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Preliminary Examination to Determine Competency of Confession as Evidence

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The extension of the period of "lives in being" by the addition of twenty-one years does not seem to have the same foundation of reasonableness to recommend it, and could very well be discarded. The extirpation of sections forty-three and forty-five, and the alteration proposed for section forty-six are, of course, necessary, they being adjunctive sections to section forty-two in that they carry out the scheme introduced by the Revisers to limit the suspension to two lives in being. The recommended change in the Personal Property Law would have the effect of placing trusts of personal property on a par with those of real property. Such a change would be in accord with recent enactments seeking uniformity in the disposition of estates of decedents.[19]

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PRELIMINARY EXAMINATION TO DETERMINE COMPETENCY OF CONFESSION AS EVIDENCE.—"The law sedulously guards against the introduction of irrelevant or incompetent evidence, by which the rights of a party may be prejudiced." [1] The reason for this is not difficult of comprehension. A litigant may reasonably demand that a Court or jury determine the merits of his action, after hearing only that evidence which is germane to the issue. Testimony which is irrelevant, or worse, incompetent, serves no useful purpose at a trial. Too often does but the mere allusion to testimony, which the Court declares incompetent, create an impression on the minds of the jurors which will react prejudicially against a litigant. Inevitably the infusion of prejudice tends to deprive him of the fair and impartial trial which the law accords all litigants. With unfailing diligence our Courts must observe and follow "the meticulous rules of evidence by which it is designed to have a case determined only on first hand evidence bearing exclusively and directly on the issues involved." [2]

While it is stated generally that the rules with regard to the admission of evidence are to be applied in civil and criminal cases alike, yet in criminal cases the necessity always exists for a more rigid enforcement of these rules.[3] Professor Wigmore has stated that:

> "In criminal charges, the higher degree of caution always exercised by the law in favor of the accused prompts to a greater strictness in excluding suspicious testimony." [4]

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[19] N. Y. Decedent Estate Law (1930).

[1] Williams v. Brooklyn Elevated Railroad Co., 126 N. Y. 96, 103, 26 N. E. 1048, 1049 (1891).

[2] (1930) 4 St. John's L. Rev. 192.

[3] Wharton, Criminal Evidence (10th ed. 1912), p. 47, Sec. 24b.

[4] 2 Wigmore, Evidence (2nd ed. 1923), p. 140, Sec. 822.

A specie of evidence, the admissibility of which has caused much perplexion, is the confession. "A confession, as applied in criminal law, is a statement by a person, made at any time afterwards, that he committed or participated in the commission of a crime." [5] There can be no stronger link in the chain of evidence against one accused of crime than his own "acknowledgment in express words of the truth of the accusation against him." With the ultimate conclusion reached by Professor Wigmore, that "a *free and voluntary* confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and, therefore, it is admitted as proof of the crime to which it refers" [6] one can not cavil. Unquestionably, when a confession is freely and voluntarily made, it is surrounded by the cloak of truthfulness and trustworthiness with which all evidence must be gowned, and as such it is most competent testimony. The rule, conceived at the common law, and adopted in New York, by statute [7] is now firmly established that a free and voluntary confession, whether made before or after apprehension, and whether in writing or in unwritten words, is admissible when offered against the accused, no matter where or to whom it was made.

The difficulty lies in the determination of the question of whether a confession offered at the trial has been *freely* and *voluntarily* made by the defendant. With annoying frequency, trial and Appellate Courts are called to rule upon the competency of confessions because the claim is made by the defendant that the purported "confession" was extorted from him by force and violence. Experience has verified the disturbing truth that frequent resort is had to the third degree in order to force a confession from an accused. "One is driven to the conclusion that the third degree is employed as a matter of course in most states, and has become a recognized step in the process that begins with arrest and ends with acquittal or final affirmance." [8] Arresting officers and prosecuting attorneys too often assume—contrary to the law—that it is within their power to institute a summary inquisition, and to extort from the party suspected a statement that would confirm their suspicions. This is indeed a sad commentary and an unpardonable indictment against the law enforcing authorities of our country,[9] especially when one

[5] Wharton, *supra* note 3 at 1265, Sec. 622.

