (8th Cir., 1909), after a full review of the cases, it was held that "a letter found upon the prisoner when arrested has been held to be no evidence of the facts stated in it."
answering all letters of inquiry may be polite, an omission of the best etiquette is not enough to raise a legal admission.

There is even less to be said for requiring people to read every word in the newspapers, magazines, or other periodicals and protest statements about them. A repetition of the prior statement, even in a correction, may be more damaging than the original publication. The subject of an article may feel that the circulation of the periodical is too small to be bothered, or that its reputation is too poor for people to believe it, or that his reputation is so good that no one will believe the story, or for other reasons may take no action. To impose a duty to correct every word said about someone in print, would, at least in the case of public figures, leave little time for any other activity. The only safe rule, which enjoys widespread judicial support, is to exclude such fact, and leave the proponent to prove his case by reliable and significant evidence.