[6] 2 Wigmore, *supra* note 4 at p. 141, Sec. 822 (Italics ours).

[7] N. Y. Code of Criminal Procedure. Sec. 395.

[8] Note (1930) 43 Harv. L. Rev. 617.

[9] In Weeks v. United States, 232 U. S. 383, 392, 34 Sup. Ct. 341, 344 (1914), the United States Supreme Court said: "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures, and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

contrasts "the practice in England where not one case showing evidence of third degree methods has been found in the past twenty years," [10] with that prevalent here, where this pernicious system has become so firmly entrenched that "a confession is adduced in practically every case where an indictment is found." [11] These facts assume a more appalling hue when it is borne in mind that it is mostly the members of the "lower classes" that are exposed to the iniquity of the third degree, for, as Dean Pound observes: "no rich man has been subjected to the third degree to obtain proof of violation of anti-trust or anti-rebate legislation, and no powerful politician has been so dealt with in order to obtain proof of bribery or graft." [12]

There is indeed ample ground for the distrust attached to confession testimony. This is a distrust based on experience. Can one reasonably attach any trustworthiness to a purported confession of an accused when the impelling motive to confess is supplied by a rubber hose, or a boxing glove in the hand of an officer? [13] What trustworthiness may be attributed to the expressions of a mind that has been subjected to endless hours of "inquisitorial compulsion"? [14] A confession thus obtained is denuded of that element with which all testimony must be vested, to wit, trustworthiness.

There is no rule more firmly established in the law of evidence, than that which declares incompetent, and thus inadmissible, any confession obtained by or made under the influence of threats or violence.[15] A confession forced from the mind by the torture of fear, comes in so questionable a shape when it is to be considered as evidence of guilt, that no credit ought to be given to it, and, therefore, it is rejected as incompetent.

This rule is too well settled, to any longer perturb trial or Appellate Courts. However, it is the proper determination of the concomitant questions of the procedure to be followed in cases where confessions are involved, that is the source of much judicial expression.

Digressing momentarily from the immediate subject matter, attention is called to several generally acknowledged rules of the law of evidence relative to the admissibility of competent testimony. It is exclusively within the Court's province to determine whether,

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[10] *Supra* note 8 at 618.

[11] Wharton, *supra* note 3 at 1290, Sec. 622f.

[12] Pound, The Spirit of the Common Law (1921), p. 105.

[13] People v. Doran, 246 N. Y. 409, 159 N. E. 379 (1927).

[14] People v. Kennedy, 159 N. Y. 346, 362, 54 N. E. 51, 56 (1899). An example of this "inquisitorial compulsion" is related in the N. Y. World-Telegram of March 17, 1931. "Exasperated officials who, for twenty-four hours, had bullied, implored and ranted without moving Mrs. from her phlegmatic attitude of innocence, this afternoon arrested her on the charge that she had murdered her husband."

[15] *Supra* note 7; 16 C. J., p. 728 and cases therein cited.

as a matter of law, testimony offered of a fact is competent as evidence. The Court having determined its competency, which determination is necessarily preliminary to admissibility, it is then within the jury's province to evaluate this evidence.

These same principles generally prevail in the procedure on the admission of confessions. The voluntary or involuntary character of a confession is a question of law, to be determined by the trial Judge, from the facts, as a condition precedent to the admission of the confession.[16] The Court has the duty to determine as a matter of law, prior to permitting the confession to go to the jury, whether it was or was not voluntary.[17]

To aid a trial Court in properly deciding the question of admissibility of a confession and to maintain inviolate the right of a defendant to a fair and impartial trial, his guilt or innocence to be determined by the jury after hearing only *competent* evidence offered against him, the following rule of procedure has been devolved:

> "Where a confession of guilt is offered against a person on trial for a criminal offense, and he objects to the same and offers to prove to the court that it was procured from him by threats or promises, or under such circumstances as would render it incompetent as evidence, it is error to receive it, without first hearing the proof offered and deciding upon the competency of the confession as evidence against the party making it." [18]

This has become the established procedure in our criminal courts.[19] The Court of Appeals recently reasserted the rule when Judge Crane wrote that:

> "When the point in the trial was reached at which the prosecution sought to introduce the confession, the learned trial justice * * * in accordance with our procedure took testimony both for the prosecution and for the defense upon the question of whether or not the confession was voluntary or was the outcome of fear and violence." [20]

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[16] People v. Rogers, 192 N. Y. 331, 85 N. E. 135 (1908); People v. Brasch, 193 N. Y. 46, 85 N. E. 809 (1908); People v. Doran, *supra* note 13; People v. Weiner, 248 N. Y. 118, 161 N. E. 441 (1928); People v. Barbato, 254 N. Y. 170, 172 N. E. 458 (1930).

[17] 16 C. J., p. 735.

[18] People v. Fox, 121 N. Y. 449, 453, 24 N. E. 923, 924 (1890).

[19] People v. Rogers, *supra* note 16; People v. Brasch, *supra* note 16; People v. Randazzio, 194 N. Y. 147, 87 N. E. 112 (1909); People v. Nunziato, 233 N. Y. 394, 135 N. E. 827 (1922); People v. Doran, *supra* note 13; People v. Barbato, *supra* note 16.

[20] People v. Doran, *supra* note 13 at 415, 159 N. E. at 381.

Our Appellate Courts countenance no digression from this established rule. It is error to deny the defendant's request to offer his testimony on the involuntary character of the confession, prior to its reception.[21]

> "The reason for the rule which requires that the defendant shall be given full opportunity before testimony of alleged confessions is given to show that the same were involuntary and made under the influence of fear produced by threats, is to avoid the possibility of a jury hearing such alleged confessions which may subsequently appear to be inadmissible. To avoid the possibility that a jury may be *unconsciously influenced* by alleged confessions admitted in the evidence and afterwards stricken out as inadmissible requires that the defendant's right to said preliminary examinations should be rigidly enforced whenever by any reasonable possibility the confessions may be inadmissible under Section 395 of the Code of Criminal Procedure." [22]

If no objection is made to its admission, then the presumption is, that the confession is voluntary. Where there is no dispute as to the circumstances under which the confession was made, the trial Judge may determine, as a matter of law, that it was voluntarily or involuntarily made. "The court should reject the confession, if a verdict that it was made freely would be against the weight of the evidence. * * * But, upon disputed facts, the voluntariness is, under proper instruction of the court, for the jury." [23] The Court passes upon the facts merely for the purpose of determining their competency and admissibility. The jury passes upon the same facts, and in connection with other facts in determining whether the confession is true and entitled to any, and how much weight. The Court and jury each have a well defined and separate province.

While these rules aim to, and to a marked extent do, preserve to a defendant his right to have the jury determine his case after hearing only competent testimony, still, we may reasonably inquire, do the rules fully achieve their purpose in practice? Can we reasonably say that a jury is not "unconsciously influenced" by the fact that the defendant has "confessed," after it listens to testimony

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[21] People v. Fox, *supra* note 18; People v. Doran, *supra* note 13; People v. Nunziato, *supra* note 19.

[22] People v. Farmer, 194 N. Y. 251, 269 87 N. E. 457, 464 (1909). (Italics ours.)

[23] Richardson, The Law of Evidence (3rd ed. 1928), pp. 272, 273. In the Doran case, *supra* note 13, the Court at 416; 159 N. E. at 381, said, "when upon this preliminary examination an issue of fact is raised by conflicting testimony, the confession may be admitted, and the question left to the jury whether it was the voluntary statement of the defendant. If not, they must disregard the confession and throw it out as no evidence."

both of the prosecution and the defense as to the voluntariness of the confession, even should the Court ultimately rule that the confession, having been extorted by force or threats is incompetent and inadmissible? Has not the defendant's right to a fair and impartial trial based exclusively on competent testimony been impaired and prejudiced, when a prosecuting attorney is permitted to tell the jury in his opening address that the defendant has confessed, when it may be decided by the Court at the trial, that as a matter of law, there has been no *voluntary* confession, and thus any testimony pertaining to it is incompetent and inadmissible? We submit that the practice of permitting the jury to listen to testimony of the making of a confession, where the confession itself will be rejected, is, inevitably, unduly prejudicial to a defendant. The jurors might be told to disregard and forget the testimony but how can one be certain that they will disregard it, and that they will not be unconsciously influenced after hearing it? Nothing must be introduced in evidence to divert the jury from the exercise of its sound and dispassionate judgment.

With a view to the elimination of the shortcomings in the procedure herein discussed, a proposed amendment to section 395 of the Code of Criminal Procedure in relation to the use of confessions as evidence, was introduced at the present session of the New York Legislature.[24] The proposed amendment provides that

> "Where a defendant claims on arraignment in any court that a confession has been obtained against him under the influence of fear produced by threats or violence, it shall be the duty of the court, judge or magistrate to order an immediate investigation, and if it shall appear after such investigation, that such confession was obtained through threats or violence it shall be excluded and shall not be competent evidence in any court wherein the same may be offered against the defendant."

The effect of this amendment marks a progressive step in securing for a defendant his right to a fair and impartial trial. It is true that our Court of Appeals has refused to sanction the practice of permitting a trial Judge to hear evidence of the manner in which a confession was obtained so as to determine the preliminary question of its competency, without the presence of the jury,[25] still the proposed procedure is neither lacking in authority nor merit.[26]

[24] Senate Bill No. 503, introduced February 3, 1931, and referred to the Committee on Codes.

[25] People v. Brasch, *supra* note 16; People v. Randazzio, *supra* note 19.

[26] Professor Wigmore suggests that "the jury, during the hearing of this evidence (of voluntariness of confession) *may be withdrawn* as is proper during all proof and arguments upon questions of admissibility." (Italics ours.) 2 Wigmore, *supra* note 4 at p. 219; See also Wharton, *supra* note 3 at pp. 1294, 1295.

Would it not be more consonant with fairness and humaneness and the proper security of a defendant's rights and liberty, to have a Court or Magistrate investigate, on the defendant's arraignment whether a confession was extracted from him by force or threats? Any marks of maltreatment on a defendant will be more apparent on the day of his arraignment than at his trial. Grant to the Judge or Magistrate presiding at the arraignment the duty to determine the voluntary nature of a confession, and an opportunity will thereby be given to the defendant of presenting to the Court any of the mute, but most eloquent testimony that he may offer in the form of battered features, echymoses, scars or abrasions. Should the Court at this preliminary hearing determine that the confession was forced from the defendant then "it shall be excluded and shall not be competent evidence in any court wherein the same may be offered against the defendant." Should the Court determine that the confession was not forced, and thus admissible, the same evidence and all other circumstances affecting the weight of the confession would then be introduced at the trial for the jury's ultimate consideration.

The dual safeguard granted to a defendant under the proposed amendment is grounded on indispensable elements of justice. A preliminary examination made at the arraignment, when livid bruises may proclaim the involuntary nature of the "confession," will unquestionably aid the Court in more properly determining its competency, and may in cases where the confession is the crux of the prosecution's case, save a defendant the indignity and irreparable injustice of an unsustained conviction.[27]

Justice and reason dictate that the security of personal liberty and the continued assurance of a fair and impartial trial determined exclusively on proper and competent evidence, will be more effectually protected if the proposed amendment in relation to preliminary examinations to determine the competency of confessions as evidence, be enacted as law.

FRANK COMPOSTO.

[27] No more striking example of the injustice that may be inflicted upon defendants by forced confessions can be found than in the Weiner and Barbato cases, *supra* note 16, where, after the jury had received, as evidence, confessions which the defendants claimed were extorted from them, convicted the defendants of murder. The Court of Appeals subsequently reversed their convictions on the grounds that it so palpably appeared that the confessions were involuntary that as a matter of law the trial Court should have excluded them. The prosecutors, being deprived of the use of the "confessions" by the opinions of the Court of Appeals never retried these defendants who had languished in jail for months, but released them on their own recognizance.